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A TREATISE
ON THE
LAW OF DAMAGES

EMBRACING
AN ELEMENTARY EXPOSITION OF THE LAW
AND ALSO
ITS APPLICATION TO PARTICULAR SUBJECTS OF
CONTRACT AND TORT

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TABLE OF CONTENTS

VOL. IV.

CHAPTER XXIII.—BREACH OF MARRIAGE PROMISE.

References are to sections.

Nature of the action; who may sue	983
Seduction is an aggravation	984
Consequences of seduction	985
Injury to feelings and other elements of damage	986
Same subject; exemplary damages	987
Damages for loss of marriage; defendant's wealth	988
What will excuse a breach of the contract	989
What may be proved in mitigation	990

CHAPTER XXIV.—EJECTMENT.

Proceedings regulated by statute	991
--	-----

Section 1.—Mesne Profits.

The remedy for; who may recover	992
What may be allowed as damages; costs of ejectment suit	993
Recovery limited to the value of the use; consequential and punitive damages	994
Proof of rental value	995
What property withheld	996
Interest	997
Compensation on recovery of a term	998
Claims for improvements, taxes, etc.	999
Remedy under the code	1000

Section 2.—Dower.

The right of	1001
It is assignable on a valuation	1002
Damages for detention of dower	1003
Extinguishment of dower right	1004
Reprisals	1005
Dower limited to husband's equitable interest	1006
Dower right subject to incumbrance	1007

References are to sections.

CHAPTER XXV.—INJURIES TO REAL PROPERTY.

Scope of chapter	1008
------------------------	------

Section 1.—Trespass to Real Property.

The gist of the action; who may sue	1009
Definition of trespass and scope of the remedy	1010
Damages confined to compensation	1011
Damages where tenant, one in possession under color of title or or licensee sues	1012
Damages where suit by executor, etc.	1013
Damages measured by benefit received	1014
Damages for destruction of property	1015
Occupation of land by railroads	1016
Damages for permanent wrong	1017
Damages where injury remediable	1018
Liability for destroying trees and mining ores	1019
Same subject; value as affected by defendant's acts	1020
Liability for additional injury to land	1021
Damage to unsecured ice, and for the diversion of water	1022
Destruction of and injury to growing crops	1023
Destruction of fences	1024
Injuries to party-walls	1025
Interest on the damages	1026
Mitigation of damages	1027
Aggravation and special damages	1028-1030
Exemplary and statutory damages	1031
Same subject; mitigation	1032

Section 2.—Injury to Inheritance.

Injury to the rights of parties not in possession	1033, 1034
---	------------

Section 3.—Nuisance.

What is a nuisance; parties liable for	1035
General principles of the law of nuisance	1036
Wrong-doer liable for at least nominal damages	1037
Usually a continuous wrong requiring successive actions	1038
What recoverable in the first action	1039
Continuing liability of the person who causes it	1040
Damages may include future expenditures	1041
When nuisance not a continuous wrong	1042 1045
Same subject; result of the cases	1046
Depreciation in value as damages	1047
Other elements of damages	1048
Injuries to crops, trees, etc.	1049
Liability for remoter consequences	1050, 1051
Exemplary damages	1052
Removal of support to land	1053

References are to sections.

Interference with business	1054
Mitigation of damages	1055
Same subject; deduction for benefits	1056
Damages affected by interest in estate	1057
Private remedy for public nuisance	1058
Joint and several liability; distinction between private and public nuisance	1059
Pleading	1060

CHAPTER XXVI.—TAKING PROPERTY FOR PUBLIC USE.

The power of eminent domain; right to compensation; what is a taking	1061
Consequential injury to property not taken	1062
What is just compensation; costs; nominal damages	1063
Measure of compensation	1064
Injury to property not taken	1065
Same subject; what facts pertinent	1066-1070
Same subject; remote damages	1071
Same subject; expenditures to lessen loss	1072, 1073
Basis for estimating value of land	1074
Same subject; value for condemnor's purpose	1075
Compensation for wrong-doer's improvements	1076
Compensation affected by title and nature of interest condemned, and purpose of use; taking railroad property for street and telegraph uses; proof of value	1077
Same subject; condemnation of railroad property for railroad uses	1078
Same subject; injury to franchise; ascertainment of its value	1079
Same subject; elevated railroad and subway cases	1080
Same subject; injuries to various interest; damages in favor of tenants	1081
Same subject; to whom payment due; existence of servitude or easement; rights remaining in owner	1082
Assessment of damages and benefits, time of; mitigation of lia- bility by act of third party	1083
Deduction for benefits; what benefits special	1084-1087
What lands considered in assessing benefits and damages	1089
Effect of judgment for compensation—Abandonment of pro- ceedings	1090
Interest	1091

CHAPTER XXVII.—TRESPASS TO PERSONAL PROPERTY.

When damages may exceed compensation	1092
Certainty of damages	1093
Comprehensiveness of the remedy	1094
Aggravations increase damages; injury to feelings; circum- stances justifying punitive damages	1095

References are to sections.

Damages for taking or destroying property; interest; value of use	1096
Same subject; quantity of interest	1097
Same subject; market value	1098
Same subject; non-marketable property	1099
Special and consequential damages	1100-1102
Expenses to recover, restore and protect property	1103
Mitigation of damages	1104
Same subject; application of property to owner's benefit	1105
Damages against trespasser from the beginning	1106-1107

CHAPTER XXVIII.—CONVERSION.

The action of trover; who may bring	1108
The general rule of damages; exception as to place of conversion	1109
Same subject; liability of purchaser; effect of wilfulness	1110
Other rules of damages in particular states	1111
Time of conversion	1112
Proof of value	1113
Same subject; fixtures	1114
Interest and value of use of property	1115
Recovery for property subject to sale	1116
Damages if property without market value	1117
Damages if property of fluctuating value	1118
Same subject; criticism and modification of the rule	1119
Same subject; conflict in New York cases	1120
Same subject; Pennsylvania rule	1121
Same subject; Massachusetts rule	1122
Same subject; English, Canadian and Australian cases	1123
Same subject; rule in North Carolina	1124
Departure from general rule sometimes justifiable	1125
Recovery where value of property enhanced by defendant	1126-1128
Special or consequential damages	1129
Attorney's fees	1130
Exemplary damages	1131
Conversion of money securities	1132
Conversion of insurance policies	1133
Conversion of deeds, etc.	1134
Conversion of shares of stock	1135
Recovery limited to plaintiff's interest	1136, 1137
Mitigation of damages	1138-1141
Plaintiff's duty to mitigate damage	1142

CHAPTER XXIX.—REPLEVIN.

Section 1.—Plaintiff's Case.

Definitions; who may sue	1143
Measure of damages	1144

References are to sections.

Exemplary damages	1145
Special and consequential damages	1146
Recovery if property not returned	1147, 1148
Damages affected by the object of the action	1149
Recovery for use and increase in value	1150
Intermediate injury and depreciation	1151-1153
Increase in value by defendant	1154

Section 2.—Defendant's Case.

Successful defendant's rights	1155
A plaintiff obtaining possession and failing in his suit a wrong- doer	1156
Measure of damages	1157
Special and consequential damages	1158
Mitigation of damages	1159
Recovery affected by interest in property	1160
Recoupment	1161
Rights where part of property found for each party	1162

CHAPTER XXX.—FRAUD.

Scope of the natural and proximate consequences	1163-1165
False representations	1166
Same subject; materiality	1167
Same subject; reliance upon representations	1168
Same subject; defendant's belief in representations	1169
Same subject; representations need not be made to plaintiff ...	1170
The measure of damages; general rule	1171
Same subject; another rule	1172
Same subject; other elements of damage	1173, 1174
Remote, conjectural and contingent damages	1175, 1176
Expenses of litigation	1177
Exemplary damages	1178
Parties	1179
Pleading	1180

CHAPTER XXXI.—INFRINGEMENT OF PATENT-RIGHTS.

Statutory remedies	1181
Same subject; judicial summary	1182
Damages recoverable at law; license fees	1183, 1184
Same subject; profits as damages	1185
Same subject; other measures of damage; who liable; assign- ments	1186
Interest on damages in actions at law	1187
Exemplary damages	1188
Compensation in equity; theory on which allowed	1189
Same subject; computation of profits	1190, 1191

References are to sections.

Same subject; computation, to what time made	1192
Rule when whole article not patented	1193
Same subject; mitigation of liability	1194
Same subject; ascertainment of profits	1195
Profits recoverable though no license fee established	1196
Interest in equity	1197

CHAPTER XXXII.—INFRINGEMENT OF COPYRIGHT.

Copyright is statutory	1198
Compensatory and penal recoveries	1199

CHAPTER XXXIII.—INFRINGEMENT OF TRADE-MARK.

Nature of the right to a trade-mark and of the wrong of infringement; parties defendant	1200
The measure of damages; in equity and at law	1201, 1202

CHAPTER XXXIV.—SLANDER AND LIBEL.

Section 1.—Plaintiff's Case.

Nature of the wrong	1203
Accusations actionable per se; scope of rule in libel	1204
Malice the gist of the action; how shown	1205
General damages; considerations upon which based	1206, 1207
Same subject; aggravation of damages	1208, 1209
Same subject; wealth and rank of the parties	1210, 1211
Evidence of reputation	1212
Injuries to business	1213
Mental suffering and physical incapacity	1214
Special damages	1215
Exemplary damages	1216
Damages in discretion of jury	1217
Special damages when words not actionable per se	1218, 1219
Same subject; injury to feelings	1220
Same subject; natural consequence	1221
Criticism of the doctrine last stated	1222
Slander of title	1223

Section 2.—The Defense.

Failure of plea of justification	1224
Same subject; effect of statutes	1225
Evidence in mitigation; plaintiff's bad character; his conduct and declaration	1226
Same subject; evidence of common reports as to plaintiff's guilt	1227
Same subject; proof of truth of words	1228, 1229

References are to sections.

Same subject; effect of statutes	1230
Evidence in mitigation generally	1231-1233

CHAPTER XXXV.—MALICIOUS PROSECUTION AND ABUSE OF PROCESS.

Nature of these wrongs	1234, 1235
Unauthorized suit or appeal	1236
Elements of damage	1237, 1238
Evidence in mitigation	1239, 1240

CHAPTER XXXVI.—PERSONAL INJURY.

Elements of damage; bad motive not essential	1241
Physical and mental pain	1242
Same subject; what mental suffering may be recovered for; aggravated wrongs	1243
Same subject; recovery for secondary consequences	1244
Same subject; rule where negligence only is alleged, and where wrong was wilful	1245
Loss of time; injury to business, diminished capacity	1246
Same subject; pleading	1247
Same subject; evidence	1248
Same subject; measure of recovery	1249
Expenses for surgical and medical aid, etc.	1250
But one action maintainable; prospective damages	1251
Husband's, wife's or parent's action; intoxicating liquors; civil damage acts	1252
Exemplary damages	1253
Pecuniary and other circumstances of the parties	1254
Evidence in mitigation	1255
Province of the jury concerning damages, and instructions thereto	1256
False imprisonment	1257
Same subject; exemplary damages; mitigations	1258

THE LAW OF DAMAGES.

VOL. IV.

CHAPTER XXIII.

BREACH OF MARRIAGE PROMISE.

- § 983. Nature of the action; who may sue.
984. Seduction is an aggravation.
985. Consequences of seduction.
986. Injury to feelings and other elements of damage.
987. Same subject; exemplary damages.
988. Damages for loss of marriage; defendant's wealth.
989. What will excuse a breach of the contract.
990. What may be proved in mitigation.

§ 983. Nature of the action; who may sue. The action for this cause is peculiar. While it is in form upon contract, and in truth based upon it and its breach, the damages are governed by principles which apply to actions for personal torts.¹ The motive of the breach may be inquired into, and may be very material to the amount of damages.² The right of action is so personal in its nature that it will not survive to or against personal representatives. Nor are the damages confined to the mere pecuniary loss. Either party may sue for breach by the other,³ though in the large majority of instances the female is the plaintiff. The recovery may be for injury to her

¹ *Rivera v. Cadierno*, 4 Porto Rico Fed. 39; *Biela v. Urbanezyk*, 38 Tex. Civ. App. 213; *Hiveley v. Golnick*, 123 Minn. 498; *Goddard v. Westcott*, 82 Mich. 180, quoting the text; *Drury v. Merrill*, 20 R. I. 2; *Kennedy v. Rodgers*, 2 Kan. App. 764; *Poehlmann v. Kertz*, 105 Ill. App. 249; *Davis v. Pryor*, 3 Ind. Ty. 396. See also, *Stacey v. Dolan*, 88 Vt. 369.

² *Kaufman v. Fye*, 99 Tenn. 145, 167, quoting the text.

³ There are several instances reported of actions by the male party to the contract. *Baker v. Cartwright*, 10 C. B. (N.S.) 124, 100 Eng. C. L. 124; *Harrison v. Cage*, 1 Ld. Raym. 386, 1 Salk. 24; *Atchinson v. Baker*, Peake's Add. Cas. 103, 104; *Gross v. Hochstim*, 72 N. Y. Misc. 343.

feelings, affections and wounded pride, as well as for the loss of the marriage.⁴

§ 984. **Seduction is an aggravation.** The result of an ordinary breach of promise is the loss of the alliance and the mortification and pain consequent on the rejection.⁵ If the defendant, during the subsistence of the promise, has seduced the plaintiff, this fact may be proved in aggravation of the damages.⁶ The common-law practice is substantially uniform in allowing such proof. The seduction which is allowed to be proven is brought about in reliance upon the contract, and is, in itself, in no indirect way, a breach of its implied conditions. Such an engagement necessarily brings the parties into very intimate and confidential relations, and the advantage taken of them by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee, guardian or con-

⁴ *Brown v. Bannister*, 14 Hawaii 34; *Johnson v. Levy*, 118 La. 447, 9 L.R.A.(N.S.) 1020, 118 Am. St. 378; *Daggett v. Wallace*, 75 Tex. 352, 16 Am. St. 908; *Wilbur v. Johnson*, 58 Mo. 600; *Holloway v. Griffith*, 32 Iowa 409, 7 Am. Rep. 208; *Royal v. Smith*, 40 Iowa 615; *Wells v. Padgett*, 8 Barb. 323; *Harrison v. Swift*, 13 Allen, 144; *Parker v. Forehand*, 99 Ga. 743; *Kennedy v. Rodgers*, *supra*; *Trammell v. Vaughan*, 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. 302; *Brown v. Odill*, 104 Tenn. 250, 52 L.R.A. 660, 78 Am. St. 914; *Liese v. Meyer*, 143 Mo. 547.

⁵ *Sheahan v. Barry*, 27 Mich. 217.

⁶ *Jennette v. Sullivan*, 63 Hun 361; *Trammell v. Vaughan*, 158 Mo. 214; *Graves v. Rivers*, 123 Ga. 224; *Clemons v. Seba*, 131 Mo. App. 378; *Fritzinger v. Ahrens*, 151 Ill. App. 396 (need not be pleaded); *Johnson v. Levy*, 122 La. 118; *Huggins v. Carey* (Tex. Civ. App.), 149 S. W. 390; *Luther v. Shaw*, 157 Wis.

231; *Houser v. Carmody*, 173 Mich. 121; *Hess v. Zimmer*, 152 Wis. 193.

Acts of intercourse subsequent to the seduction may be shown where the plaintiff consented thereto in reliance on the defendant's promise of marriage. *Falkner v. Schultz*, 160 Wis. 594.

The seduction need not be alleged. *Jennette v. Sullivan*, *supra*; *Poehlmann v. Kertz*, 204 Ill. 418. But it may be pleaded in aggravation of the damages without subjecting the complaint to the objection that it embraces two causes of action. *Geiger v. Payne*, 102 Iowa 581.

Seduction prior to the promise cannot be shown. *Espy v. Jones*, 37 Ala. 379; *Burks v. Shain*, 2 Bibb 341, 5 Am. Dec. 616.

If such evidence is introduced it cannot be considered by the jury in fixing the damages. *Jaskolski v. Morawski*, 178 Mich. 325. In this case there had been a settlement on birth of a child before the promise of marriage was made.

fidential adviser who cheats a confiding ward, beneficiary or client into a losing bargain. It differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has thus been abused cannot fail to be aggravated in fact by the seduction. The contract is twice broken; for to the results of an ordinary breach there are added loss of character and social position, and not only a deeper shame and sorrow, but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect as well as affection, and is violated by the seduction, as it is by the refusal to marry. A subsequent marriage condones the first wrong, but a refusal to marry makes the seduction a very grievous element of the injury that cannot be lost sight of in any view of justice.⁷ The

⁷Dalrymple v. Green, 88 Kan. 673, 43 L.R.A.(N.S.) 972; Fletcher v. Ketcham, 160 Iowa 364; Nolan v. Glynn, 163 Iowa 146; Anderson v. Kirby, 125 Ga. 62, citing the text; Churan v. Sebesta, 131 Ill. App. 330; Brown v. Bannister, 14 Hawaii 34; Lauer v. Banning, 152 Iowa 99; Scramiek v. Sklemar, 73 Kan. 450; Sheahan v. Barry, 27 Mich. 217; Coil v. Wallace, 24 N. J. L. 291; Whalen v. Layman, 2 Blackf. 194, 18 Am. Dec. 157; Green v. Spencer, 3 Mo. 318; Hill v. Maupin, id. 323; Conn v. Wilson, 2 Overt. 233, 5 Am. Dec. 663; Goodall v. Thurman, 1 Head, 209; Williams v. Hollingsworth, 6 Baxter 12; Mathews v. Cribbett, 11 Ohio St. 330; Fidler v. McKinley, 21 Ill. 308; Tubbs v. Van Kleeck, 12 Ill. 446; Kniffen v. McConnell, 30 N. Y. 285; Sherman v. Rawson, 102 Mass. 395; Kelly v. Riley, 106 id. 339, 8 Am. Rep. 336; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Smith v. Braun, 37 La. Ann. 225; Bird v. Thompson, 96 Mo. 424; Musselman v. Barker, 26 Neb. 737; Dag-

gett v. Wallace, 75 Tex. 352, 16 Am. St. 908; Giese v. Schultz, 53 Wis. 462; Bennett v. Beam, 42 Mich. 346; Dent v. Pickens, 34 W. Va. 240, 26 Am. St. 921, stating the substance of the text; Spellings v. Parks, 104 Tenn. 351; Geiger v. Payne, 102 Iowa 581; Liese v. Meyer, 143 Mo. 547; Osmun v. Winters, 25 Ore. 260, citing the text; Davis v. Pryor, 3 Ind. Ty. 396; Maniz v. Lederer, 21 R. I. 370, quoting the text and distinguishing Perkins v. Hersey, 1 R. I. 493, which has been cited in opposition to the rule; Rosenquest v. Noble, 21 App. Div. (N. Y.) 583; Poehlmann v. Kertz, 105 Ill. App. 249; Wolters v. Shultz, 1 N. Y. Misc. 106 Finkelstein v. Barnett, 17 N. Y. Misc. 564.

As to the vindication of the general usefulness of the remedy, see observations of Parker, C. J., in Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77. A different view is advanced by Mr. Schouler in 7 So. L. Rev. 57.

The fact that the seduction was on account of the promise of marriage may be inferred from the cir-

right to prove the seduction in aggravation of damages is not affected by a statute giving to an unmarried woman over twenty-one a right of action for her own seduction.⁸ But in such a case, and independent of the statute, it is in the discretion of the jury to award damages on account of the seduction.⁹ Seduction as matter of aggravation cannot be proved unless specially alleged.¹⁰ In Rhode Island and Pennsylvania the seduction cannot be proven in aggravation of damages. The act is one of mutual imprudence, and the maxim *volenti non fit injuria* applies.¹¹ In Maine evidence of the fact that the plaintiff had been seduced and delivered of a child may be proven if the facts are specially pleaded, for the purpose of showing her condition at the time of the breach and increasing the damages on that account.¹² Rape or mere sexual commerce is not cause for increasing the damages.¹³

§ 985. **Consequences of seduction.** There cannot be added to the damages awarded for mental suffering, injury to reputation and loss of virtue, compensation for the loss of time, or the expense of medical or other attendance resulting from the seduction. In considering a recovery for the last-mentioned items, Lyon, J., said, referring to the liability for the other consequences of seduction, that it is believed that none of the cases go beyond their allowance, and "it would seem that the rule as stated includes all elements of proximate injury result-

circumstances in the absence of express proof. *Walters v. Cox*, 67 Mo. App. 299.

Another reason given is that it cannot be fairly ascertained to what extent the plaintiff is damaged by the breach of the contract without considering the condition in which she is left by the defendant's conduct. *Daggett v. Wallace*, *supra*.

⁸ *Lanigan v. Neely*, 4 Cal. App. 760.

⁹ *Osmun v. Winters*, 25 Ore. 260.

¹⁰ *Leavitt v. Cutler*, 37 Wis. 46; *Cates v. McKinney*, 48 Ind. 562, 17 Am. Rep. 768; *Tyler v. Salley*, 82 Me. 128.

¹¹ *Weaver v. Bachert*, 2 Pa. 80, 44 Am. Dec. 159; *Gring v. Lereh*, 112 Pa. 244, 56 Am. Rep. 314.

In Rhode Island the cases have fluctuated; it was first held that seduction could not be shown. *Perkins v. Hersey*, 1 R. I. 493. In *Mainz v. Lederer*, 21 R. I. 370, that case was overruled. In *Wrynn v. Downey*, 27 R. I. 454, 4 L.R.A.(N.S.) 615, the original view was again favored, and the intermediate case overruled.

¹² *Tyler v. Salley*, 82 Me. 128; *Hickey v. Kimball*, 109 Me. 433.

¹³ *Fletcher v. Ketcham*, 160 Iowa 364.

ing from the breach of the promise of marriage, if indeed it does not go beyond the line of proximate injury. Other elements of injury, such as loss of time, expenses of medical and other attendance and the like, might be held proximate, and might therefore increase the damages in an action of *per quod servitium amisit*, in which the seduction of the servant is proved in aggravation of the damages. In that form of action the loss of service caused by the seduction is the primary cause of action, and, of course, such loss is proximate. And the same may be said of the expenses which are the direct result of the act which caused the loss of service. But in this case the cause of action is further removed from the injuries just mentioned. The breach of promise of marriage is the foundation of the action; the seduction is the result of such promise—perhaps proximate—although, but for the authorities, that might well be doubted; but the loss of service and expenses of sickness which might or might not result from the seduction are certainly not the proximate results of the breach of promise, although they may be of the seduction.”¹⁴ On a second appeal of the same case it was ruled, in accordance with the foregoing quotation, that additional damages are not to be allowed because the plaintiff was gotten with child or suffered a miscarriage.¹⁵ The commission of an abortion, though at the instance of the defendant, is not the natural consequence of the breach of the contract to marry.¹⁶

If seduction is, on principle, an element of damages in an action for breach of promise and the disgrace or injury to reputation which follows it is such an element, it seems illogical to exclude any other result of the seduction from the consideration of the jury. Mental suffering may result from seduction without pregnancy following; but compensation for

¹⁴ Giese v. Schultz, 53 Wis. 462.

¹⁵ Giese v. Schultz, 65 Wis. 487; Salchert v. Reinig, 135 Wis. 194; Dalrymple v. Green, 88 Kan. 673, 43 L.R.A.(N.S.) 972. See Hanson v. Johnson, 141 Wis. 550.

A recovery for injured feelings

and for the loss of the marriage precludes a recovery for such other damages as was sustained as the result of the seduction because the damages would thereby be doubled. Huggins v. Carey, *infra*.

¹⁶ Nolan v. Glynn, 163 Iowa 146.

disgrace or injury to reputation must be based on the theory that seduction has resulted in pregnancy. Hence, the physical suffering and the expense connected with confinement, where pregnancy follows the seduction, are not more remote than injury to the reputation.¹⁷ It might be otherwise where there is a miscarriage. In Minnesota it is held that evidence of the physical condition, the sickness of the plaintiff directly after the intercourse with the defendant, is admissible both for the purpose of corroborating her testimony and as bearing upon the matter of damages.¹⁸ In Texas distress occasioned by the seduction is an element of the damages.¹⁹ It may be shown by the plaintiff that her relatives have knowledge of the fact that she has given birth to a child.²⁰ She may not show that she contracted a venereal disease from the defendant;²¹ nor recover for the support of her child, the fruit of the seduction.²² In Maine the effect upon the bodily health of the plaintiff and her pregnancy cannot be shown though specially pleaded. "The plaintiff was in part, at least, responsible for the seduction; and she cannot recover of her associate in the wrong damages for it, or its consequences."²³

§ 986. Injury to feelings and other elements of damage. As the plaintiff is entitled to recover damages for injury to her feelings,²⁴ circumstances tending to increase or mitigate such in-

¹⁷ *Booren v. McWilliams*, 26 N. D. 558, quoting the text.

¹⁸ *Schmidt v. Durnham*, 46 Minn. 227. Compare dissenting opinion in *Dalrymple v. Green*, *supra*. See first note to next section.

¹⁹ *Huggins v. Carey* (Tex. Civ. App.), 149 S. W. 390.

²⁰ *Lanigan v. Neely*, 4 Cal. App. 760.

²¹ *Churan v. Sebesta*, 131 Ill. App. 330. But see *Millington v. Loring*, 6 Q. B. Div. 190.

²² *Johnson v. Levy*, 122 La. 118.

²³ *Tyler v. Salley*, 82 Me. 128.

²⁴ *Hickey v. Kimball*, 109 Me. 433; *Fisher v. Oliver*, 172 Mo. App. 18; *Huggins v. Carey* (Tex. Civ.

App.), 149 S. W. 390; *Kendall v. Dunn*, 71 W. Va. 262, 43 L.R.A. (N.S.) 553, citing the text; *Anderson v. Kirby*, 125 Ga. 62, 114 Am. St. 85; *Graves v. Rivers*, 123 Ga. 224; *Brown v. Bannister*, 14 Hawaii 34; *Rivere v. Cadierno*, 4 Porto Rico Fed. 39; *Fisher v. Barker* (Tex. Civ. App.), 130 S. W. 871; *Salchert v. Reinig*, 135 Wis. 194; *Waddell v. Wallace*, 32 Okla. 140; *Parker v. Forchand*, 99 Ga. 743; *Robinson v. Craver*, 88 Iowa 381; *Rime v. Rater*, 108 Iowa 61; *Kennedy v. Rodgers*, 2 Kan. App. 764; *Rutter v. Collins*, 103 Mich. 143; *Brown v. Odill*, 104 Tenn. 250; *Stewart v. Anderson*, 111 Iowa 329;

jury may be proved; the same applies to injuries to her health.²⁵ The plaintiff may show that she announced her engagement to friends and invited them to her wedding;²⁶ that the defendant assigned as a reason for discontinuing his attentions to her that she was a thief, and had submitted her person to his pleasure.²⁷ Injury to the feelings of the family and friends of the plaintiff are not to be considered, though she was seduced.²⁸ Evidence may be given of defamatory words, actionable in themselves, or otherwise, as circumstances of contumely and aggravation which attended the defendant's refusal to perform his contract;²⁹ but, it has been held, not an indecent and insulting letter writ-

Hughes v. Nolte, 7 Ind. App. 526; *Grubbs v. Pence*, 24 Ky. L. Rep. 2183.

It is error for the court to assume that the feelings of the plaintiff were injured; the question is for the jury. *Walters v. Cox*, 67 Mo. App. 299.

In *Goddard v. Westcott*, 82 Mich. 180, the following instruction was approved as not including any special damages: "And first, she is entitled to damages as compensation for loss of time, for any expense she may have been put to in making preparations for marriage, for mental suffering which may have been occasioned by the breaking off of the contract, for injury to her health, if any, for loss of a permanent home, and the worldly advantages which might have been derived therefrom by her—the circumstances as to home, property and pecuniary condition of the defendant being considered from the evidence in the case, and her own lack of independent means, if established. She is entitled [to compensation for damage] to her reputation, if any, either moral or physical, for injury to her future prospects of marriage. She is entitled to damages for any humili-

ation, contempt or mortification she may have suffered in the circles wherein she has moved, by reason of the breach of the contract upon defendant's part. All these she may recover by way of compensatory damages; and these she would be entitled to, even if the jury should find that he broke the contract in a careful, considerate, discreet and kindly manner."

²⁵ *Houser v. Carmody*, 173 Mich. 121; *Goddard v. Westcott*, *supra*; *Hiveley v. Goltmick*, 123 Minn. 498, holding that damages for injury to health may be recovered though not specially pleaded.

²⁶ *Reed v. Clark*, 47 Cal. 194; *Vanderpool v. Richardson*, 52 Mich. 336; *Liebrandt v. Sorg*, 133 Cal. 571.

²⁷ *Chesley v. Chesley*, 10 N. H. 327.

²⁸ *Bell v. Giberson*, 30 New Bruns. 10.

²⁹ *Chesley v. Chesley*, *supra*; *Roberts v. Druillard*, 123 Mich. 286; *Lawrence v. Cooke*, 56 Me. 187, 96 Am. Dec. 443 (the circumstances which attend a breach of promise of marriage may be given in evidence in aggravation of damages whether they occurred before, at the time or after the breach).

ten by the defendant to the plaintiff after the commencement of the action,³⁰ though on this point there is authority to the contrary.³¹ It is doubtful if a recovery can be had for slanderous words used either before or after the commencement of the suit because the defendant is liable therefor in a distinct action, and if it is brought cannot set up a recovery in the breach of promise suit.³² Any misconduct of the defendant in which the plaintiff did not participate at the time of the breach, or before or afterwards, tending to increase the injury therefrom may be shown, as well as loss of time and expense incurred in

³⁰ Greenleaf v. McColley, 14 N. H. 303.

³¹ In Osmun v. Winters, 30 Ore. 177, an article published over the defendant's signature, attacking the character of the plaintiff, and an insulting letter addressed by him to her, both being written after the commencement of the action, were admitted in evidence as tending to prove the *animus* of the defendant in breaking the contract and in aggravation of the damages. The court said: We are aware that there are good authorities against the admission of the statement and this letter in evidence. The reasons upon which they proceed are that they involve matters or transactions occurring subsequent to the commencement of the action, which should not be permitted to contribute to an increase of damages above such as were contemplated by the plaintiff when the action was begun (Leavitt v. Cutler, 37 Wis. 46; Greenleaf v. McColley, 14 N. H. 303), and because they require the consideration of an independent tort. But if we are right in our position that an unfounded charge of unchastity incorporated in the answer is cause for aggravation of damages, then, logically, these authorities are wrong. Strahan, J.,

in Kelley v. Highfield, 15 Ore. 290, says: "There can be no doubt, if the defendant's desertion of the plaintiff was without cause, or his conduct at the time towards her, or afterwards, was harsh, cruel or malicious, or if at any time, even upon the trial, he makes a wrongful attempt to blacken her name or reputation, the jury have a right to consider it, and may, if they think proper, add something to the amount of damages on account of such new or additional wrong." So, in this case, if the contractual relations were wantonly broken off by the defendant, and he afterwards wilfully and maliciously persisted in casting imputations against the plaintiff's character through the public press, and by indicting to her indecent and insulting letters, whether done before or after the commencement of the action, such acts may be considered as a reflex of the defendant's wicked incentive for severing such relations, and taken into account by the jury in awarding damages. To the same effect is Liese v. Meyer, 143 Mo. 547.

³² Greenup v. Stoker, 7 Ill. 688; Dunlap v. Clark, 25 Ill. App. 573; Roberts v. Druillard, *supra*.

preparations for marriage.³³ If services have been performed for the defendant by the plaintiff and a lucrative business has been abandoned at the request of the former and in reliance upon his promise the former may be recovered for as well as the loss resulting from the latter.³⁴ The injury in estimating the damages, therefore, may well take into account, as has been stated, the seduction of the plaintiff by the defendant as tending to increase the mortification and distress suffered by her.³⁵ In considering the extent of the plaintiff's mental distress the duration of the acquaintance of the parties and the length of their engagement will be weighed; and if the defendant proposed an unlawful alliance with the plaintiff her knowledge that he was sustaining a like relation with another and that her affection for him was not thereby affected is a material fact as bearing upon the extent of her distress.³⁶ In a late case in Michigan the defendant, a physician and surgeon, had been living with the plaintiff, and after she had been badly burned, cast her off, knowing that she must perform manual labor to

³³ *Rivera v. Cadierno*, 4 Porto Rico Fed. 39; *Baldy v. Stratton*, 11 Pa. 316; *Johnson v. Jenkins*, 24 N. Y. 252; *Chellis v. Chapman*, 125 id. 214, 11 L.R.A. 784. See *Smith v. Sherman*, 4 Cush. 408; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Dunlap v. Clark*, 25 Ill. App. 573; *Goddard v. Westcott*, *supra*.

The recovery on account of expenditures must be limited to the proven loss resulting to the plaintiff on account of them. *Stribley v. Welz*, 1 Ohio Dec. 621, 624, 8 Ohio C. C. 571; *Olmstead v. Hoy*, 112 Iowa 349.

In *Dent v. Pickens*, 34 W. Va. 240, 26 Am. St. 921, it is said to be the general rule to exclude evidence of events occurring after the commencement of the suit, as the marriage of the defendant to another and matters affecting his financial standing unless the last

was connected with his previous circumstances; but this is subject to the exception that the nature of the defense has a bearing upon the recovery.

³⁴ *Sanborn v. Bay*, 114 C. C. A. 242, 194 Fed. 351.

The plaintiff cannot show, in order to affect the amount of recovery, that while the contract to marry was in force she sold a part of her stock of goods at a loss in order to be ready to marry the defendant and that he knew of such sale at the time it occurred. *Clement v. Skinner*, 72 Vt. 159.

³⁵ *Sherman v. Rawson*, 102 Mass. 395; *Musselman v. Barker*, 26 Neb. 737; *Berry v. Da Costa*, L. R. 1. C. P. 331; *Bennett v. Beam*, 42 Mich. 463.

³⁶ *Walters v. Schultz*, 1 N. Y. Misc. 196.

support herself and children, and that such labor would interfere with the healing of an ulcer on her arm and eventually necessitate its amputation. Though the jury was not instructed on this matter as affecting the damages, the reviewing court said: We see no valid reason why he should not be held responsible for the results which naturally followed and which might have been reasonably anticipated by a medical man.³⁷ Injury to the plaintiff's future prospects of marriage, or to her moral reputation resulting from the breach are to be considered.³⁸

In the exercise of their right to draw inferences from facts proved it is competent for them in estimating the damages to consider the period of time that had elapsed pending the engagement,³⁹ the intimacy of the parties, the frequency of the defendant's visits, the time, place and circumstances of making them;⁴⁰ the imputations, if any, cast upon the plaintiff's character by the defendant's denial on oath or otherwise that, notwithstanding all these considerations, he never promised or intended to marry her.⁴¹ In such a case if the jury discredit his testimony in such denial they may regard it as an attempt on his part, in the most public and solemn manner, to excite groundless suspicions against the plaintiff's character.⁴²

In fixing the amount of damages the jury may take into consideration the nature of the defense set up; if by pleading or evidence the defendant attempts to justify or palliate his abandonment or breach of the contract to marry on the ground of any misconduct or bad character of the plaintiff, and fails to establish the same and had no reasonable grounds for believing any such objections to exist, such defamatory and

³⁷ Duff v. Judson, 160 Mich. 386.

³⁸ Kendall v. Dunn, 71 W. Va. 262, 43 L.R.A.(N.S.) 556.

³⁹ Fisher v. Oliver, *supra*; Sramek v. Sklemar, 73 Kan. 450; Coolidge v. Neat, 129 Mass. 146; Vanderpool v. Richardson, 52 Mich. 336; Grant v. Willey, 101 Mass. 356; Miller v. Rosier, 31 Mich. 475; Olmstead v. Hoy, 112 Iowa 349.

⁴⁰ Hanson v. Johnson, 141 Wis. 550.

⁴¹ Lawrence v. Cooke, 26 Me. 187, 45 Am. Dec. 103; Chellis v. Chapman, 125 N. Y. 214, 11 L.R.A. 784; Stribley v. Lenz, 1 Ohio Dec. 621, 624, 8 Ohio C. C. 571; Poehlmann v. Kertz, 105 Ill. App. 249; Traummell v. Vaughan, 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. 306.

⁴² *Id*; Duvall v. Fuhrman, 3 Ohio C. C. 305.

fraudulent defense may be considered as increasing the injury and justifying a larger verdict.⁴³ To justify any increase of damages on account of such defense, not established, the jury should be satisfied that it is interposed in bad faith.⁴⁴ Where the only evidence offered to sustain the allegations of unchastity was of the defendant's own criminal conduct with the plaintiff the claim of good faith was pronounced baseless.⁴⁵ But in Wisconsin it is held that allegations of the plaintiff's unchastity in the answer, though unsupported by any evidence, are not cause for aggravating the damages unless the charges were made dishonestly or in bad faith.⁴⁶ Defamation of the plaintiff, in the pleadings or otherwise, is not the basis of an independent award of damages; it must be confined to showing wantonness and malice.⁴⁷ Remarks made by counsel during the trial, authorized or permitted by the defendant, are not cause for enhancement of the recovery.⁴⁸ One who enters into a contract to marry, knowing that he is afflicted with a contagious venereal disease, perpetrates a fraud upon the other party to the contract and aggravates the damages she may recover on the breach thereof by him.⁴⁹ If services have been rendered in expectation of marriage with the party served, they cannot be recovered for in any other action than that based

⁴³ *Rivera v. Cadierno*, 4 Porto Rico Fed. 39; *Haymond v. Saucer*, 84 Ind. 3; *Duvall v. Fuhrman*, 3 Ohio C. C. 305; *Denslow v. Van Horn*, 16 Iowa 476; *Southard v. Rexford*, 6 Cow. 254; *Reed v. Clark*, 47 Cal. 194; *White v. Thomas*, 12 Ohio St. 312, 80 Am. Dec. 347; *Kniffen v. McConnell*, 30 N. Y. 285; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Kelley v. Highfield*, 15 Ore. 277; *Liese v. Meyer*, 143 Mo. 547; *Osmun v. Winters*, 30 Ore. 177; *Kaufman v. Fye*, 99 Tenn. 145; *Fleetford v. Barnett*, 11 Colo. App. 77.

⁴⁴ *Luther v. Shaw*, 157 Wis. 231, citing the text; *Pearce v. Stace*, 207 N. Y. 506; *Hiveley v. Gohnick*, 123

Minn. 498; *Broyhill v. Norton*, 175 Mo. 190, citing the text; *Hunter v. Hatfield*, 68 Ind. 416; *White v. Thomas*, 12 Ohio St. 312, 80 Am. Dec. 347; *Leavitt v. Cutler*, 37 Wis. 46; *Simpson v. Black*, 27 Wis. 206; *Powers v. Wheatly*, 45 Cal. 113; *Clark v. Reese*, 35 Cal. 89; *Blackburn v. Mann*, 85 Ill. 222; *Kelley v. Highfield*, *supra*.

⁴⁵ *Kelley v. Highfield*, *supra*.

⁴⁶ *Alberts v. Albertz*, 78 Wis. 72, 10 L.R.A. 584.

⁴⁷ *Spencer v. Simmons*, 160 Mich. 292; *Roberts v. Druillard*, 123 Mich. 286.

⁴⁸ *Pearce v. Stace*, *supra*.

⁴⁹ *Trammell v. Vaughan*, 158 Mo. 214.

on the breach of promise to marry.⁵⁰ Where the plaintiff sought in the first count of her complaint to recover for services rendered to the defendant pending their engagement, in consideration of and reliance upon the promise of marriage, and in the second count to recover for the breach of that promise, it was ruled that, inasmuch as the compensation which she had agreed to receive was the performance of the promise of marriage and that performance would have satisfied her claim, the damages recovered under the second count were the legal equivalent of performance, and that no other compensation could be recovered.⁵¹ While the jury in assessing damages may ordinarily take into consideration the plaintiff's loss of opportunity during her engagement for contracting a suitable marriage with another than the defendant,⁵² a plaintiff who has broken an existing contract to marry at the solicitation of the defendant and promised to marry him, cannot recover for the loss of the opportunity to marry her jilted lover. She cannot profit by her own perfidy.⁵³

§ 987. **Same subject; exemplary damages.** It is the policy of the law to encourage matrimony, and society has an interest in contracts of marriage both before and after they are consummated. A man who enters into such a contract with improper motives and then ruthlessly and unjustifiably breaks it does a wrong to the woman, and also, in a more remote sense, to society, and needs to be punished in the interest of society, equally with the man who commits a tort under circumstances showing a bad heart. The rule of damages applicable to ordinary contracts would be wholly inadequate;—so much depends upon the circumstances surrounding the case, upon the conduct, standing and character of the parties. Accordingly, in actions for breach of promise of marriage, where it appears that the contract was made and broken, exemplary damages may be given if the defendant was actuated by such motives and has

⁵⁰ *Lafontain v. Hayhurst*, 89 Me. 388, 56 Am. St. 430.

⁵² *Hiveley v. Golnick*, 123 Minn. 498.

⁵¹ *Smith v. Hall*, 69 Conn. 651.

⁵³ *Hahn v. Bettingen*, 81 Minn. 91; *Trammell v. Vaughan*, *supra*.

been guilty of a ruthless and unjustifiable breach.⁵⁴ The jury may⁵⁵ give such an amount of damages, not flagrantly excessive and disproportionate to the injury, as will mark their disapprobation of, and deter others from, the violation of such sacred promises.⁵⁶ For this purpose the jury may take into consideration all the facts and circumstances of the case and the conduct of both parties toward each other, and particularly the conduct of the defendant in his whole intercourse with and treatment of the plaintiff in connection with the making and breach of the contract, and afterwards up to and including the defense and trial of the action.⁵⁷ It is, among other facts, a legitimate subject for the consideration of the jury, if the fact is so, that the defendant not only abandoned the plaintiff and trifled with her affections, but had sought to disgrace her and ruin her character.⁵⁸ If the abandonment of the plaintiff by the defendant was wanton and ruthless, and so accomplished

⁵⁴ *Jacoby v. Stark*, 205 Ill. 34, citing the text, 108 Ill. App. 630; *Poehlmann v. Kertz*, 204 Ill. 418, 105 Ill. App. 249; *Sneve v. Lunder*, 100 Minn. 5; *Rivera v. Cardierno*, 4 Porto Rico Fed. 39; *Johnson v. Travis*, 33 Minn. 231; *Kelley v. Highfield*, 15 Ore. 277; *Chellis v. Chapman*, 125 N. Y. 214, 11 L.R.A. 784, 21 Am. St. 736; *Duvall v. Fuhrman*, 3 Ohio C. C. 305 (the award of punitive damages need not be based on the value of the defendant's property at the time he broke his promise); *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Coryell v. Colbaugh*, 1 N. J. L. 77, 1 Am. Dec. 192; *Johnson v. Jenkins*, 24 N. Y. 252; *Hughes v. Nolte*, 7 Ind. App. 526; *Tamke v. Vangsnes*, 72 Minn. 236; *Wolters v. Schultz*, 1 N. Y. Misc. 196; *Finklestein v. Barnett*, 16 N. Y. Misc. 488; *Stribley v. Welz*, 1 Ohio Dec. 621, 8 Ohio C. C. 571; *Kaufman v. Fye*, 99 Tenn. 145, 167, quoting the text; *Ayers v. Mahuka*, 9 Hawaii 377;

Clark v. Reese, 26 Tex. Civ. App. 619.

⁵⁵ It is error to direct the jury to award such damages. Their allowance is for the discretion of that body. *Jacobs v. Sire*, 4 N. Y. Misc. 398. See § 403.

⁵⁶ *Coil v. Wallace*, 24 N. J. L. 291.

⁵⁷ *Kelley v. Highfield*, *supra*; quoting the text.

⁵⁸ *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561, per Smith, J. The general principles here stated, it is believed, are sustained by the best authorities, and, considering the exceptional character of the action, are just and reasonable. They are ably discussed and illustrated by Earl, C. J., in the case last cited. Compare *Greenleaf v. McColley*, 14 N. H. 303; *Leavitt v. Cutler*, 37 Wis. 46. See *Osmun v. Winters*, in note to § 896.

The marriage of the defendant to a third person subsequently to the bringing of the suit cannot be proven to show that he was deceitful or

as to manifest an intent unnecessarily to wound her feelings, injure her reputation and destroy her future prospects all the circumstances showing the latter to have been influenced by bad motives may be proved, and then the largest measure of damages, not only by way of compensation to the plaintiff, but by way of punishment to the defendant, is proper.⁵⁹ On the contrary, if the breach was occasioned by a change of circumstances which, without legally justifying, took from the abandonment all its character of cruelty and wantonness, and the defendant, in withdrawing from his engagement, was tender of the feelings and reputation of the plaintiff, and so accomplished his purpose as to leave no stain upon her reputation and to do the least injury to her feelings and future prospects, it would be a case for compensatory damages merely.⁶⁰ In respect to damages imposed as a punishment, a woman who has lived in adultery with a man who breaks his engagement to marry her does not stand in the same position as one to whose conduct no exception can be taken, and cannot recover anything beyond compensatory damages.⁶¹ In Missouri it is said that if the defendant fraudulently entered into the contract the plaintiff was entitled to withdraw therefrom, the fraud having vitiated her consent. If he entered his suit in malice and not in love [which the facts indicated] this aggravated the plaintiff's damages and she was entitled to compensation therefor, but not to punitive damages.⁶² The estate of the seducer cannot be held liable for such damages.⁶³ A defense set up in good faith cannot form a basis for the allowance of either punitive or compensatory damages.⁶⁴

§ 988. **Damages for loss of marriage; defendant's wealth.**
In determining the damages for the loss of marriage, where no

malicious toward the plaintiff.
Dent v. Pickens, 34 W. Va. 240, 26 Am. St. 291.

⁵⁹ *Johnson v. Jenkins*, 24 N. Y. 252.

⁶⁰ *Id.*; *Moore v. Hopkins*, 83 Cal. 270, 17 Am. St. 248; *Dupont v. McAdow*, 6 Mont. 226; *Goddard v. Westcott*, 82 Mich. 180.

⁶¹ *Clement v. Brown*, 57 Minn. 314.

⁶² *Trammell v. Vaughan*, 158 Mo. 214, 81 Am. St. 302, 51 L.R.A. 854.

⁶³ *Johnson v. Levy*, 122 La. 118.

⁶⁴ *Iliveley v. Golnick*, 123 Minn. 498, defense setting up epilepsy of plaintiff.

special damages are alleged, the jury may take into view the money value or wordly advantages, separate from considerations of sentiment⁶⁵ and affection, of the marriage which would have given the plaintiff a permanent home and an advantageous establishment; and if her affections were in fact implicated and she had become attached to the defendant the injury to her affections may be considered as an additional element of damage.⁶⁶ It is proper for the jury to consider the pecuniary as

⁶⁵ *McKenzie v. Gray*, 143 Iowa 112; *Jacoby v. Stark*, 205 Ill. 34; *Lauer v. Banning*, 152 Iowa 99.

⁶⁶ *Hickey v. Kimball*, 107 Me. 433; *Fisher v. Oliver*, 172 Mo. App. 18; *Fisher v. Barber* (Tex. Civ. App.), 130 S. W. 871, citing the text; *Salchert v. Reinig*, 135 Wis. 194; *Waddell v. Wallace*, 32 Okla. 140; *Spencer v. Simmons*, 160 Mich. 292; *Trammell v. Vaughan*, 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. 302; *Dupont v. McAdow*, 6 Mont. 226, quoting the text; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Harrison v. Swift*, 13 Allen, 144; *Grubbs v. Pence*, 24 Ky. L. Rep. 2183.

In *Coolidge v. Neat*, 129 Mass. 146, the following instruction was approved as being in conformity with repeated decisions of the supreme court: "As elements of damage the jury would have the right to consider: 1. The disappointment of the plaintiff's reasonable expectations, and to inquire what she had lost by reason of such disappointment, and, for that purpose, to consider, among other things, what would be the money value or wordly advantage of a marriage which would have given her a permanent home and an advantageous establishment. 2. The wound and injury to her affections, whatever mortification or distress of mind she suffered, resulting from the refusal

of the defendant to fulfill his promise. That, in connection with the question how she had been wounded in her affections or suffered mortification or distress, the jury might consider the length of time during which the engagement had subsisted; that if a female had been wantonly deserted, after an engagement of this kind, public policy as well as justice dictated the propriety of a legal indemnity, and if her affections had been deeply implanted, her wounded spirit, the disgrace, the insult to her feelings, the probable solitude which might result by reason of such desertion after a long courtship, were all matters for their consideration. It cannot be assumed that the defendant, by associating with the plaintiff, prevented her from forming any other marriage alliance or engagement to marry. The plaintiff might have had no other opportunity for marriage, and the defendant cannot be held responsible for merely possible damage." But see, *Falkner v. Schultz*, 160 Wis. 594.

In *Hahn v. Bettingen*, 81 Minn. 91, a broader rule of liability is stated: In assessing damages the jury may take into consideration the plaintiff's pecuniary loss, her loss of opportunities during her engagement to the defendant for contracting a suitable marriage with

well as the social standing of the defendant, as tending to show the condition in life which the plaintiff would have secured by the marriage.⁶⁷ In these cases the jury should take into consideration the rank and condition of the parties, the estate of the defendant and all the facts proven,⁶⁸ which may include the pecuniary condition of the plaintiff and the surroundings of her home life.⁶⁹ The amount of damages, not being capable of measurement by any precise rule, is left to the discretion of the jury on the circumstances of each particular case,⁷⁰ subject to

another, the disappointment of her reasonable expectations of material and social advantages resulting from the intended marriage, the injury to her health or feelings, the wounding of her pride, the blighting of her affections, and the marring of her prospects in life by reason of the defendant's promise and his refusal to keep it.

⁶⁷ *Lemke v. Franzenburg*, 159 Iowa 466; *Houser v. Carmody*, 173 Mich. 121; *Hess v. Zimmer*, 152 Wis. 193; *Kendall v. Dunn*, 71 W. Va. 262, 43 L.R.A.(N.S.) 556, citing the text; *Lanigan v. Neely*, 4 Cal. App. 760; *Brown v. Bannister*, 14 Hawaii 34; *McKenzie v. Gray*, 143 Iowa 112; *McKee v. Mouser*, 131 Iowa 203; *Richmond v. Roberts*, 90 Ill. 472; *Crosier v. Craig*, 47 Hun 83; *McPherson v. Ryan*, 59 Mich. 33; *Johnson v. Travis*, 33 Minn. 231; *Bennett v. Beam*, 42 Mich. 346; *Olson v. Solverson*, 71 Wis. 663; *Dent v. Pickens*, 34 W. Va. 240, 26 Am. St. 921; *Chellis v. Chapman*, 125 N. Y. 214, 11 L.R.A. 784; *Holloway v. Griffith*, 32 Iowa 409, 7 Am. Rep. 208; *Rutter v. Collins*, 103 Mich. 143; *Tamke v. Vangsnes*, 72 Minn. 236; *Stratton v. Dole*, 45 Neb. 472; *Brown v. Odill*, 104 Tenn. 250; *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, citing the text; *Vierling v. Binder*, 113 Iowa 337; *Hahn*

v. Bettingen, 84 Minn. 512; *Smith v. Compton*, 67 N. J. L. 548, 58 L.R.A. 480; *Kennedy v. Rodgers*, 2 Kan. App. 764; *Hunter v. Hatfield*, 68 Ind. 416.

⁶⁸ *Huggins v. Carey* (Tex. Civ. App.), 149 S. W. 390; *Rivera v. Cadierno*, 4 Porto Rico Fed. 39; *Hanson v. Johnson*, 141 Wis. 550; *Sanborn v. Bay*, 114 C. C. A. 242, 194 Fed. 351; *Jarvis v. Johnson*, 2 West. L. Monthly, 389; *Royal v. Smith*, 40 Iowa 615; *Reed v. Clark*, 47 Cal. 194; *Geiger v. Payne*, 102 Iowa 581; *Rime v. Rater*, 108 Iowa 61; *Kennedy v. Rodgers*, 2 Kan. App. 764; *Casey v. Gill*, 154 Mo. 181.

⁶⁹ *Heasley v. Nichols*, 38 Wash. 485.

In *Harrison v. Cage*, *Carthew* 467, an action for breach on the part of the woman, the value of her estate when the plaintiff courted her and also its subsequent increase was shown.

⁷⁰ *Hickey v. Kimball*, 109 Me. 433; *Gerlinger v. Frank*, 74 Ore. 517; *Hess v. Zimmer*, 152 Wis. 193; *Lemke v. Franzenburg*, 159 Iowa 466; *Kendall v. Dunn*, *supra*; *Fisher v. Oliver*, *supra*; *Lanigan v. Neely*, 4 Cal. App. 760; *Halnass v. Anderson*, 110 Minn. 204; *Hanson v. Johnson*, *supra*; *Salchert v. Reinig*, 135 Wis. 194; *Southard*

the power of the court to set aside the verdict when it appears that the jury has been misled or influenced by passion or prejudice.⁷¹

Where the plaintiff introduces no proof as to the defendant's pecuniary condition it has been held that the latter cannot bring in such testimony on his own behalf to reduce the amount of damages.⁷² But as damages for loss of the marriage are to be ascertained by considering the rank and condition of the parties and as the pecuniary standing of the defendant is a material element, the offer of proof of that condition by him is not so much to reduce damages as to exhibit the state of facts from which they are primarily to be determined. The true principle is well stated in an Iowa case.⁷³ While in such action the question whether the defendant will, in view of his pecuniary circumstances, be able to pay the damages awarded should have no influence with the jury in arriving at the amount of their verdict they may, nevertheless, properly consider the pecuniary as well as social standing of the defendant as tending to show

v. Rexford, 6 Cow. 254; Wilbur v. Johnson, 58 Mo. 600; Holloway v. Griffith, 32 Iowa 409, 7 Am. Rep. 208; Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443; Goodall v. Thurman, 1 Head 209; Denslow v. Van Horn, 16 Iowa 476; Richmond v. Roberts, 98 Ill. 472; Schreckengast v. Ealy, 16 Neb. 510; Musselman v. Barker, 26 Neb. 737; Kelley v. Highfield, 15 Ore. 277; Daggett v. Wallace, 75 Tex. 352, 16 Am. St. 908; Giese v. Schultz, 69 Wis. 521; Olson v. Solverson, 71 Wis. 663; Mahiat v. Codde, 106 Mich. 387; Liese v. Meyer, 143 Mo. 547; Brown v. Odill, *supra*; Hooker v. Phillippe, 26 Ind. App. 501; Lohner v. Coldwell, 15 Tex. Civ. App. 444, citing this section.

⁷¹ Huggins v. Carey, *supra*; McCarty v. Heryford, 125 Fed. 46; Johnson v. Levy, 122 La. 118; Broyhill v. Norton, 175 Mo. 190 (reduced). Suth. Dam. Vol. IV.—2.

ing verdict from \$25,000 to \$12,500); Fisher v. Kenyon, 56 Wash. 8; Wilbur v. Johnson, 58 Mo. 600; Collins v. Mack, 31 Ark. 684; Douglass v. Gausman, 68 Ill. 170; Gough v. Farr, 1 Y. & J. 477; Goodall v. Thurman, 1 Head 209; Wolters v. Schultz, 1 N. Y. Misc. 196; Kellett v. Robie, 99 Wis. 303; Kolsch v. Jewell, 21 App. Div. (N. Y.) 581; Bowman v. Bowman, 153 Ind. 498; Hahn v. Bettingen, 84 Minn. 512; Smith v. Woodfine, 1 C. B. (N.S.) 660. See Berry v. Vreeland, 21 N. J. L. 184.

⁷² Wilbur v. Johnson, 58 Mo. 600.

Where the evidence does not show the loss of a permanent home it is error to instruct that damages may be awarded on that account. Dunlap v. Clark, 25 Ill. App. 573.

⁷³ Holliday v. Griffith, 32 Iowa 409, 7 Am. Rep. 208.

the condition in life which the plaintiff would have secured by a consummation of the marriage contract.⁷⁴ In a Maine case the instruction of the court to the effect that, if the jury found for the plaintiff, the rule in actions of this sort, as in other cases, is that the plaintiff is entitled to such damages as will place her in as good condition as she would have been in if the contract had been fulfilled, was approved. It was construed as referring to her pecuniary condition. Her loss of pecuniary support is one of the elements of damage. Evidence of the defendant's pecuniary ability was properly introduced to show the probable character of such support. The instruction was treated as calling for the judgment of the jury upon the question of the pecuniary value to the plaintiff of a matrimonial alliance with the defendant, and in that view was unobjectionable.⁷⁵

The relevancy of the defendant's financial condition to the plaintiff's cause of action is placed on impregnable ground by the reasoning of the Michigan court: "In this state it is a well-settled legal axiom that the just theory of an action for damages, and its primary object, are that the damages recovered shall compensate for the injury sustained. * * * Now the contract for a breach of which this suit was brought was one for a life association of interests, and it is one of the most obvious facts that the pecuniary circumstances of the defendant, as well as his social position, would largely influence any one's estimate of the damages suffered. This would be so even if the woman had in no manner taken the man's property into account in engaging herself to him; but the law always supposes that property considerations are not ignored in these cases. In cases like the present what loss is it that the plaintiff has sustained by a breach of the contract? To determine this we must look at the surroundings, and see what it was to which the defendant invited her. If it was to a home of poverty and a life of probable hardship and misery, the loss would apparently be small, but if it was to a home possessed of and surrounded by all the comforts and even the luxuries of life, and where her social

⁷⁴ Fisher v. Oliver, *supra*; Beans v. Denny, 141 Iowa 52; Royal v. Smith, 40 Iowa 615.

⁷⁵ Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443.

position in the circles in which she would move by right of the marriage would be the very best, the case would be exactly the opposite, because in such case there would be abundant promise of social and domestic happiness. But beyond this, the very marriage confers certain rights in the husband's real and personal estate of which she cannot afterwards be deprived, except by her own consent, and she would naturally and justly look to them as her security against becoming dependent through the accidents and misfortunes of life. It is all these that the breach of the marriage contract deprives the woman of, and she is allowed to prove them, not to show that he will be able to satisfy a judgment if she obtains one, but to measure the extent of her loss."⁷⁶ The evidence of the defendant's financial ability must be limited to the time the breach occurred or to such time as he might reasonably be expected to fulfill his contract;⁷⁷ though where the trial of the action for the breach occurs soon after the contract was made proof may be made of the property he owned at the time of the trial.⁷⁸ Testimony as to the financial ability of the relatives of the defendant is not admissible.⁷⁹

The financial condition of the defendant may be proven by evidence of general reputation,⁸⁰ "but it seems to have been the common practice in such cases to allow specific evidence of defendant's pecuniary circumstances to be introduced."⁸¹ The

⁷⁶ *Bennett v. Beam*, 42 Mich. 346, approved in *Mahiat v. Codde*, 106 Mich. 387. The text is approved in *Stribley v. Weiz*, 1 Ohio Dec. 621, 625, 8 Ohio C. C. 571. See *Miller v. Rosier*, 31 Mich. 475.

⁷⁷ *Dent v. Pickens*, 34 W. Va. 240, 26 Am. St. 921.

⁷⁸ *Fisher v. Kenyon*, 56 Wash. 8, quoting the text; *Vierling v. Binder*, 113 Iowa 337.

⁷⁹ *Miller v. Rosier*, 31 Mich. 475; *Aldis v. Stewart*, 4 N. Y. Misc. 389; *Totten v. Read*, 16 Daly 282; *Spencer v. Simmons*, 160 Mich. 292; *Crandall v. Quin*, 19 J. & S. 276.

⁸⁰ *Chellis v. Chapman*, 125 N. Y. 214, 11 L.R.A. 784; *Stratton v. Dole*, 45 Neb. 472; *McKee v. Mouser*, 131 Iowa 203. *Contra*, *Johansen v. Mondahl*, 4 Neb. (Unof.) 411, the court saying: While his reputation for wealth, as distinguished from his actual circumstances, if proved, might possibly give the plaintiff, as his wife, additional social advantages for a while at least, it is too remote to be taken into account.

⁸¹ *Johansen v. Mondahl*, *supra*; *Vaughn v. Smith*, 177 Ind. 111; *Vierling v. Binder*, *supra*, citing *Sprague v. Craig*, 51 Ill. 288; *Doug-*

last proposition is denied by the New Jersey court of errors and appeals, which says that in principle the question is the same as when an attack is made on character; it must be sustained by proof of general reputation and not by proving particular instances. But if the defendant conveyed particular tracts of land to relatives shortly before the time fixed for the marriage the value of the land conveyed may be proven to show bad faith on his part,⁸² and so if special damages are claimed because of the loss of the right of dower in the defendant's property.⁸³

§ 989. What will excuse a breach of the contract. A promise of marriage in consideration of illegal intercourse is void.⁸⁴ A man is not legally holden on his promise of marriage and may justify his refusal to fulfill it if he made it in ignorance of the fact that the woman had an illegitimate child or had committed fornication with other men, and on that ground declines entering into the marriage.⁸⁵ All promises of this kind are

lass v. Gausmann, 68 Ill. 170; Clark v. Hodges, 65 Vt. 273; Rime v. Rater, 108 Iowa 61.

⁸² Smith v. Compton, 67 N. J. L. 548, 58 L.R.A. 480; Kerfoot v. Marsden, 2 F. & F. 160; Kniffen v. McConnell, 30 N. Y. 285; Stratton v. Dole and Chellis v. Chapman, *supra*, are referred to as being opposed to the rule of the Iowa cases.

⁸³ Smith v. Compton, *supra*.

⁸⁴ Edmonds v. Hughes, 115 Ky. 561; Baldy v. Stratton, 11 Pa. 316; Judy v. Sterrett, 52 Ill. App. 265; Hanks v. Naglee, 54 Cal. 52, 35 Am. Rep. 67.

⁸⁵ Cox v. Edwards, 120 Minn. 512; Guptill v. Verbaek, 58 Iowa 98; Bench v. Merrick, 1 C. & K. 463; Irving v. Greenwood, 1 C. & P. 350; Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122; Berry v. Bakeman, 44 Me. 164; La Porte v. Wallace, 89 Ill. App. 517; Foster v. Hanchett, 68 Vt. 319, 54 Am. St. 886; Edmonds v. Hughes, *supra*.

In Wharton v. Lewis, 1 C. & P. 529, it was held that if it appear that the defendant was induced to make the promise or to continue the connection, either by misrepresentation or wilful suppression of the real state of the circumstances of the family and previous life of the plaintiff, this goes in bar, and not to the damages only. And in Baddeley v. Mortlock, Holt's N. P. 151, which was an action against a woman for breach of a promise of marriage, it was held a sufficient justification for non-performance that the person to whom she had given the promise turned out upon inquiry to be a man of bad character. The bad conduct charged against the plaintiff was dishonesty in some pecuniary concerns and perjury.

In Foulkes v. Sellway, 3 Esp. 236, Lord Kenyon ruled that where the defendant relies upon general bad character a witness may be exam-

founded upon the presumption of chastity on the part of the woman. This is the consideration of the contract and where that is discovered to have failed she has herself been guilty of the first breach.⁸⁶ And if she be guilty of such immorality after the promise it will be a bar.⁸⁷ But if the defendant made his promise with knowledge of such past misconduct with other men, or if such misconduct occurs afterwards with his connivance it is no bar.⁸⁸ In an early Massachusetts case⁸⁹ the following distinctions were declared as law, and they appear to be generally recognized by later adjudications: 1. That if the woman was of bad character at the time of the contract and that was unknown to the defendant the verdict ought to be in his favor. 2. If the plaintiff after the promise had prostituted her person to any other than the defendant she thereby discharged the defendant. 3. If her conduct was improperly indelicate, although not criminal, before the promise, and it was unknown to the defendant it ought to be considered in mitigation of dam-

ined as to representations made to him by third persons.

In *Berry v. Bakeman*, 44 Me. 164, Tenney, C. J., said no case has been found which sustains the principle that a breach of the criminal law by the plaintiff, accruing after the promise or before the promise, of which the party contracting is ignorant, will necessarily be a bar to a suit, but such conduct would be material on the question of damage.

⁸⁶ *Beans v. Denny*, 141 Iowa 52; *Carson v. Slattery*, 123 La. 825; *Colburn v. Marble*, 196 Mass. 376, 124 Am. St. 561; *Budd v. Crea*, 6 N. J. L. 370; *Stratton v. Dole*, 45 Neb. 472.

⁸⁷ *Colburn v. Marble*, *supra*; *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122; *Burnett v. Simpkins*, 24 Ill. 264; *Johnson v. Travis*, 33 Minn. 231.

Plaintiff's unchaste and lewd habits cannot be proven unless they are

pleaded. *Smith v. Braun*, 37 La. Ann. 225.

⁸⁸ *Beans v. Denny*, *supra*; *Johnson v. Travis*, 33 Minn. 231; *Kelley v. Highfield*, 15 Ore. 277; *Denslow v. Van Horn*, 16 Iowa 476; *Burnett v. Simpkins*, 24 Ill. 264; *Johnson v. Smith*, 3 Pittsb. 184; *Bowman v. Bowman*, 153 Ind. 498; *Sprague v. Craig*, 51 Ill. 288; *Von Storch v. Griffin*, 77 Pa. 504.

⁸⁹ *Boynton v. Kellogg*, *supra*.

It is said in *Colburn v. Marble*, 196 Mass. 376, 124 Am. St. 561, that the decision of the full court was only that the defendant could not prove in mitigation the plaintiff's general bad character after the promise and before the breach, and that the somewhat broader statements of the decision in *Boynton v. Kellogg*, *supra*, made in *Butler v. Eshleman*, 18 Ill. 44, and in the dissenting opinion in *Johnson v. Jenkins*, 24 N. Y. 252, 258, are not to be supported.

ages. 4. If such was her conduct after the promise it was proper, in the same view, for the consideration of the jury. So, when a man breaks off the engagement after he has seduced the woman, and does so on grounds furnishing no excuse or reason, and on the trial produces evidence of her previous incontinence before or during the engagement, of which he had no knowledge or suspicion before he so broke off the engagement, such evidence, if believed, will go in mitigation only, and not in bar of damages.⁹⁰

General reputation of bad character in respect to chastity is not a defense; the defendant must prove that the plaintiff is what she is reputed to be;⁹¹ nor is it a defense that the plaintiff was hysterical or subject to nervous or convulsive fits;⁹² or had previously contracted to marry another person than the defendant;⁹³ nor that the latter was married, the plaintiff not knowing the fact,⁹⁴ nor that the defendant was immodest and indecent or had in some respects violated the criminal law.⁹⁵ A woman who knows that the man to whom she has engaged herself has for many years lived and cohabited with another woman as her husband is bound to know that he is married, and, though he represented he was single, cannot maintain an action for breach of his promise to marry her.⁹⁶ No action for breach of promise will lie if the parties are disqualified by statute by reason of affinity.⁹⁷ The defendant, of course, can claim no advantage growing out of his own wrong conduct to the plaintiff after the promise to marry was made.⁹⁸ Lord Ellenborough charged in a case brought by a man that if he had conducted himself in a brutal or violent manner and threatened to use the

⁹⁰ *Sheahan v. Barry*, 27 Mich. 217; *Houser v. Carmody*, 173 Mich. 121; *Cox v. Edwards*, *supra*.

⁹¹ *Butler v. Eschleman*, 18 Ill. 44; *Foster v. Hanchett*, 68 Vt. 319, 54 Am. St. 886.

⁹² *Rime v. Rater*, 108 Iowa 61, citing *Simmons v. Simmons*, 8 Mich. 318; *Lenke v. Franzenburg*, 159 Iowa 466.

⁹³ *Casey v. Gill*, 154 Mo. 181; *Hahn v. Bettingen*, 81 Minn. 91.

⁹⁴ *Kerns v. Hagenbuchle*, 60 N. Y. Super. Ct. 222; *Davis v. Pryor*, 3 Ind. Ty. 396.

⁹⁵ *Colburn v. Marble*, *supra*.

⁹⁶ *Davis v. Pryor*, 112 Fed. 274, 50 C. C. A. 579, reversing 3 Ind. Ty. 396.

⁹⁷ *Reed v. Reed*, 49 Ohio St. 654.

⁹⁸ *Dunn v. Trout*, 87 Ill. App. 432; *Bowman v. Bowman*, 153 Ind. 498.

defendant illy she had a right to say that she would not commit her happiness to such keeping, and such facts would constitute a legal defense.⁹⁹

The marriage engagement is made upon the assumption that the woman is perfect as such; if the fact is otherwise it is a defense to an action for the breach of the contract. If she informs the man of her defective physical condition and promises to have it remedied, but does not do so, he is not bound to marry her. The defect that works this result need not be such as would entitle him to a divorce if he was her husband.¹ By unnecessarily submitting to an operation, subsequent to the contract to marry, whereby a woman is made incapable of procreation, the right to recover for the breach of such contract is lost.²

Where the defendant, who had contracted syphilis, entered into an agreement to marry, believing in good faith that he had been cured of the disease, its reappearance, without fault on his part, so as to render him unfit to marry, constituted a good defense to an action for the breach of his contract. The court said: While the contract to marry is silent as to any condition, it must be implied that any subsequent change in the physical or mental condition of either party, without fault, so as to render it impossible in the nature of things to accomplish the objects of the marriage relation, will release the parties from the agreement. Impotency, insanity or such a diseased condition of the body as would affect the offspring and endanger the life of the mother if the contract were carried out would certainly be within this rule.³ In a Virginia decision the court holds that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and if the condition of the parties has so changed that the marriage state would endanger the life or health of

⁹⁹ Leeds v. Cook, 4 Esp. 256.

¹ Gring v. Lerch, 112 Pa. 244, 56 Am. Rep. 314; Vierling v. Binder, 113 Iowa 337. See Goddard v. Westcott, 82 Mich. 180.

² Edmonds v. Hughes, 115 Ky. 561.

³ Shackleford v. Hamilton, 93 Ky. 80, 15 L.R.A. 531, approving the minority opinions in Hall v. Wright, 96 Eng. C. L. 745. See Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444. Gardner v. Arnett, 21 Ky. L. Rep. 1, follows the principal case.

either, a breach of the contract is excusable.⁴ This is substantially the view held in Missouri, with the condition that if the disease is merely of a temporary character the party afflicted is entitled to postpone the marriage until health is restored.⁵ The New Jersey court of errors and appeals refuses to recognize that an exception exists as to the duty to perform a contract of marriage which is absolute, and withholds its assent from the doctrine just stated, because, as said by Van Syckel, J., such a defense is excluded by the well settled rule that no one can claim to be absolved from the performance of his obligation by reason of his own immoral conduct or his own turpitude, where the other party has not participated in it. Where both parties are in complicity in an illegal act or an act of turpitude the court will not listen to a controversy between them founded upon it, but will leave them in the position which they have placed themselves. Where a party offers to set up in his own defense his own immoral conduct the court will not permit it. In my judgment, it would be more in accordance with correct legal principle to hold that the plaintiff would be entitled to refuse to marry him and treat his condition as a breach of the contract.

* * * The contract is an unconditional one, into which the defendant cannot read a condition which will defeat it. I agree with the declaration of the majority of the judges in *Hall v. Wright*,⁶ that it is not enough to show in answer to an action upon the contract, after breach, that its performance is inconvenient or may be dangerous. Impossibility to perform will alone constitute an absolute bar. Ill health is the defendant's misfortune, not to be visited, beyond what is inevitable, upon the plaintiff.⁷

A recent Massachusetts case contains some important general rules respecting fraudulent concealment as a ground for annulling a contract to marry: It is not the duty of a party, before

⁴ *Sanders v. Coleman*, 97 Va. 690, 47 L.R.A. 581, citing *Shackleford v. Hamilton* and *Allen v. Baker*, *supra*. The same view is favored in Iowa in discussion. *Vierling v. Binder*, 113 Iowa 337, 340.

⁵ *Trammell v. Vaughan*, 158 Mo. 214, 51 L.R.A. 854.

⁶ 96 Eng. C. L. 746.

⁷ *Smith v. Compton*, 55 Cent. L. J. 409, 67 N. J. L. 548, 58 L.R.A. 480.

making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life; if the parties became engaged without making any investigations and without receiving any assurances or representations which led to the engagement, even though matters were discovered subsequently which, if known at the time, would have prevented the engagement, unless they were such as gave a right to the other party to terminate the contract upon their discovery, they will be bound by their engagement to marry. The fact, if it was a fact, that the plaintiff had some negro blood in her veins, or that her motives were mercenary, or that there was a want of affection on her part, or that there was incompatibility resulting from disparity of age, difference in character and disposition, and other causes, which apart from fraud, were the things relied on by the defendant, would not justify him as matter of law in breaking the contract.⁸ "But we think that if the plaintiff undertook, without inquiry from the defendant, to state facts relating to any circumstances in her history or life, or to her parentage or family, or to her former or present position, which were material, she was bound not only to state truly the facts which she narrated, but she was also bound not to suppress or conceal any facts which were necessary to a correct understanding on the part of the defendant of the facts which she stated, and if she wilfully concealed and suppressed such facts, and thereby led the defendant to believe that the matters to which such statements related were different from what they actually were, she would be guilty of a fraudulent concealment."⁹

⁸ Referring to *Reynolds v. Reynolds*, 3 Allen 605; *Coolidge v. Neat*, 129 Mass. 146; *Gring v. Lerch*, 112 Pa. 244; *Berry v. Bakeman*, 44 Me. 164; *Leeds v. Cook*, 4 Esp. 256; *Baker v. Cartwright*, 10 C. B. (N.S.) 124; *Beachey v. Brown*, El. Bl. & El. 796; *Young v. Murphy*, 3 Bing. N. C. 54; *Bench v. Merrick*, 1 C. & K. 463.

⁹ *Van Houten v. Morse*, 162 Mass. 414, 26 L.R.A. 430, citing *Kidney v. Stoddard*, 7 Metc. (Mass.) 252;

Short v. Currier, 153 Mass. 182; *Burns v. Dockray*, 156 Mass. 135; *Prentiss v. Russ*, 16 Me. 30; *Astwood v. Chapman*, 68 Me. 38, 28 Am. Rep. 5; *Potts v. Chapin*, 133 Mass. 276; *Clark v. Baird*, 5 Seld. 183; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404; *Devoe v. Brandt*, 53 N. Y. 462; *Hill v. Gray*, 1 Stark. 434; *Stevens v. Adamson*, 2 Stark. 422; *Arkwright v. Newbold*, 17 Ch. Div. 301; *Aortson v. Ridgway*, 18 Ill. 23; Add. Torts (Wood's ed.),

§ 990. **What may be proved in mitigation.** If a man promises to marry a woman, knowing at the time that she had borne an illegitimate child, or that she is loose and immodest, he is bound by his contract, and if he refuses to perform it must respond in damages.¹⁰ Such actions, however, are brought to recover, among other things, for injury to reputation, and therefore it is involved in them, and must necessarily depend on the general conduct of the party subsequent as well as previous to the injury complained of.¹¹ It may be the subject of inquiry on the question of damages, for a loose and immodest woman cannot be said to be entitled to so large a compensation as one on whose reputation no imputation has ever rested.¹² Any misconduct showing that the party complaining would be an unfit companion in married life may be given in evidence in mitigation.¹³ The general reputation and standing of the plaintiff's family may be shown by her to enhance, and by the defendant to diminish, damages, but the reputation of a particular member of the family, other than the plaintiff, cannot be inquired into.¹⁴ The defendant cannot reduce damages by showing his want of

1205. See *Gross v. Hochstim*, 72 N. Y. Misc. 343.

¹⁰ *Irving v. Greenwood*, 1 C. & P. 350; *Bench v. Merrick*, 1 C. & K. 463; *Denslow v. Van Horn*, 16 Iowa 476; *Morgan v. Yarborough*, 5 La. Ann. 316; *Woodard v. Bellamy*, 2 Root, 354; *Johnson v. Caulkins*, 1 Johns. Cas. 116; *Johnson v. Smith*, 3 Pittsb. 184.

¹¹ *Willard v. Stone*, 7 Cow. 22; *Johnson v. Caulkins*, 1 Johns. Cas. 116, 3 id. 437; *Markham v. Herrick*, 82 Mo. App. 327; *Stratton v. Dole*, 45 Neb. 472.

¹² *Bench v. Merrick*, *Johnson v. Caulkins*, *supra*; *Von Storch v. Griffin*, 77 Pa. 504; *Budd v. Crea*, 6 N. J. L. 370; *Butler v. Eschleman*, 18 Ill. 44; *Burnett v. Simpkins*, 24 Ill. 264; *Denslow v. Van Horn*, 16 Iowa 476; *Palmer v. Andrews*, 7 Wend. 142; *Daubet v. Kirkman*, 15

Ill. App. 622; *Kantzler v. Grant*, 2 id. 236; *Dupont v. McAdow*, 6 Mont. 226; *Brown v. Bannister*, 14 Hawaii 34. The doctrine of the text is doubted in *Colburn v. Marble*, 196 Mass. 376, 124 Am. St. 561.

Bad character five years before and in another state may not be shown unless there is evidence that it was bad at the time in question among those with whom the plaintiff lived. *Bracken v. Diming*, 141 Ky. 265. But see *Tompkins v. Wadley*, 3 Thomp. & C., 424.

¹³ *Leeds v. Cook*, 4 Esp. 256; *Button v. McCauley*, 5 Abb. Pr. (N.S.) 29; *Alberts v. Albertz*, 78 Wis. 72, 10 L.R.A. 584; *Gross v. Hochstim*, 72 N. Y. Misc. 343 (spendthrift characteristics of male plaintiff).

¹⁴ *Spellings v. Parks*, 104 Tenn. 349, citing *Thompson v. Clendenning*, 1 Head 297.

affection for the plaintiff, on the assumption that he would not fulfill the duties of a husband.¹⁵ She may, however, show that she is sincerely attached to the defendant.¹⁶ So it has been held that declarations made by the plaintiff after the breach that she would not marry the defendant but for his money may be proved by him in mitigation of damages,¹⁷ but such declarations made after the commencement of the action have been excluded.¹⁸ The defendant may show instances of licentious conduct in the plaintiff, and her general character as to sobriety and virtue.¹⁹ A defendant, however, who was shown to have seduced the plaintiff and gotten her with child was held not entitled to prove her general reputation. Parker, J., said: "It appears from the declaration in this case that the plaintiff had been seduced by the defendant, and that pregnancy was the consequence of the seduction. This, of itself, would degrade her in the estimation of the public; and the defendant wishes to avail himself of this degradation, a consequence of his own misconduct, to avoid the plaintiff's action, or to reduce the sum she may recover in damages. No argument can show the absurdity of such a proposal in a stronger light than the bare statement of it. A gentleman, under pretense of courtship, pursues a lady to seduction, leaves her to suffer the pain and ignominy which necessarily follow, and when she appeals to the laws of her country for a pecuniary satisfaction, even that, inadequate as it is, is to be resisted or reduced by arguing her ignominy as a reason why she should not recover. To permit such a defense would be a reproach upon the administration of justice."²⁰ Nor will a

¹⁵ *Richmond v. Roberts*, 98 Ill. 472; *Coolidge v. Neat*, 129 Mass. 146; *Piper v. Kingsbury*, 48 Vt. 480. See *Hall v. Wright*, El. B. & E. 746, 96 Eng. C. L. 745, 763.

¹⁶ *Sprague v. Craig*, 51 Ill. 288.

¹⁷ *Miller v. Rosier*, 31 Mich. 475; *Robinson v. Craver*, 88 Iowa 381.

¹⁸ *Miller v. Hayes*, 34 Iowa 496, 11 Am. Rep. 154.

¹⁹ *Johnson v. Caulkins*, 1 Johns. Cas. 116, 3 id. 437; *Foulkes v. Sellway*, 3 Esp. 236; *Williams v. Hol-*

lingsworth, 6 Baxt. 12; *Cole v. Holiday*, 4 Mo. App. 94; *Button v. McCauley*, 38 Barb. 413, 5 Abb. Pr. (N.S.) 29; *Alberts v. Albertz*, *supra*; *Clark v. Reese*, 26 Tex. Civ. App. 619; *Clemons v. Seba*, 131 Mo. App. 378; *Gerlinger v. Frank*, 74 Ore. 517.

²⁰ *Boynton v. Kellogg*, 3 Mass. 187; *Espy v. Jones*, 37 Ala. 379; *Fleetford v. Barnett*, 11 Colo. App. 77 (intercourse before and after the promise).

defendant be permitted to show by general reputation that after the promise another had supplanted him in the affections of the plaintiff.²¹ He may prove in mitigation that at the time of the breach he was afflicted with an incurable disease.²² If, however, the disease was contracted subsequently to the promise, or if before, and he knew it was incurable, he must respond in damages; but it is otherwise if it was contracted prior to the engagement and he had reason to believe that it was temporary only.²³ The motive which induced the defendant to break his contract does not affect compensatory damages.²⁴

The courts are not agreed concerning the effect of proof of a subsequent offer to perform the contract. The weight of authority is against its reception for the purpose of mitigating damages.²⁵ It is doubtful if any hard-and-fast rule can be laid down on this proposition. The facts and circumstances of the whole case will determine whether such evidence is to be received or rejected. The defendant cannot affect his liability by proof of relationship where the degree is not within the prohibition of the statute;²⁶ nor by the fact that the plaintiff did him bodily harm after the breach was committed.²⁷ The acts, con-

In *Duvall v. Fuhrman*, 3 Ohio C. C. 305, it was held, the defendant having seduced the plaintiff, that her unchaste conduct after the action was brought was not provable.

²¹ *Willard v. Stone*, 7 Cow. 22, 17 Am. Dec. 496.

²² *Sprague v. Craig*, 51 Ill. 288; *Mabin v. Webster*, 129 Ind. 430, 28 Am. St. 199 (if the plaintiff knew of the affliction). See *Hall v. Wright*, El. B. & E. 746, 96 Eng. C. L. 715.

²³ *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444.

²⁴ *Fisher v. Barber* (Tex. Civ. App.), 130 S. W. 871.

²⁵ *Southard v. Rexford*, 6 Cow. 254; *Holloway v. Griffith*, 32 Iowa 409, 7 Am. Rep. 208; *Bennett v. Beam*, 42 Mich. 246; *Heasley v.*

Nichols, 38 Wash. 485; *Contra*, *Kelly v. Renfro*, 9 Ala. 325, 44 Am. Dec. 441; *McCarty v. Heryford*, 125 Fed. 46; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275 (it seems); *Stacey v. Dolan*, 88 Vt. 369.

An offer to renew and perform, made prior to the institution of suit, may be considered by the jury, when the circumstances warrant; but not if made thereafter. This is in accordance with the principle that evidence of facts occurring after the beginning of suit cannot be shown to affect the recovery. *Kendall v. Dunn*, 71 W. Va. 262, 43 L.R.A.(N.S.) 556.

²⁶ *Alberts v. Albertz*, 78 Wis. 72, 10 L.R.A. 584.

²⁷ *Schmidt v. Durnham*, 46 Minn. 227.

duct and declarations of the defendant after the breach and down to the time of trial may be proven in mitigation if they have a tendency to that end.²⁸ Where seduction is proved by way of aggravation its consideration in that view cannot be excluded on account of the existence or even the prior actual enforcement of the parent's or master's right of action for that wrong, for such action is not for the same injury; although the damages they may recover for loss of service are allowed to be much larger than the value of wages could have been, they are, nevertheless, in legal contemplation, the damages of the parent or master, and not of the woman.²⁹ Though the action for the seduction be brought by the plaintiff in the breach of promise suit it is not a bar to the latter even if in such suit it be alleged that the seduction was accomplished under promise of marriage.³⁰ The engagement of the plaintiff to another man at the time the defendant promised to marry her and her fraudulent representation to the contrary, does not mitigate the damages if the engagement for the breach which she sues was continued after knowledge of the previous one and its discontinuance.³¹ Nor are they mitigated by proof that the plaintiff, prior to her association with the defendant, had kept company with another man, it not appearing that such prior association was of anything more than a friendly nature.³² Prior engagements to marry entered into by the plaintiff are too remote unless they were broken by some fault on her part.³³ It seems that, under proper pleadings, the defendant may show that he had contracted with the plaintiff not knowing that insanity existed in her family, if he broke the engagement on that ground.³⁴ A plea of the diseased condition of plaintiff on the question of the existence of the contract, and not in mitigation, does not justify the consideration of that condition in mitigation. Matter in mitigation should be special-

²⁸ *Crandall v. Quin*, 51 N. Y. Super. Ct. 276.

²⁹ *Sheahan v. Barry*, 27 Mich. 217; *Wells v. Padgett*, 8 Barb. 323.

³⁰ *Ireland v. Emmerson*, 93 Ind. 1, 47 Am. Rep. 364.

³¹ *Alberts v. Albertz*, *supra*.

³² *Robinson v. Craver*, 88 Iowa 381; *McCarty v. Coffin*, 157 Mass. 478; *Edge v. Griffin*, *infra*.

³³ *Edge v. Griffin* (Tex. Civ. App.), 63 S. W. 148.

³⁴ *Lohner v. Coldwell*, 15 Tex. Civ. App. 444.

ly pleaded.³⁵ In some states matter in mitigation may be shown under the general denial including the condition of mind or body which renders a man less fitted to fill the position of a husband, or a woman less fitted to fill the position of a wife.³⁶ The scope of the evidence in mitigation may be as wide as that received in aggravation of damages. The defendant's declarations showing that his failure to marry the plaintiff proceeded from no want of respect to her are admissible.³⁷ The plaintiff is not limited to the recovery of a nominal sum because she married another.³⁸

³⁵ Vierling v. Binder, 113 Iowa 337; Edge v. Griffin (Tex. Civ. App.), 63 S. W. 148; Lemke v. Franzenburg, 159 Iowa 466.

³⁶ Walker v. Johnson, 6 Ind. App. 600.

³⁷ Johnson v. Jenkins, 24 N. Y. 252; Crandall v. Quin, 19 J. & S. 276.

³⁸ Fisher v. Barber, *supra*.

CHAPTER XXIV.

EJECTMENT.

§ 991. Proceedings regulated by statute.

SECTION 1.

MESNE PROFITS.

- 992. The remedy for; who may recover.
- 993. What may be allowed as damages; costs of ejectment suit.
- 994. Recovery limited to the value of the use; consequential and punitive damages.
- 995. Proof of rental value.
- 996. What property withheld.
- 997. Interest.
- 998. Compensation on recovery of a term.
- 999. Claims for improvements, taxes, etc.
- 1000. Remedy under the code.

SECTION 2.

DOWER.

- 1001. The right of.
- 1002. It is assignable on a valuation.
- 1003. Damages for detention of dower.
- 1004. Extinguishment of dower right.
- 1005. Reprisals.
- 1006. Dower limited to husband's equitable interest.
- 1007. Dower right subject to incumbrance.

§ 991. Proceedings regulated by statute. The damages for withholding possession of real property are recoverable in this country by proceedings, to a great extent regulated by statute, either in the action for recovery of its possession or in a supplementary suit or proceeding. The action for recovery of the

land is made, in many states, a bar to any other action or proceeding to recover *mesne* profits. But in most cases, even though such profits may be recovered in the same action in which the land is recovered, the common-law action for them may be maintained after the action for the recovery of the land has been determined in favor of the plaintiff.¹

SECTION 1.

MESNE PROFITS.

§ 992. The remedy for; who may recover. The action of trespass for *mesne* profits is usually regarded as consequential to the recovery in ejectment.² The plaintiff in the latter, upon the introduction of the fictions by which the proceedings were distinguished, was a nominal party, and the damages assessed became nominal also.³ As these damages are not given in satisfaction of the *mesne* profits, but only entitle the plaintiff to costs,⁴ the recovery of the latter will not preclude him from the recovery of such profits by action⁵—that is, in tres-

¹ Newell on Eject. 607; Tyler on Eject. 838.

² Lord Mansfield in *Aslin v. Par-kin*, 2 Burr. 668; *Mitchell v. Mitchell*, 1 Md. 55; *Morgan v. Var-ick*, 8 Wend. 587; *Benson v. Matz-dorf*, 2 Johns. 369; *Blount v. Garen*, 3 Hayw. 88; *Van Alen v. Rogers*, 1 Johns. Cas. 283, note, 3 id. 457; *Cushwa v. Cushwa*, 9 Gill 242; *People v. Mullender*, 132 Cal. 217; *Bockes v. Lansing*, 74 N. Y. 437; *Alt v. Gray*, 55 App. Div. (N. Y.) 563; *Whitehead v. Callahan*, 44 Colo. 396; *Norman v. Beckman*, 58 Fla. 325. See note 5, *infra*.

³ It has been held that it is not error to assess the actual damages in ejectment. *Miller v. Melchor*, 13 Ired. 439; *Boyd's Lessee v. Cowan*, 4 Dall. 128; *Lessee of Battin v. Bigelow*, 1 Pet. C. C. 452; *Osbourne*

v. Osbourne, 11 S. & R. 58, per *Duncan, J.*

Under a statute expressing that "damages in actions for the possession, or for the use and occupation, of land must be computed to the time of the verdict," there cannot be a recovery in the statutory real action of damages for waste growing out of the destruction of timber standing on the lands. *Prestwood v. Watson*, 111 Ala. 604.

⁴ *Van Alen v. Rogers*, 1 Johns. Cas. 283, note, 3 id. 457; *Davis v. Doe*, 25 Miss. 445.

⁵ *Van Alen v. Rogers*, *supra*, and note; *O'Reilly v. Long*, 25 Ind. App. 525; *Emrich v. Ireland*, 55 Miss. 390.

In Indiana, inasmuch as under the statute a recovery may be had in one suit for possession and for

pass.⁶ Where his title expires after the commencement of the ejectment suit and before trial he cannot recover the land, but is entitled to damages and costs, and these may be recovered in such suit. This was allowed at common law,⁷ and is a right now very generally declared by statute. In this action of trespass for *mesne* profits after recovery in ejectment the tenant or defendant is estopped from controverting the title from the time of the ouster complained of in the ejectment or date of the demise laid in the declaration;⁸ but if the plaintiff proceed for antecedent profits he must prove his title to the premises whence they arose to show his right to recover them.⁹ Only the lessor

use and occupation of the premises wrongfully withheld, it would seem necessarily to follow that when possession had been obtained by the voluntary surrender of the premises by the wrong-doer, the right to the *mesne* profits remains and may be enforced. *Huncheon v. Long*, 25 Ind. App. 530.

And it is said in a late case that where the disseisor surrenders possession or abandons the premises and the owner enters in assertion of his right, we can see no reason why the rule that *mesne* profits can only be recovered in ejectment should hold good, since it would allow the defendant to deprive the real owner of a substantial right to damages by his own wrongful act. *Blew v. Ritz*, 82 Minn. 530.

In Pennsylvania a defendant who quits the premises in controversy pending the ejectment suit is not liable for *mesne* profits afterward accruing. *Mitchell v. Friedley*, 10 Pa. 198.

In California there must be a finding of the value of the use and occupation in the ejectment suit or the plaintiff cannot recover *mesne* profits. *Camarillo v. Fenlon*, 49 Cal. 205.

⁶ Bac. Abr., tit. Ejectment (H); Suth. Dam. Vol. IV.—3.

Cape Girardeau, etc. R. Co. v. St. Louis & G. R. Co., 222 Mo. 461; *Tongue v. Nutwell*, 31 Md. 302. *

⁷ *Jackson v. Davenport*, 18 Johns. 295; *Wilkes v. Lion*, 2 Cow. 333; *Woodhull v. Rosenthal*, 61 N. Y. 393.

Mesne profits only are recoverable under the Alabama statute. *Henry v. Davis*, 149 Ala. 359.

⁸ *Id.*; *Benson v. Matzdorf*, 2 Johns. 369; *Avent v. Hord*, 3 Head 458; *Van Alen v. Rogers*, 3 Johns. Cas. 457; *Crockett v. Lashbrook*, 5 T. B. Mon. 531; *Man v. Drexel*, 2 Pa. 202; *Drexel v. Man*, *id.* 271, 44 Am. Dec. 195; *Myers v. Sanders*, 8 Dana 65; *Doe ex d. Marshall v. Dupey*, 4 J. J. Marsh. 388; *Graves v. Joicé*, 5 Cow. 261; *Poston v. Jones*, 2 Dev. & B. 294; *Brewer v. Beckwith*, 35 Miss. 467; *Chirac v. Reinecker*, 11 Wheat. 280, 6 L. ed. 474; *Leland v. Tousey*, 6 Hill 328; *Den v. McShane*, 13 N. J. L. 35.

⁹ *Id.*; *Masterson v. Hagan*, 17 B. Mon. 328; *Avent v. Hord*, 3 Head 458; *Kille v. Ege*, 82 Pa. 102; *Brewer v. Beckwith*, *supra*; *West v. Hughes*, 1 Har. & J. 574, 2 Am. Dec. 539; *Danziger v. Boyd*, 54 N. Y. Super. Ct. 365. See *Cape Girardeau, etc. R. Co. v. R. Co.*, *supra*; *Gilman v. Gilman*, 111 N. Y. 265;

of the plaintiff can proceed for damages anterior to the demise.¹⁰ No party can recover *mesne* profits for any time prior to his obtaining title; an heir or devisee cannot recover those which accrued in his ancestor's time.¹¹ The right of a purchaser at an execution sale does not cover the period between the time thereof and the execution of the deed.¹² If there has not been an ouster, damages, as between tenants in common, can be recovered only from the time suit was instituted,¹³ and if the defendant had no notice of the plaintiff's title anterior to the suit the recovery cannot antedate that event.¹⁴ Heirs in possession are not personally liable for rents and profits received by their ancestor, unless it is shown that a portion thereof have come into their possession;¹⁵ and their liability does not antedate the time they obtained title or a claim thereto.¹⁶ A licensee is liable for *mesne* profits from the time of the revocation of his license.¹⁷ The holder of a tax deed in possession of land is liable to account for the value of the use to the holder of the better estate on its being adjudicated, in an action to quiet the latter's title, that his deed was void as an instrument of title and the right of possession under it is denied.¹⁸ But this liability does not attach to the holder of a tax deed in possession under a statute authorizing it until the successful claimant of the land repays the taxes to which the former is entitled.¹⁹ By removing from the premises, though the keys are retained, one who does not thereafter rent them is not liable because they

Gaslight Co. v. Rome, etc. R. Co., 51 Hun 119.

¹⁰ Tyler on Eject. 839; Denn v. Chubb, 1 N. J. L. 466.

¹¹ King v. Little, 77 N. C. 138; Hotchkiss v. Auburn, etc. R. Co., 36 Barb. 600; Brown v. McCloud, 3 Head 280. See Cook v. Webb, 21 Minn. 428; Mills v. Geer, 111 Ga. 275, 52 L.R.A. 934; Smith v. White, 165 Mo. 590; Scheffel v. Weiler, 41 Ill. App. 85.

The plaintiff's rights have been extended to the time the contract to buy was made though the deed was

subsequently executed. Brown v. Grady, 16 Wyo. 151.

¹² Clark v. Boyreau, 14 Cal. 634. See Haish v. Pollock, 79 Kan. 624.

¹³ Miller v. Myers, 46 Cal. 535.

¹⁴ Cowan v. Mueller, 176 Mo. 192.

¹⁵ Noble v. Douglass, 56 Kan. 92; Gardner v. Granniss, 57 Ga. 539.

¹⁶ Fitzpatrick v. Graham, 122 Fed. 401, 58 C. C. A. 619.

¹⁷ Watson v. Chicago, etc. R. Co., 46 Minn. 321.

¹⁸ Will v. Ritchie, 61 Kan. 715, distinguishing Uhl v. Small, 54 Kan. 651; Whitehead v. Callahan, *supra*.

¹⁹ Hoffmire v. Rice, 22 Kan. 749.

are occupied by others with his knowledge and consent.²⁰ *Mesne* profits may be recovered for the use of property during the plaintiff's minority.²¹

§ 993. What may be allowed as damages; costs of ejectment suit. The plaintiff must prove the value of the *mesne* profits, for the judgment in ejectment does not establish anything as to that.²² In estimating them, however, the jury are not confined to the mere rent of the premises; they may give extra damages; and the costs in ejectment are recoverable whether the judgment be by default against the casual ejector or upon a verdict against the tenant or landlord, and are, therefore, usually declared for as damages in the action for *mesne* profits.²³ The general principle is that the plaintiff is entitled to recover all damages fairly resulting from his having been wrongfully kept out of possession.²⁴ They may be computed during the whole period the defendant has withheld the premises from him down to the verdict unless the statute of limitations is pleaded,²⁵ if the defendant has kept possession; the

²⁰ *Haish v. Pollock*, *supra*.

²¹ *McCrubb v. Bray*, 36 Wis. 333.

²² *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634.

²³ *Bac. Abr.*, tit. Ejectment (H); *Goodtitle v. Tombs*, 3 Wils. 118.

²⁴ *Symonds v. Page*, 1 Cr. & J. 29; *Doe v. Perkins*, 8 B. Mon. 198; *Bodkin v. Arnold*, 48 W. Va. 108; *Norman v. Beekman*, 58 Fla. 325; *Yuen Suey v. Fleshman*, 65 Ore. 606.

²⁵ *Fagan v. McDonnell*, 115 App. Div. (N. Y.) 89; *Willis v. McKinnon*, 178 N. Y. 451, 79 App. Div. (N. Y.) 249; *Dawson v. McGill*, 4 Whart. 230; *Gaslight Co. v. Rome*, etc. R. Co., 51 Hun 119; *Whissenhunt v. Jones*, 78 N. C. 361; *Pendergast v. McCaslin*, 2 Ind. 87; *McCrubb v. Bray*, 36 Wis. 341; *Field v. Columbet*, 4 Sawyer 523; *Jackson v. Wood*, 24 Wend. 443; *Budd v. Walker*, 9 Barb. 493; *Morgan v. Varick*, 8 Wend. 587; *Avent v.*

Hord, 3 Head 458; *Love v. Shartzer*, 31 Cal. 487; *Danziger v. Boyd*, 120 N. Y. 628; *Pearson v. Carr*, 97 N. C. 194; *Ashmead v. Wilson*, 22 Fla. 255; *Dean v. Tucker*, 58 Miss. 487; *Hihn v. Fleekner*, 106 Cal. 95.

In Missouri it is declared by statute that the judgment shall provide for the payment of accruing rents and profits at the rate found by the jury from the time of verdict until possession of the premises is delivered to the plaintiff. Hence if the defendant in ejectment restrains the plaintiff from taking possession he must answer for the rents and profits during the life of the injunction. *Stump v. Hornback*, 109 Mo. 272. Under the statutes of that state the liability dates from the time the defendant in ejectment first knew of the plaintiff's claim to the

time and extent of his possession are open to proof.²⁶ On this principle he is entitled to recover *the costs of the ejectment suit*, both on the trial and in error. In England if the costs have been taxed the recovery is confined to the taxed costs, and no extra costs will be allowed; but it is not essential to the recovery that they be taxed.²⁷ And where the costs cannot be taxed it has been held that the jury might reasonably consider those between attorney and client as the measure.²⁸ Costs of the ejectment suit have been held recoverable in this country.²⁹ The right to recover the expenses of the former action depends upon the necessity for the action, and not upon its particular form. In an action of trespass *quare clausum* the costs of preliminary proceedings in equity may be recovered.³⁰ It was held in a Kentucky case which has recently been overruled that the costs which may be recovered are not limited to those which are taxable between party and party. Marshall, C. J., said: "The principle from which the rule on this subject is to be extracted is in our opinion this: that the plaintiff in this action is entitled to be reimbursed in such amount as he has in good faith been compelled to pay in obtaining by legal means the restoration of the property which the defendant has wrong-

land. *Phillips v. Stewart*, 87 Mo. App. 486.

In the absence of statutory direction a judgment against two for profits prior to their joint possession is erroneous. *Ashmead v. Wilson*, 22 Fla. 255.

In North Carolina, under the revision of 1905, the recovery of rents cannot extend over more than three years, and there can be no recovery if the betterments are in excess of the rents for that time. *Whitfield v. Boyd*, 158 N. C. 451.

In Mississippi the bringing of an action is equivalent to a re-entry and there may be a recovery of rent from that time to the trial. *Yazoo, etc. R. Co. v. Lakeview T. Co.*, 100 Miss. 281.

²⁶ *Aslin v. Parkin*, 2 Burr. 668;

Pearse v. Coaker, L. R. 4 Ex. 92, 38 L. J. (Ex.) 32; *Vance v. Inhabitants, etc.*, 7 Blackf. 241; *Ryers v. Wheeler*, Hill & D. Supp. 389; *Ainslie v. Mayor, etc.*, 1 Barb. 168; *Mitchell v. Freedley*, 10 Pa. 198; *Miller v. Henry*, 84 id. 33.

²⁷ *Newell v. Roake*, 7 B. & C. 404; *Symonds v. Page*, 1 Cr. & J. 29; *Doe v. Davis*, 1 Esp. 358; *Doe v. Filliter*, 13 M. & W. 47, 11 id. 80; *Doe v. Hare*, 2 Dowl. P. C. 245, 2 Cr. & M. 145; *Doe v. Huddart*, 2 Cr., M. & R. 316.

²⁸ *Newell v. Roake*, 7 B. & C. 404.

²⁹ *Furlong v. Cooney*, 72 Cal. 322; *Baron v. Abeel*, 3 Johns. 481, 3 Am. Dec. 515; *Doe v. Perkins*, 8 B. Mon. 198; *Denn v. Chubb*, 1 N. J. L. 466. See *Tate v. Doe*, 24 Miss. 465.

³⁰ *Fowler v. Owen*, 68 N. H. 270.

fully taken or withheld from him." "The amount recoverable under this head cannot exceed what he has actually paid, or is in good faith actually bound to pay for obtaining restitution. But as he cannot have been compelled to pay more than the reasonable fees and charges for the services of others necessary for obtaining legal redress, he may not be entitled to recover the full amount which he has bound himself to pay for such services. And on the other hand, as he may have obtained the services for less than their actual or reasonable value, he may not always be entitled to recover to the full amount of that value. The recovery under this head may thus be limited below the amount which the plaintiff has actually paid or bound himself to pay on the ground that that amount is more than the reasonable value of the services necessary in his suit for restitution of his right. But it cannot be carried beyond that amount on the ground that the necessary services were reasonably worth more. Then the criterion in this case is not what would have been reasonable if the plaintiff had paid or undertaken to pay so much, but what the plaintiff had paid, or had undertaken and was bound to pay, if that sum was not unreasonable."³¹ In Rhode Island and New Hampshire the defendant's liability for counsel fees and expense incurred for the services of an engineer in examining records, making plat, etc., for use in the trial of the ejectment suit are not allowed. Referring to the case last quoted from Durfee, C. J., says: "The court cite no authority for their decision. Such an allowance may be just, but it is anomalous, for there is no reason for the recovery of the counsel fees and expenses of the ejectment suit which would not apply as well to any other suit. If plaintiff is entitled to recover his counsel fees and expenses when he succeeds in the ejectment suit, why should not the defendant have the same measure of justice when he succeeds?"³² This is doubtless the

³¹ Doe v. Perkins, 8 B. Mon. 198. This case is not now the law in Kentucky. Apparently, without knowledge of it, the court held that such fees could not be recovered, and, on having its attention called to the

case, added an addendum to its opinion overruling so much of it as allowed attorneys' fees. Smith v. Bell, 91 Ky. 655 (1891).

³² Herreshoff v. Tripp, 15 R. I. 92,

rule in Pennsylvania,³³ Tennessee³⁴ and Oregon.³⁵ In a *nisi prius* case in New Jersey the jury was instructed that in assessing *mesne* profits they might include in the damages all the plaintiff's reasonable and necessary expenses, including the fee to his counsel.³⁶ But this view has been disapproved, and the plaintiff can recover only such costs as are taxed.³⁷ In Texas in an action of forcible entry and detainer the statute provides for the recovery of the rental value of the premises for withholding possession and the fee of the attorney for defending the suit.³⁸ Statute providing for the recovery of the costs of recovering possession refers only to the costs incurred in a previous action, and even then expenditures therein do not recover attorney's fees as an element to increase the damages in a later action.³⁹ While the title to land is undetermined the owner out of possession is not entitled to the fruits of the land or their value from a *bona fide* purchaser of them from an occupant in adverse possession; it is immaterial whether the fruits were the result of labor or were the product of a volunteer crop.⁴⁰ Where the ejectment defendant brings an action against the successful ejectment plaintiff to recover for improvements made prior to the time the statute of limitations began to run the latter may counterclaim for rents and profits to the same period, and also for the balance adjudged to be due him for rents and profits and costs in the ejectment suit, as well as for the value of the use of the premises, without the improvements, since the judgment therein.⁴¹

§ 994. Recovery limited to the value of the use; consequential and punitive damages. There are old cases in which observations have been made tending to convey the impression that the plaintiff may recover more than the annual income from the land during the time the defendant withheld posses-

2 Am. St. 879; *Hersey v. Hutchins*, 71 N. H. 458.

³³ *Alexander v. Herr*, 11 Pa. 537.

³⁴ *White v. Clack*, 2 Swan 230.

³⁵ *Yuen Suey v. Fleshman*, 65 Ore. 606.

³⁶ *Denn v. Chubb*, *supra*.

³⁷ *Pike v. Daly*, 54 N. J. L. 4.

³⁸ *McRae v. White* (Tex. Civ. App.), 42 S. W. 793.

³⁹ *Hegar v. DeGroat*, 3 N. D. 354.

⁴⁰ *Johnston v. Fish*, 105 Cal. 420,

45 Am. St. 53; *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710; *Nash v. Sullivan*, 32 Minn. 189.

⁴¹ *Davis v. Louk*, 30 Wis. 308.

sion. The general rule is that the damages are to be measured on this basis, though other damages are recoverable if waste has been committed. That measure affords compensation.⁴² This income is measured by the net value of the use of the property, not by what the defendant received from it, nor by what he might have obtained,⁴³ if he had put it to a use for

⁴² *Leyson v. Davenport*, 38 Mont. 62; *Fagan v. McDonnell*, 115 App. Div. (N. Y.) 89; *Kimball v. Miller*, 1 Alaska 347 ("special damages to the property by cutting trees, or removing crops, or collecting rents or other profits" seem to be clearly excluded); *Trotter v. Stayton*, 45 Ore. 301; *Nash v. Sullivan*, 32 Minn. 189; *Larwell v. Stevens*, 12 Fed. 559; *Carman v. Bean*, 88 Pa. 319; *Campbell v. Brown*, 2 Woods 349; *Kille v. Ege*, 82 Pa. 102-112; *Goodtitle v. Tombs*, 3 Wils. 118; *Dewey v. Osborn*, 4 Cow. 329; *Drexel v. Man*, 2 Pa. 271, 44 Am. Dec. 195; *Brown v. Galloway*, Pet. C. C. 291; *Lippett v. Kelley*, 46 Vt. 516; *Congregational Soc. v. Walker*, 18 Vt. 600; *Averett v. Brady*, 20 Ga. 523; *Masterson v. Hagan*, 17 B. Mon. 325; *New Orleans v. Gaines*, 15 Wall. 624, 21 L. ed. 215; *Woodhull v. Rosenthal*, 61 N. Y. 394.

Profits which might have been realized from a business conducted on the premises in connection with the use of chattels are not recoverable. *Johnson v. Levy*, 3 Cal. App. 591.

⁴³ *Kille v. Ege*, 82 Pa. 102; *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321; *Campbell v. Brown*, 2 Woods 349; *Bolling v. Leisner*, 26 Gratt 36; *Phillips v. Stewart*, 87 Mo. App. 486; *Bodkin v. Arnold*, 48 W. Va. 108; *Sanders v. Thornton*, 2 Ind. Ty. 92; *Smith v. Cook* (Tex. Civ. App.), 142 S. W. 26; *Columbia, etc. R. Co. v. Histogenetic*

M. Co., 14 Wash. 475; *Crawford v. Eidman*, 129 Fed. 992; *Scott v. Colson*, 156 Ala. 450; *Combs v. Lake*, 91 Ark. 128; *Baldwin v. Bohl*, 23 S. D. 395; *Lownsdale v. Grays Harbor B. Co.*, 36 Wash. 198; *Scott v. Scott*, 91 Kan. 372; *Nathan v. Dierssen*, 164 Cal. 607. See *Curry v. Sandusky F. Co.*, 88 Minn. 485.

In Louisiana the rent collected for the land, without the improvements made by the defendant, measures his liability if it does not appear that the plaintiff could have realized more. *Larido v. Perkins*, 132 La. 660.

No matter how wilful and long-continued the trespass may have been there is no law, which authorizes the disallowance of the expense of managing property or the infliction of a penalty on the defendant. *McArthur v. Cornwall*, [1892] App. Cas. 75.

A mistake by the defendant as to the acreage of the land and any advantage obtained by his tenant on that account are immaterial so far as his liability is concerned. *Phillips v. Stewart*, *supra*.

Where the defendant remained in possession under an adverse claim of title, though the plaintiff demanded a specific rental, he was liable only for the reasonable rental value. *Ft. Smith Warehouse Co. v. Freidman-Howell & Co.*, 111 Ark. 15.

No deduction is to be made from the fair rental value because of any limitations imposed upon the use of

which it was not adapted.⁴⁴ If, however, the title is in real doubt and the parties have acted in entire good faith the actual receipts, and not the rental value, will be taken as the damages.⁴⁵ Where the defendant has made improvements on the land the plaintiff is entitled only to what the rental value would have been without such improvements.⁴⁶ The stipulated rent for the land in question or the royalty agreed to be paid for working a mine have been regarded as the proper measure of damages.⁴⁷ In an English case in which there had been an actual ouster and the defendant kept the plaintiff out until judgment in the ejectment it was held that recovery was not to be confined to *mesne* profits only, but, as was remarked by Gould, J., the plaintiff might recover for "his trouble, etc.;" that he had known four times the value of such profits to be

the premises while in the plaintiff's possession. *Lewis v. Lewis*, 76 Conn. 586.

Where the land was wild and unfenced, and no injury was done it nor profits received from it, a recovery was refused. *Grieffey v. Kennard*, 24 Neb. 174. Where it was part of a highway and was occupied by a railroad and pending the ejectment action was condemned, only nominal damages were recovered for withholding possession prior to the award made in the condemnation proceedings. *Judge v. New York, etc. R. Co.*, 56 Hun 60.

In *Graham v. St. Louis, etc. R. Co.*, 69 Ark. 562, 66 id. 344, land conveyed for railroad purposes only, with the grantee's acquiescence, remained in the possession of the grantor and was cultivated by him for a number of years until he notified the grantee that he was holding adversely. In an action of ejectment the grantee was entitled to nominal damages only.

Where a mill site was involved the fair value of the premises measured the recovery. It was compe-

tent to show what kind of premises they were. Was the site a good one, centrally located for sawmill purposes, or one remote from the necessary timber to keep a mill busy? If there was in the vicinity a grove of standing pine the site would be of more value than if the timber were at a distance and the site would be of greater value yet if there were half a million feet of saw logs in the adjacent mill pond. The fact that plaintiffs owned those logs would be immaterial. *Noyes v. French L. Co.*, 80 Minn. 397.

⁴⁴ *Crane v. Oregon R. & N. Co.*, 66 Ore. 317.

⁴⁵ *Lawrence v. Rector*, 137 U. S. 139, 34 L. ed. 600. See *Brown v. Nelms*, 86 Ark. 368, as to who is a *bona fide* occupant of land within a statute limiting liability for *mesne* profits to three years before suit was brought.

⁴⁶ *Armor v. Frey*, 253 Mo. 447.

⁴⁷ *Moragne v. Moragne*, 143 Ala. 459, 111 Am. St. 52.

"When a mortgagee holds possession of the mortgaged premises he is chargeable with the fair rental

given.⁴⁸ Referring to this language, Gibson, C. J., said: "If trouble and expense are subjects of compensation, why are they not also included in the original judgment? But it would have been viewed as a startling novelty. A separate suit could not lie for the trouble and expense of a previous one; and there is no reason why they should be component parts of a cause of action in common with something else. There is no case in which compensation has been specifically recovered for them. There are *dicta* that a jury may give whatever they may think reasonable; but surely no court will subject a party to a blind and an unbridled discretion. A verdict will not be set aside for excess of damages except in an extreme case; and the defendant would often suffer all but extreme injustice."⁴⁹

Consequential damages, besides costs of the ejectment, may be recovered—as for shutting up an inn and destroying its custom, if they are specially declared for.⁵⁰ Delay in the erection of a building on the land in question in which to carry on a business may be shown, as may interference with access to other land owned by the plaintiff.⁵¹ Where there may be a recovery for all waste and injury the damage done in consequence of the removal of a fence on the premises may be recovered for.⁵² There cannot be a recovery for incidental tortious acts resulting in damage—as where land is overflowed by the obstruction of a stream, or ingress and egress therefrom is cut off.⁵³ The loss of an opportunity to rent the premises is not an element of damage.⁵⁴ The plaintiff may recover the

values of the property. The fair rental values, generally speaking, are such as an owner of ordinary prudence could secure by the exercise of reasonable diligence. When the mortgagee leases the premises and reserves and receives rent therefor, *prima facie* he has acted with reasonable care and diligence, and, therefore, *prima facie* he will be charged with the rent he has received." Pollard v. American F. M. Co., 139 Ala. 183.

⁴⁸ Goodtitle v. Tombs, 3 Wils. 118.

⁴⁹ Alexander v. Herr, 11 Pa. 539. See Good v. Mylin, 8 id. 51, 49 Am. Dec. 493.

⁵⁰ Dunn v. Large, 3 Doug. 333.

⁵¹ Trotter v. Stayton, *supra*, citing this section.

⁵² Sieferer v. St. Louis, 141 Mo. 586.

⁵³ Lownsdale v. Grays Harbor B. Co., 54 Wash. 542.

⁵⁴ Crawford v. Eidman, 129 Fed. 992.

actual damage and injury to the premises as well as the yearly value of the land.⁵⁵ The value of wood cut and removed from the premises is not the extent of the recovery for the damage done; the effect of the wrong upon them is involved, and their value before and after the cutting may be shown, and incidentally, the value of turpentine secured.⁵⁶ The rent covers the natural wear and tear of improvements resulting from the lapse of time; but not such as are caused by negligence, misuse or abuse.⁵⁷ Defendants, in an action for *mesne* profits, had demised premises for a term of fifteen years at an annual rent of \$2,000, besides the payment of royalty on each ton of iron ore mined; they had received the rent for one year; but the premises were in no way injured and no ore was taken therefrom. The defendants, having been evicted by the plaintiffs, became unable to fulfill their covenants in the lease and the lessors thereby acquired a right of action against them for damages. It was held that the \$2,000 received did not establish a correct basis for fixing the rental value of the premises.⁵⁸ A defendant, being a *bona fide* purchaser for value, and having taken possession under color of title of mines which were unimproved, and expended large sums in their development, as well as in permanent improvements thereon of great value, was chargeable for ores removed, only their value in place, that is,

⁵⁵ Cooch v. Gerry, 3 Harr. 280; Huston v. Wickersham, 2 W. & S. 308; Masterson v. Hagan, 17 B. Mon. 325; Lippett v. Kelley, 46 Vt. 516; Ashmead v. Wilson, 22 Fla. 255, 1 Am. St. 191.

It is otherwise under statutes in some states. Pacquette v. Pickness, 19 Wis. 219; Bottorff v. Wise, 53 Ind. 32; Emrich v. Ireland, 55 Miss. 390; Prestwood v. Watson, 111 Ala. 604.

Under the California code it is optional with the plaintiff to sue for injury to the premises in the same action. Field v. Columbet, 4 Sawyer 523.

The occupant cannot be held liable

for diminution in the value of the land which has occurred without his fault. Willis v. Morris, 66 Tex. 628, 59 Am. Rep. 634.

If the land was suitable only for a particular crop and its detention prevented the owner from putting in seed, with the result that the rental value of the land was thereby impaired for the year following the recovery of possession, the impaired value may be considered in estimating the damages. Case v. Hall, 2 Ind. Ty. 8.

⁵⁶ Norman v. Beekman, 58 Fla. 325.

⁵⁷ Bodkin v. Arnold, *supra*.

⁵⁸ Kille v. Ege, 82 Pa. 102.

by deducting from their market value the cost of mining, cleansing and delivering in market.⁵⁹ And he may defend against the claim of *mesne* profits by showing that the improvements he has made and left upon the lands are of value sufficient to be a full compensation for their use and occupation.⁶⁰ Under a statute which fixes the damages at "the clear annual value of the premises for the time" the defendant was in possession the jury cannot take into consideration the special value of the land in dispute as a passageway to adjacent premises,⁶¹ or for other special use unless the right to devote it thereto is appurtenant to the land.⁶² The purchaser from a life tenant cannot mitigate the damages recoverable by the remainder-man by proving his outlay in preserving the property.⁶³ The good faith of the defendant does not affect his liability for the rents and profits.⁶⁴ If the action is not founded on the want of probable cause and the existence of malice punitive damages are not recoverable.⁶⁵ Double damages imposed by statute must be specially claimed and are dependent upon proof that the holding over was deliberate, intentional, obstinate, unreasonable or perverse.⁶⁶ In New York damages done to the freehold are not recoverable with the *mesne* profits unless they are specially alleged; "and when part of a lot is withheld by an intruder from the rightful possessor who seeks to recover the part by ejectment, with the damages sustained by the diminution of the rental value of the lot, such special damages must be specifically alleged."⁶⁷ In South Carolina it has been held that where injuries to the freehold are alleged, the pleading is sufficient though no demand for damages be made therefor.⁶⁸

⁵⁹ *Ege v. Kille*, 84 Pa. 333; *Maye v. Tappan*, 23 Cal. 306; *Goller v. Fett*, 30 id. 481; *Stockbridge I. Co. v. Cone I. Works*, 102 Mass. 80; § 103.

⁶⁰ *Id.*

⁶¹ *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321; *Furlong v. Cooney*, 72 Cal. 322.

⁶² *Lowndale v. Grays Harbor B. Co.*, *supra*.

⁶³ *Schorr v. Carter*, 120 Mo. 409.

⁶⁴ *Tongue v. Nutwell*, 31 Md. 302.

⁶⁵ *Bodkin v. Arnold*, 48 W. Va. 108; *Crawford v. Eidman*, 129 Fed. 992. See *McArthur v. Cornwall*, *supra*.

⁶⁶ *Barson v. Mulligan*, 191 N. Y. 306, 16 L.R.A.(N.S.) 151.

⁶⁷ *Gaslight Co. v. Rome, etc. R. Co.*, 51 Hun 119.

⁶⁸ *Lassiter v. Okeetee Club*, 70 S. C. 102.

At common law waste could not be recovered for in an action for *mesne* profits unless demanded in the declarations.⁶⁹

§ 995. **Proof of rental value.** The price usually paid for like local lands during the time in question is evidentiary of the rental value.⁷⁰ If the land which has been recovered could not or would not, in the usual course of things, be held, used or occupied independently of adjoining lands owned by the plaintiff it is proper to prove the rental value of such lands with and without that in dispute. The difference between the two sums would, *prima facie*, be the basis for ascertaining the rental value of the latter.⁷¹ Where a wall formed one side of a store room, a narrow strip of which was in dispute, proof of the rental value of the entire room was admitted to aid the jury in assessing *mesne* profits.⁷² Opinions as to value should not be rested on exceptional incidents or circumstances.⁷³ Evidence tending to show the loss of speculative profits, based on an exaggerated notion of the value of the land, is not admissible.⁷⁴

§ 996. **What property withheld.** "Whatever would be rent as between landlord and tenant is *mesne* profits as between the parties in ejectment."⁷⁵ Where there was a mill on the premises the court said: "Though the mill and the land may have been separable without injury to either, still, while they were in fact together and used, or capable of being used in the ordinary way, they were worth so much for rent. It is proper and accords with usage, we think, to speak of the rent of a mill, the rent of a factory, etc., and in so doing the use of the machinery, fixed or unfixed, is not thought of as excluded, but as included. The exact point made by counsel, however, is that the declaration does not mention the mill, but describes the land only. There

⁶⁹ *Emrich v. Ireland*, 55 Miss. 390.

⁷⁰ *Gibson v. Fields*, 79 Kan. 38, 20 L.R.A.(N.S.) 378, 131 Am. St. 278.

⁷¹ *Danziger v. Boyd*, 54 N. Y. Super. Ct. 365.

⁷² *Jenkins v. Means*, 59 Ga. 55.

⁷³ *Curry v. Sandusky F. Co.*, 88 Minn. 485.

⁷⁴ *Bodkin v. Arnold*, 48 W. Va. 108.

⁷⁵ *Morris v. Tinker*, 60 Ga. 466.

"*Mesne* profits" means the rents and profits, or the value of the use and occupation of the land recovered, and consist of the net rents after deducting all necessary repairs and taxes, or the net rental value of the use and occupation. *Wallace v. Berdell*, 103 N. Y. 13, 57 Am. Rep. 701.

is plausibility in the objection, but not much positive force. With reference to rent or *mesne* profits, the whole is to be taken as realty, and a suit for the profits of the land applies to the land in its actual condition.”⁷⁶ In an action to recover *mesne* profits of a ferry landing it was sufficiently liberal to the defendant to instruct the jury to consider the proceeds of the ferry, deducting the expense of fitting it up and carrying it on, and making due allowance for all risk and expense.⁷⁷ As will appear presently, if a *bona fide* occupant of land makes lasting and valuable improvements thereon in good faith, he is entitled to have them taken into account in the ascertainment of the *mesne* profits. If the improvements made are such as the occupant cannot recover for, as where, without his fault, they are burned before he delivers possession, he should not be charged with the income which has been derived from them; and so if the improvements are in existence.⁷⁸ Where the statute excludes the use of the improvements it is immaterial whether the defendant was or was not holding the land in good faith, or whether the damages are sought in the ejectment action or in a later action.⁷⁹ But under a statute which is less broad a defendant who cannot bring himself within the betterment act may not claim exemption from liability for rent on the value of his improvements after he has been compensated for them.⁸⁰ The general rule as stated applies to a trustee who has wrongfully kept posses-

⁷⁶ *Morris v. Tinker*, 60 Ga. 466.

⁷⁷ *Averett v. Brady*, 20 Ga. 523; *Dunlap v. Yoakum*, 18 Tex. 582.

⁷⁸ *Nixon v. Porter*, 38 Miss. 401; *Tatum v. McLellan*, 56 id. 352; *Southern C. O. Co. v. Henshaw*, 89 Ala. 448 (*bona fide* possessor); *Davis v. Louk*, 30 Wis. 308; *Pacquette v. Pickness*, 19 id. 219; *Lee v. Humphries*, 124 Ga. 539; *Reynolds v. Reynolds*, 55 Ark. 369 (improvements on land of minor); *Deitzler v. Wilhite*, 55 Kan. 200 (prior to commencement of action); *Worthington v. Hiss*, 70 Md. 172 (*bona fide* purchaser). See § 998.

The equity of this rule is recognized in Texas, but it was not applied because the court was committed to the contrary doctrine. *Evetts v. Tendick*, 44 Tex. 570.

A successful ejectment plaintiff who thereafter sues in trespass for *mesne* profits may not recover the insurance which the occupier obtained on his own account upon a house on the land which was afterwards burned. *Tongue v. Nutwell*, 31 Md. 302.

⁷⁹ *Nash v. Sullivan*, 32 Minn. 189.

⁸⁰ *Teaver v. Akin*, 47 Ark. 528.

sion of and used land, where no allowance is made for the improvement put upon it.⁸¹ The owner, if liable for the cost of improvements, is entitled to the resulting increased income.⁸² Under a statute giving the *bona fide* occupant, after a judgment establishing the title against him, a lien on the lands for the value of his improvements and the owner a set-off against the value of the improvements and taxes, the rental value as enhanced by the improvements is to be regarded in a subsequent accounting.⁸³ In Texas the good faith of the possessor determines whether his improvements shall be regarded in computing the rental value of the premises.⁸⁴

§ 997. **Interest.** Interest has been held recoverable on *mesne* profits;⁸⁵ but not prior to a liquidation.⁸⁶ In equity its al-

⁸¹ *Tatum v. McLellan*, 56 Miss. 352.

⁸² *Bell v. Barnet*, 2 J. J. Marsh. 517; *Miller v. Ingram*, 56 Miss. 510; *Hicks v. Blakeman*, 74 id. 459.

In *Dungan v. Von Puhl*, 8 Iowa 263, it is held that the occupier of unimproved land who puts it in a state suitable for cultivation may be charged for its use and occupation in the state in which he puts it, "without having the right to complain that he is required to pay rent for improvements made by himself." The argument upon which this liability is rested is thus stated, if not demolished, by the court: "He pays rent, not upon such improvements, but upon land, worth more for the purpose for which he uses it, by reason of its being brought into a state fit for cultivation. The owner is entitled to rents and profits according to the value of the land for the purpose for which it is devoted by the occupant. The occupant is to pay what the use of the land is worth to him. In such a rule, we think, there will nothing be found inequitable. It does not require the occupant to

pay rent on improvements made by himself. But it does require him to pay rent according to the increased adaptation of the land for the purpose for which it is used, though such adaptation has been brought about by the occupant's own labor." The court also held that no rent was to be charged for the use of buildings or farm fixtures erected by the occupant.

⁸³ *Hardeman v. Turner*, 112 Fed. 41, 50 C. C. A. 110.

⁸⁴ *Gilley v. Williams* (Tex. Civ. App.), 43 S. W. 1094.

⁸⁵ *Jackson v. Wood*, 24 Wend 443; *Bolling v. Lersner*, 26 Gratt. 36 (statute); *Low v. Purdy*, 2 Laus. 422; *Allen v. Smith*, 63 Mo. 103; *Furlong v. Cooney*, 72 Cal. 322; *New Orleans v. Gaines*, 15 Wall. 624, 21 L. ed. 215; *Swayne v. Lone Acre O. Co.*, 98 Tex. 597, 69 L.R.A. 986; *Nunn v. Lynch*, 89 Ark. 41 (from the institution of the action to judgment); *Sopp v. Winpenny*, 68 Pa. 78; *Nathan v. Dierssen*, 164 Cal. 607 (if necessary to full indemnity).

⁸⁶ *Fricker v. Americus Mfg. & I. Co.*, 124 Ga. 165.

lowance is largely discretionary.⁸⁷ Where the property was situate in New York City, rent being payable quarterly, it was proper to add interest quarterly.⁸⁸ But this is not allowable in Massachusetts;⁸⁹ nor in New York if the value of the use and occupation was in excess of the sum received, in which case interest is allowed only from the time the action was begun.⁹⁰ Simple interest on each month's rent from the time it became due until judgment may be offset against simple interest upon the value of the improvements in an accounting between the parties after judgment in ejectment.⁹¹ Interest will be computed from the time rent became due under the terms of the agreement made the basis of the recovery.⁹² Under the statute of New York and similar statutes in other states providing for the recovery of damages upon a suggestion after determination of the ejectment suit the measure is that applicable in *assumpsit* for use and occupation. The compensation is adjusted as upon contract, and not upon the footing of a tort.⁹³ The action has been regarded as one for unliquidated damages, and the allowance of interest as being within the discretion of the jury.⁹⁴ The statutes indicate the measure of damages and the defenses which may be made.

§ 998. **Compensation on recovery of a term.** In a case of ejectment brought for the recovery of a term it appeared that the buildings on the leased premises were partially destroyed; neither party expressed an intention to rebuild; they were replaced by the defendant's grantor by a more expensive and larger building, erected in good faith, which yielded increased rents and profits. The plaintiff's damages were measured by the amount which would place him in as good position as he would have been in if he had not been dispossessed. He was not entitled to the whole amount of the rents and profits of the improved estate. His rights were governed by what would have

⁸⁷ Whitaker v. Poston, 120 Tenn. 207.

⁸⁸ Jackson v. Wood, 24 Wend. 443.

⁸⁹ Hodgkins v. Price, 141 Mass. 162.

⁹⁰ Fagan v. McDonnell, 115 App. Div. (N. Y.) 89.

⁹¹ Hardeman v. Turner, 112 Fed. 41, 50 C. C. A. 110.

⁹² Lane v. Ruhl, 103 Mich. 38.

⁹³ Holmes v. Davis, 19 N. Y. 488, reversing 21 Barb. 265; Woodhull v. Rosenthal, 61 N. Y. 394.

⁹⁴ Hegar v. De Groat, 3 N. D. 354.

been the measure of damages if the defendant had wrongfully withheld possession of the premises for the same length of time in substantially the same condition in which they were just prior to the fire. The court suggest that this rule was too favorable to the plaintiff: "If the defendant had objected we might have found it difficult to hold that it was not too favorable." In determining the damages upon this basis it was right to deduct from the gross rents and profits which might have been received a fair compensation for the necessary time and labor involved in the care and management of the premises and in the collection of rents. The plaintiff was entitled to interest on the net profits while he was dispossessed; but notwithstanding the rents were payable quarterly, interest should not be computed by making quarterly rests, compound interest not being allowed in Massachusetts.⁹⁵

§ 999. Claims for improvements, taxes, etc. The common-law action of trespass for *mesne* profits is a liberal one, and equitable defenses may be made.⁹⁶ Taxes paid by the defendant may be deducted from the damages.⁹⁷ But the payment of taxes by the possessor has been held to be entirely voluntary, and the amount paid cannot be recovered.⁹⁸ In answer it has been said:

⁹⁵ *Hodgkins v. Price*, 141 Mass. 162.

⁹⁶ *Murray v. Gouverneur*, 2 Johns. Cas. 441; *Jackson v. Loomis*, 4 Cow. 172.

The evicted occupant cannot maintain a bill in equity against the ejectment plaintiff to recover compensation for improvements made during his occupancy, they not having been made in consequence of the owner's fraud or negligence. *Anderson v. Reid*, 14 D. C. App. Cas. 54.

⁹⁷ *Scott v. Scott*, 91 Kan. 372; *Nunn v. Lynch*, 89 Ark. 41; *Brown v. Nelms*, 86 Ark. 368; *Ringhouse v. Keener*, 63 Ill. 230; *Stark v. Starr*, 1 Sawyer 15; *Semple v. Bank*, 5 id. 394; *McCloy v. Arnett*, 47 Ark.

445; *Huebschmann v. Cotzhausen*, 107 Wis. 64; *Larido v. Perkins*, 132 La. 660. See *Commonwealth v. Gould*, 48 Pa. Super. Ct. 528, stated in § 537.

Before allowances can be made for taxes, insurance and repairs the amount thereof must be shown by the defendant, such matters being peculiarly within his knowledge. *Bean v. Atkins*, — Vt. —, 89 Atl. 643.

The owner of land may not compel one who has excluded him from possession to reimburse him for the taxes paid. *Itzel v. Winn*, 141 Wis. 645.

⁹⁸ *Napton v. Leaton*, 71 Mo. 358; *Homestead Co. v. Valley R.*, 17 Wall. 153, 21 L. ed. 622.

But taxes are a charge upon the land, and must have been paid by the plaintiffs had they been in possession, consequently they should be taken into account in estimating the actual damages which they have sustained by the wrongful withholding of possession.⁹⁹ Where he had paid ground rent during his occupancy, which otherwise the plaintiff must have paid, it was deducted from the damages in an action for *mesne* profits.¹ And so where necessary repairs had been made;² and interest paid on a mortgage given by the defendant.³ At common law whoever takes and holds possession of land to which another has a better title, whether he be a *bona fide* or *mala fide* possessor, is liable to the true owner for all the rents and profits which he has received; but the disseizor, if he be a *bona fide* occupant, may recoup the value of the meliorations made by him against the claim of damages.⁴ The owner is not compelled to pay for improvements as a condition on which he may regain possession of his property. The improvements, when annexed to the land, become part of the freehold.⁵ But a *bona fide* occupant is entitled to have them taken into account in ascertaining whether the owner has sustained damages or not, both in the case where such improvements were made by him and where they were made by one whose title he has purchased.⁶ In such case the defendant

⁹⁹ McCloy v. Arnett, *supra*.

¹ Doe v. Hare, 2 Cr. & M. 145.

² Semple v. Bank, *supra*; Fagan v. McDonnell, 115 App. Div. (N. Y.) 89.

A deficiency of profits of one year, to meet payments, may be deducted from an excess of profits over the payments of another year. The plaintiff may show that a deficiency of profits in particular years within the period of recovery has been compensated by an excess in years without that period because barred by the statute. But the defendant cannot increase his claim for reimbursement by the recovery of expenses for a period during which he has, by pleading the

Suth. Dam. Vol. IV.—4.

statute of limitations, barred the recovery of profits against him. Ewalt v. Gray, 6 Watts 427. See Tongue v. Nutwell, 31 Md. 302; Davis v. Louk, 30 Wis. 308.

³ Fagan v. McDonnell, *supra*; Scott v. Scott, 91 Kan. 372.

⁴ Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547.

⁵ Anderson v. Fisk, 36 Cal. 629; Russell v. Blake, 2 Pick. 505. See, as to the rule in equity, Bright v. Boyd, 2 Story 605, 1 id. 478; Valle v. Fleming, 29 Mo. 152; Union Hall Ass'n v. Morrison, 39 Md. 281, 296; Hatcher v. Briggs, 6 Ore. 31.

⁶ Willingham v. Long, 47 Ga. 540; Morrison v. Robinson, 31 Pa. 456.

should be allowed the value of lasting and valuable improvements reasonably necessary for the enjoyment of the premises, made in good faith, that is, in belief of his title and without notice of the real owner's claim,⁷ to the extent of the rents and profits due to such owner.⁸ The improvements should be estimated in favor of the defendant at such amount as they add to the market value of the premises.⁹ The claim for them may be

⁷ *Alston v. Connell*, 145 N. C. 1; *Bodkin v. Arnold*, 48 W. Va. 108; *Williamson v. Jones*, 43 W. Va. 563, 38 L.R.A. 694; *Van Tassell v. Wakefield*, 214 Ill. 205, citing local cases; *Pemlo v. Beakley*, 15 S. D. 344. See *Turner v. Gonzales*, 3 Ind. Ty. 649, as to what is not peaceable possession which gives the right to claim the benefit of improvements.

⁸ *Brown v. Nelms*, 86 Ark. 368; *Tice v. Fleming*, 173 Mo. 49, 96 Am. St. 479; *Jackson v. Loomis*, 4 Cow. 172; *Hatcher v. Briggs*, 6 Ore. 31; *Tongue v. Nutwell*, 31 Md. 302; *Irick v. Fulton*, 3 Gratt. 193; *Dowd v. Faucett*, 4 Dev. 92; *Ewing v. Handley*, 4 Litt. 346; *Porter v. Hanley*, 10 Ark. 187; *Doe v. Doe*, 2 Houst. 321; *Dothage v. Stuart*, 35 Mo. 251; *Russell v. Blake*, 2 Pick. 505; *Campbell v. Brown*, 2 Woods 349; *Utterbach v. Binns*, 1 McLean 242; *Averett v. Brady*, 20 Ga. 523; *White v. Moses*, 21 Cal. 34; *McGarritty v. Byington*, 12 Cal. 426; *Worthington v. Young*, 8 Ohio 401; *Bedell v. Shaw*, 59 N. Y. 46; *Bright v. Boyd*, 1 Story 478, 2 id. 607; *Union Hall Ass'n v. Morrison*, 39 Md. 281; *Morrison v. Robinson*, 31 Pa. 456; *Worsham v. Lancaster*, 20 Ky. L. Rep. 701; *Huebschmann v. Cotzhausen*, *supra*.

A defendant in ejectment is not liable for *mesne* profits taken prior to his own entry by those under whom he claims; but if in account-

ing for the profits chargeable to himself he claims credit for improvements made by his predecessors, such improvements must first answer for the profits taken by those who erected them. *Gardner v. Grannis*, 57 Ga. 539.

A defendant in such an action who claims under a tax title, also under a conveyance from a third party, and who made improvements before the tax title accrued, cannot recover the value of his improvements from the plaintiff. *Jacks v. Dyer*, 31 Ark. 334.

Improvements made by the grantee of one who has not purchased for value cannot be charged against the owner though the grantor covenanted to protect the grantee's possession. *Shettler v. Southern Oregon Co.*, 19 Ore. 192.

⁹ *Whitfield v. Boyd*, 158 N. C. 451; *Hicks v. Blakeman*, 74 Miss. 459; *Lothrop v. Michaelson*, 44 Neb. 633; *Carolina Cent. R. Co. v. McCaskill*, 98 N. C. 526, citing local cases; *Harman v. Harman*, 54 S. C. 100; *Fisher v. Edington*, 85 Tenn. 23; *Taylor v. James*, 109 Ga. 327; *Petel v. Flint, etc. R. Co.*, 119 Mich. 492, 75 Am. St. 417; *Greer v. Fontaine*, 71 Ark. 605; *Alston v. Connell*, *supra*; *Thomas v. Thomas*, 16 B. Mon. 420; *Bell v. Barnett*, 2 J. J. Marsh. 516; *Allison v. Taylor*, 3 B. Mon. 363; *Stark v. Starr*, 1 Sawyer 15; *Woodhull v. Rosenthal*, 61 N. Y.

co-extensive in time with the allowance of rents and profits which the improvements contributed to produce. In other words, their value is not to be limited to their worth in cash at the time of the trial, but by the benefit they have conferred upon the plaintiff, whether by adding to the worth of the land at the time of its recovery or, retrospectively, by augmenting the amount he may recover as *mesne* profits.¹⁰ Interest on the gross expense of repairs made has been allowed.¹¹

The compensation allowed at common law for improvements was a mere equitable defense in mitigation of damages. Now very generally this defense or the right of a *bona fide* occupant to compensation for improvements is defined and regulated by statute; and where it is so defined and regulated the party claiming such compensation must bring himself within the statute.¹² It is not the policy of these statutes that the owner of property

396, 397; *Wythe v. Myers*, 3 Sawyer 598.

Recovery on account of a church built by popular subscription and for the fertilization of land has been denied. *Crummey v. Bentley*, 114 Ga. 746.

In some states the value of the improvements is measured by the benefits which the owner will receive from them. *McMurray v. Day*, 70 Iowa 671; *Morris v. Tinker*, 60 Ga. 466.

¹⁰ *Johnson v. Futch*, 57 Miss. 73. Compare *Morris v. Tinker*, 60 Ga. 466.

¹¹ *New Orleans v. Gaines*, 15 Wall. 624, 21 L. ed. 215.

¹² *Lanquest v. Ten Eyck*, 40 Iowa 213; *Love v. Shartzer*, 31 Cal. 487; *Huggins v. Clark*, 51 Cal. 112; *McCrubb v. Bray*, 36 Wis. 342. See *Rutland R. Co. v. Chaffee*, 72 Vt. 404, sustaining the right to a judgment for betterments made on a railroad right of way, and pointing out the manner of enforcing it.

Such statutes stand upon a prin-

ciple of natural justice and equity, and do not impair vested rights. *Searl v. School Dist.*, 133 U. S. 553, 561, 33 L. ed. 740, 745. See *Richmond v. Ashcraft*, 137 Mo. App. 191.

The burden of showing the amount of allowances for repairs is on the defendant. *Bean v. Atkins*, — Vt. —, 89 Atl. 643.

The defendant may show the length of time he was engaged in construction of buildings on the property and the amount expended therefor. *New York, N. H. & H. R. Co. v. Cella*, 88 Conn. 515.

Improvements can be recovered for only to the extent they were made since the statute providing therefor took effect. *Gould v. White*, 54 Wash. 394.

The defendant may prove valuable improvements in reduction or extinguishment of the rental damages irrespective of the statutory suggestion of adverse possession; but such suggestion must be made as a basis for a judgment over. *New v. Young*, 148 Ala. 253.

shall be improved out of his title by volunteers or wrong-doers. Hence, such statutes, being in derogation of the common law, are strictly construed,¹³ and allow a recovery for improvements "only in excess of the clear annual value of the premises during the time the occupant was in possession (exclusive of the use by the tenant of the improvements thereon made by himself or those under whom he claims), and only to the extent and upon clear and full proof of the amount to which the value of the premises is actually increased thereby at the time of the assessment."¹⁴ If the defendant was not a *bona fide* occupant of the premises he may set off against the claim for waste the improvements made by him in the nature of general repairs. He is not liable for the natural wear or tear resulting from the lapse of time, but only for the consequences of his negligence, misuse or abuse of the premises.¹⁵ Repairs made after notice of a defect in the occupant's title or pending an action of ejectment against him cannot be considered as against a subsequent claim for *mesne* profits.¹⁶ If the owner retains improvements which are

¹³ Sutherland on Statutory Const., §§ 290, 400.

¹⁴ Hollingsworth v. Funkhouser, 85 Va. 448; Proctor v. Maine Cent. R. Co., 101 Me. 459. See Brown v. Nelms, 86 Ark. 368; Fitch v. Douglass, 76 Kan. 60, 12 L.R.A.(N.S.) 172; Leighton v. Young, 3 C. C. A. 176, 52 Fed. 439, 18 L.R.A. 266; McMurray v. Day, 70 Iowa 671; Young v. Commissioners, 53 Fed. 895.

The rule is expressed in various ways. Thus, in one decision, it is said the plaintiff is only entitled to the rents which the land would have produced had no improvements been made by the defendant, and to such damages as he has sustained by reason of waste or injury to the land. But in estimating the damages from waste and the rent which result solely from the defendant's improvements, any valuable and lasting improvements made by him

should be deducted from such damages and rent, as the plaintiff is not damaged beyond the loss he has sustained, and it cannot be said that he has sustained any loss beyond what is left after thus deducting the improvements which he necessarily received under the judgment. In no state of the case, however, can the value of the improvements be allowed to be paid out of the land or deducted from the rents which it would have borne if the defendant had not trespassed upon or improved it; nor is he entitled to judgment for any excess of his improvements beyond the waste or rents accruing on the land before or after its improvement. Smith v. Bell, 91 Ky. 655.

¹⁵ Bodkin v. Arnold, 48 W. Va. 108.

¹⁶ In re Gleeson's Est., 192 Pa. 279; Commonwealth v. Gould, 48 Pa. Super. Ct. 528.

separable from the land, instead of receiving their removal by the defendant, their value is fixed by the value of the material and workmanship represented by them.¹⁷ If the defendant cannot recover interest on the value of his improvements his liability for rent will be limited to the value of the land without them.¹⁸

It has recently been adjudged in Georgia that neither in an action of ejectment nor in complaint for land can the defendant set off the value of improvements placed thereon by him to an amount beyond the sum which the plaintiff would be entitled to recover by way of *mesne* profits; nor can the defendant in such a case, upon an equitable answer, recover against the plaintiff the value of improvements in good faith placed upon the premises by such defendant, and have the same, by equitable decree against the owner, made a charge upon the premises on which they are placed, and from which the defendant is evicted under a judgment rendered against him in such a suit.¹⁹ It has also, and more recently, been held in that state that it is competent for the legislature to provide, even as to improvements made prior to its action in the premises, that a defendant who has been in *bona fide* possession of land under an adverse claim of title may plead as a set-off the value of all permanent improvements *bona fide* placed thereon by him, or by other *bona fide* claimants under whom he asserts title, and that if the value of such improvements at the time of the trial exceeds the *mesne* profits the defendant shall recover the amount thereof although in excess of such profits.²⁰ Where the plaintiff had been in possession of or enjoyed the rents, issues and profits from lands of the defendant which he had received in lieu of the lands involved in the suit, the latter could plead such benefits derived by

¹⁷ Larido v. Perkins, 132 La. 660.

¹⁸ Gibson v. Fields, 79 Kan. 38, 20 L.R.A.(N.S.) 378, 131 Am. St. 278.

The defendant must allege the value of the land, of the *mesne* profits, and of the permanent improvements. La Roche v. Falligant, 130 Ga. 596; Brought v. Cherokee

Nation, 129 Fed. 192, 63 C. C. A. 350; Carraway v. Moore, 75 Ark. 146; McRae v. Preston, 54 Fla. 190.

¹⁹ Dudley v. Johnson, 102 Ga. 1.

²⁰ Hawks v. Smith, 141 Ga. 422; Mills v. Geer, 111 Ga. 275, 52 L.R.A. 934.

the former as a set-off to his claim for *mesne* profits. A defendant who claims credit for improvements made by his predecessor is liable for all such profits chargeable to the latter; but if the defendant claims credit only for such improvements as he made since his possession began, the rule is otherwise.²¹ In a suit by remainder-men, where the improvements were made during the pendency of a precedent life estate by the defendant *bona fide* in possession under an adverse claim of title, the value of the improvements is to be estimated as of the time of bringing the suit, and the defendant is only required to account for *mesne* profits accruing subsequently to the falling in of the life estate.²² A vendor who was not a *bona fide* purchaser may not claim the value of improvements made by his vendee though he covenanted to protect his possession; he did not thereby acquire his rights.²³

§ 1000. **Remedy under the code.** The claim for damages for withholding possession is a distinct cause of action from the claim of possession.²⁴ It was necessarily the subject of a subsequent action at common law. Under the code, however, it is at the option of the plaintiff to join it with the claim of possession or bring a separate action. By the New York statute, prior to the code, the action for *mesne* profits was required, in substance, to be an action for use and occupation.²⁵ The change in the statutes by the introduction of the code did not disturb or affect this right of action for use and occupation, but the action or procedure for its recovery was changed. When the code came to unite the various classes of actions into one, under which all rights of action were to be enforced, and to abolish all peculiarities in the forms of pleading, the remedy for *mesne* profits naturally fell into the arrangement and became the subject of a civil action under the new system; and the peculiar method of commencing it by suggestion became inapplicable.²⁶ Hence a claim for the recovery of real property and damages for withholding the possession was held not to embrace the claim for the

²¹ *Mills v. Geer*, 111 Ga. 275. See *Deitzler v. Wilhite*, 55 Kan. 200.

²² *Hawks v. Smith*, 141 Ga. 422.

²³ *Schetter v. Southern Oregon Co.*, 19 Ore. 192.

²⁴ *Rinfret v. Morrissey*, 29 R. I. 223.

²⁵ *Holmes v. Davis*, 19 N. Y. 488;

Woodhull v. Rosenthal, 61 id. 394.

²⁶ *Holmes v. Davis*, *supra*.

rents and profits, because the latter is a separate and distinct cause of action.²⁷ It is otherwise under the present code of New York.²⁸ If the defendant is in possession the plaintiff is entitled by way of damages to the rents and profits or the value of the use and occupation of the land from the time the action was commenced.²⁹

Under the Kentucky statute the plaintiff may unite in the same petition "claims for the recovery of specific real property, and the rents, profits and damages for withholding the same." It was held that if the plaintiff shall elect to sue for the recovery of the land merely, or for that and damages for being kept out of possession in the same action, and seek by another suit to recover damages for trespasses and injuries committed by the destruction of timber or other property upon or appurtenant to the land, a judgment in one case should not bar a recovery in the other.³⁰

The right to damages for withholding the possession of real property given by the Oregon code is equivalent to the action of trespass for *mesne* profits under the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the premises as well as for waste committed or suffered by the occupant as the value of the use and occupation. Such right is a distinct cause of action, and if joined with a claim of possession should be separately stated.³¹ The same rule has been applied in Washington.³²

SECTION 2.

DOWER.

§ 1001. **The right of.** Dower at common law exists where a man is seized of an estate of inheritance and dies in the life-

²⁷ Larned v. Hudson, 57 N. Y. 151; Livingston v. Tanner, 12 Barb. 481. See Cagger v. Lansing, 64 N. Y. 417.

²⁸ Clason v. Baldwin, 129 N. Y. 183.

²⁹ Trustees of Union College v. City of New York, 173 N. Y. 38.

³⁰ Burr v. Woodrow, 1 Bush 692.

³¹ Wythe v. Myers, 3 Sawyer 595; Neff v. Pennoyer, id. 495. See Arnold v. Woodward, 14 Colo. 164; Crane v. Oregon R. & N. Co., 66 Ore. 317.

³² Columbia, etc. R. Co. v. Histo-genetic M. Co., 14 Wash. 475.

time of his wife. She is entitled to be endowed for her natural life of the third part of all the lands whereof her husband was seized, either by deed or in law at any time during the coverture, and which any issue which she might have had could by possibility have inherited.³³ Marriage, seizin of the husband and his death are essential; and where they concur, on the happening of the latter the right of dower becomes perfect, not as an estate or interest in the land, but as a chose in action.³⁴

§ 1002. It is assignable on a valuation. Whatever the proceeding by which dower is recoverable, the value of the lands must be ascertained, for it is by that standard that the dower right is measured. If the lands were aliened by the husband and have afterwards increased in value it has been a question whether such increase should be excluded from the valuation. Where the increase is the result of improvements made on the land by the alienee it does not enter into the estimation for the purpose of dower; in other words, the admeasurement is then to be made according to the value at the date of alienation; the dowress recovers the equivalent of one-third of the value of the land as such value was at that time.³⁵ But if the value is en-

³³ 4 Kent's Com. 35; Butler v. Cheatham, 8 Bush 594; Carter v. McDaniel, 94 Ky. 564.

It was contended in the last case that because the husband was in possession of a reversionary interest before dower was allotted, the widow was entitled to dower. The court said: We do not think so, because he held the possession subject to the superior and paramount right of the widow to the possession of any part of the land that might be assigned to her as dower, and when she obtained the possession of the same by virtue of this paramount right the inchoate right to dower therein ceased. He stood in the same attitude that he would have done if he had lost the right of possession by a superior title.

³⁴ 4 Kent's Com. 35; Sheafe v.

O'Neil, 9 Mass. 13; Hildreth v. Thompson, 16 id. 191; Croade v. Ingraham, 13 Pick. 33; Shields v. Batts, 5 J. J. Marsh. 13; Stedman v. Fortune, 5 Conn. 462; Jackson v. Aspell, 20 Johns. 412; Cox v. Jagger, 2 Cow. 638, 14 Am. Dec. 522; Yates v. Paddock, 10 Wend. 528; Johnson v. Shields, 32 Me. 424; Summers v. Babb, 13 Ill. 483; Moore v. New York, 4 Sandf. 456; Torrey v. Minor, Sm. & M. Ch. 489; Harrison v. Wood, 1 Dev. & B. Eq. 437; Potter v. Everitt, 7 Ired. Eq. 152; Webb v. Boyle, 63 N. C. 271; Van Name v. Van Name, 23 How. Pr. 247; Murray v. Scully, 259 Mo. 57.

³⁵ Warner v. Trustees Norwegian C. Ass'n, 19 Iowa 115; Turner v. Kuehnle, 70 N. J. Eq. 61; Baden v. McKenny, 18 D. C. 268; Davis v.

hanced by extrinsic or general causes the weight of authority seems to be in favor of including it. Tilghman, C. J., said: "I have found no adjudged case in the year books confining the widow to the time of the alienation by her husband where the question did not arise on improvements made after the alienation; and, having considered all the authorities which bear upon the question, I find myself at liberty to decide according to what appears to me to be the reason and justice of the case, which is that the widow shall take no advantage of the improvements of any kind made by the purchaser, but throwing these out of the estimate she shall be endowed according to the value at the time her dower shall be assigned to her."³⁶ This view is supported by Story and Kent and many adjudications.³⁷ The rule has

Hutton, 127 Ind. 481, 1006; Griffin v. Regan, 79 Mo. 73; Humphrey v. Phinney, 2 Johns. 484; Hale v. James, 6 Johns. Ch. 258, 10 Am. Dec. 328; Tod v. Baylor, 4 Leigh, 498; Wilson v. Oatman, 2 Blackf. 223; Thrasher v. Pinckard, 23 Ala. 616; Dunseth v. Bank of U. S., 6 Ohio 77; Hogg v. Hensley, 100 Ky. 719; Fritz v. Tudor, 1 Bush. 29; Young v. Thrasher, 115 Mo. 222; Powell v. Monson & B. Mfg. Co., *infra*; Jefferies v. Allen, 34 S. C. 189.

³⁶ Thompson v. Morrow, 5 S. & R. 289.

³⁷ Baden v. McKenney, 18 D. C. 268; Powell v. Monson & B. Mfg. Co., 3 Mason 347; Smith v. Addleman, 5 Blackf. 406; Dunseth v. Bank, *supra*; Allen v. McCoy, 8 Ohio 418; Gore v. Brazier, 3 Mass. 544; Seammon v. Campbell, 75 Ill. 223; Barney v. Frowner, 9 Ala. 901; Summers v. Babb, 13 Ill. 483; Manning v. Laboree, 33 Me. 343; Hobbs v. Harvey, 16 Me. 80; Mosher v. Mosher, 15 Me. 371; Bowie v. Berry, 3 Md. Ch. 359; Fritz v. Tudor, 1 Barb. 28; Westcott v. Campbell, 11 R. I. 378; Carter v. Parker, 28 Me.

509; Wall v. Hill, 7 Dana 175; Taylor v. Brodrick, 1 id. 348; Lawson v. Morton, 6 id. 471; Young v. Thrasher, 115 Mo. 222. See Doe v. Gwinnell, 1 Q. B. 682.

In Rannels v. Washington University, 96 Mo. 226, 9 Am. St. 344, the property, when conveyed by the husband, was unimproved and non-productive. Because of improvements and the increased value one-fourth of it as improved was set off to the widow. It was contended that she was not entitled to damages for the detention of that part because any profit realized from it was the result of the improvements made by the grantee. This view was pronounced illogical and unjust in view of the fact that the whole property produced \$800 or \$900 per annum. "It is true that without the improvements the property would have produced no rental income, but it does not follow that plaintiff is entitled to no damages. To so hold is to look to the improvements alone and to disregard the land. This we have no right to do, for the land is a substantial part

frequently been stated, however, to be that when lands are alienated by the husband during coverture his widow is to be endowed at their value at the time of alienation, thereby excluding her from the benefit of any subsequent increase in their value from any cause.³⁸ As to lands of which the husband died seized, she is entitled to dower according to their value at the time of the assignment.³⁹ She is entitled to have such part of the land set out as dower as will produce an income equal to one-third part of that which the whole estate would then produce.⁴⁰ In Kentucky, if the property is indivisible, it is in the discretion of the chancellor to allow the widow a stated portion of the rents or a gross sum in lieu of dower, computed in accordance with the life tables. "Having a joint interest with the vendee in the property, and it being indivisible, she would have been entitled under the code to a decree of sale and a division of proceeds."⁴¹ The allowance of dower should not be made payable in advance.⁴²

§ 1003. **Damages for detention of dower.** Originally, damages were not recoverable in an action at law for dower.⁴³ They were first given by the statute of Merton; but as that only applied to actions for dower in lands of which the husband died seized damages continued to be denied in actions brought against the husband's alienee.⁴⁴ At common law the right to damages

of the capital which produced the income."

³⁸ *Turner v. Kuehnle*, 70 N. J. Eq. 61; *Humphrey v. Phinney*, 2 Johns. 484; *Shaw v. White*, 13 id. 179; *Dorchester v. Coventry*, 11 id. 509, 25 Am. Dec. 574; *Walker v. Schuyler*, 10 Wend. 481; *Green v. Tennant*, 2 Harr. 336; *Ayer v. Spring*, 9 Mass. 8; *Catlin v. Ware*, id. 217; *Wooldridge v. Wilkins*, 3 How. (Miss.) 360; *Markham v. Merrett*, 7 id. 437, 40 Am. Dec. 76; *Thomas v. Gammel*, 6 Leigh 9; *Polard v. Underwood*, 4 Hen. & M. 459; *Leggett v. Steele*, 4 Wash. C. C. 305.

³⁹ *Catlin v. Ware*, 9 Mass. 217; *Wright v. Jennings*, 1 Bailey 277;

McCreary v. Cloud, 2 id. 343; *Larowe v. Beam*, 10 Ohio 498.

One who purchases after demand made is liable for damages from the time it was made. *Rannels v. Washington University*, *supra*.

⁴⁰ *Carter v. Parker*, 28 Me. 509.

⁴¹ *Hogg v. Hensley*, 100 Ky. 719.

⁴² *Young v. Thrasher*, 115 Mo. 222.

⁴³ 2 Saund. 45, note 4; *Fisher v. Morgan*, 7 N. J. L. 125; *Wright v. Jennings*, 1 Bailey 277; *Layton v. Butler*, 4 Harr. 507.

⁴⁴ *Kendall v. Honey*, 5 T. B. Mon. 282; *Marshall v. Anderson*, 1 B. Mon. 198; *Waters v. Gooch*, 6 J. J. Marsh. 589; 22 Am. Dec. 108; *Embree v. Ellis*, 2 Johns. 119; *Fisher v. Morgan*, 1 N. J. L. 125; *Hopper*

was limited by the remedy. In this country damages are generally, by statute or otherwise, recoverable against the alienee from the time of demand and refusal, or of the institution of suit.⁴⁵ The heir or devisee in possession is answerable for damages from the death of the husband, and in New York, Maryland, New Jersey, and perhaps other states, even without a demand, unless he plead *tout temps prist*; and even on sustaining that plea he is liable from the commencement of the suit.⁴⁶ If that issue be found for the demandant she is entitled to damages from the death of the husband, and not from the date of the demand only.⁴⁷ The statute of Merton seems not to have been adopted in South Carolina, and therefore damages are not recoverable in actions for dower;⁴⁸ and in that state interest cannot be recovered in a court of law on a sum of money assessed in lieu of

v. Hopper, 22 id. 715; Gaston v. Bates, 4 B. Mon. 366.

⁴⁵ Warner v. Warner, 235 Ill. 448; Kahaleaahu v. Pereira, 15 Hawaii 284 (if the widow has not slept on her rights); McAllister v. Dexter & P. R. Co., 106 Me. 371, 29 L.R.A. (N.S.) 726; O'Ferrall v. Simplot, 4 Iowa 381; Beavers v. Smith, 11 Ala. 20; Slatter v. Meek, 35 Ala. 528; Atkin v. Merrell, 39 Ill. 62; Galbreath v. Gray, 20 Ind. 290; Price v. Hobbs, 47 Md. 359; Steiger v. Hillen, 5 Gill & J. 121; McClannahan v. Porter, 10 Mo. 746. But see Benner v. Evans, 3 P. & W. 454; Barnet v. Barnet, 15 S. & R. 72; McElroy v. Wathen, 3 B. Mon. 135; Roan v. Holmes, 32 Fla. 295, 21 L.R.A. 180; Bedford v. Bedford, 136 Ill. 354; Marsh v. Irwin, 168 Ill. 50.

A person acting in his own behalf as the owner of a dower right may not make a demand upon himself as the guardian and trustee of the infant heirs and by refusing or neglecting to comply with such demand make them liable to pay him

damages. Rawson v. Corbett, 150 Ill. 466.

⁴⁶ Darnall v. Hill, 12 Gill & J. 388; Thrasher v. Tyack, 15 Wis. 256; Hitchcock v. Harrington, 6 Johns. 290; Hopper v. Hopper, 22 N. J. L. 715; Rankin v. Oliphant, 9 Mo. 239; Layton v. Butler, 4 Harr. 507; Slatter v. Meek, 35 Ala. 528; Turner v. Morris, 27 Miss. 733; Thomas v. Gammel, 6 Leigh 9.

Under the New York Code of Civil Procedure, § 1600, entitling a widow to damages for the withholding of her dower, the amount to be computed, where the action is against the heir, from her husband's death, or, where it is against any other person, from the time when she demanded her dower of the defendant, devisees are "other persons" within the meaning of the statute and she may only recover *mesne* damages from the time of her demand. Roessle v. Roessle, 163 App. Div. (N. Y.) 344.

⁴⁷ Watson v. Watson, 20 L. J. (C. P.) 25.

⁴⁸ Heyward v. Cuthbert, 1 McCord 386.

dower where the husband died seized; but by statute interest may be allowed on assessments against the husband's alienee.⁴⁹ It has been usual there to assess one-sixth of the value of the entire fee as equivalent to the widow's estate for life in one-third of the land, and as a general rule it is said that that proportion should be adhered to except in extreme cases of youth on the one hand, or of age and infirmity on the other.⁵⁰ In Maryland damages against the husband's alienee can be recovered only in equity.⁵¹ The admeasurement and assignment of dower defines it with a view to future enjoyment. If withheld afterwards the loss is of that specific parcel. For withholding dower before assignment, damages, when recoverable, include, but do not consist exclusively of, the net annual value of the third part of the lands in which the right of dower exists.⁵² The profits which could have been derived from the land under the circumstances measures the recovery, rather than those which were derived from it.⁵³ In a Canadian case,⁵⁴ after a judgment of seizin in dower, on a writ of inquiry, it was held that the *mesne* value of the premises between the death of the husband and the judgment should be assessed; also the demandant's taxable costs in obtaining judgment of seizin; her costs of executing the writ of *habere facias* and her necessary traveling expenses incurred in prosecuting the suit. It was also held that her residence on the premises, in the family and at the expense

⁴⁹ Wright v. Jennings, 1 Bailey 277; McCreary v. Cloud, 2 id. 343. See Jeffries v. Allen, 34 S. C. 189, for a construction of the statute of 1883.

⁵⁰ Wright v. Jennings, *supra*.

⁵¹ Sellman v. Bowen, 8 Gill & J. 55, 29 Am. Dec. 524; Kiddall v. Trimble, 1 Md. Ch. 143.

⁵² Where the executors failed to comply with the statute respecting the setting aside of dower the widow was entitled to one-third of the net rents and profits during the time that dower was withheld, and these were due her at the time, each year, of their receipt by the execu-

tors, together with interest at the legal rate from such time. The gross amount of the rentals is the actual value of the land each year, not the amount which the executors may have received. Henderson v. Chaires, 35 Fla. 423.

⁵³ McAllister v. Dexter & P. R. Co., 106 Me. 371, 29 L.R.A.(N.S.) 726.

The widow's conduct may make the rents received, rather than the ordinary rental value of the property, the measure of recovery. Woodbury v. Woodbury, 144 App. Div. (N. Y.) 680.

⁵⁴ Robinett v. Lewis, Draper 272.

of the heir at law for part of the time between the death of the husband and her obtaining judgment, was not admissible as a set-off to her damages for the detention, though proper to go to the jury in mitigation.⁵⁵ Prior to the time dower is set off

⁵⁵ See *Bogardus v. Parker*, 7 How. Pr. 303.

In *Fisher v. Morgan*, 1 N. J. L. 125 (1792), Kinsey, C. J., said: "One question which has been debated is whether the word *damages* includes the value or *mesne* profits, or whether there is to be a recovery of the value or third part of the profits and also damages for the detention, with costs. Upon this subject the books seem irreconcilable. It would appear from Co. Litt. 32*b*; the Statute of Merton, 20 H. III., cap. 1, 1 Ruffhead 16; 2 Inst. 80; Rastal's Entries, *b*; *Spiller v. Adams*, 8 Mod. 25, Hetley 141, as if the value and damages for detention were not distinguishable from each other, but assessed and recovered together under the name of *damages*. But although the word *damna*, properly taken, does include both the *mesne* profits and the extra sum for the illegal detention, yet there are not wanting respectable authorities who appear to regard them as distinct objects of the suit and judgment. In *Trials Per Pais*, 333, where the duty of the jury is laid down, it is said, if they find the husband died seized, then they are to inquire: 1st. Of the value beyond reprises. 2d. What time has elapsed since the death of the husband. 3d. What damages the demandant has sustained by the detention of the dower. In *Dennis v. Dennis*, 2 Saund. 328, the jury find, first, that the husband died seized; secondly, the value; thirdly, the damages for the detention beyond the value and costs, by the

name of damages; fourth, the costs and charges. The judgment follows, first, to recover seizin of the third part; second, the value of the third part; third, for damages found by the jury, extra, and the costs of increase; and the record concludes, *value and damages*, and not, as in *Rastal*, which *damages* amount to, etc. *Clifton* 301-303; *Hoxley* 99; *Ashton* 262, 265, seem to confirm this form of entry. As to the question before the court, it is this: Whether, as the jury have not found that the husband died seized, the court are empowered to give judgment either for the value—the damages for detention—or costs. In *Dyer* 28*a*, it is laid down that 'the common practice is, and the precedents of the common pleas are, that a woman demandant in dower shall not recover any damages unless the husband died seized; and this by the Statute of Merton, c. 1.' The same law is laid down in *Doct. and Stud.*, cap. 13, p. 140; *Co. Litt.* 32*b*; *Yelv.* 112. The form of the writ of inquiry strengthens the authority of these books; it always directs the jury to inquire if the husband *died seized*, and *if he did*, then to inquire of the value and damages. A note in *Jenk.* 45, seems contrary to this, and to give countenance to the idea that, if the husband did not die seized, she shall recover her damages from the time of the *demand* from the tenant. Buller adopts the same doctrine, but in neither of these books is there any other authority cited than 1 Inst. 32*b*, which, as we have seen,

the widow may occupy or rent the homestead at her election without diminishing her dower rights.⁵⁶ The measure of the consummate right of dower existing in a widow or a divorced wife is not affected by legislation enacted during widowhood or after the granting of a divorce.⁵⁷

Dower was originally granted for the sustenance of widows, and for this purpose they were relieved of feudal exactions. It was provided by Magna Charta that a widow should give nothing for her dower and tarry in the chief house of her husband for forty days after his death, within which time it was required that dower be assigned her.⁵⁸ Hence she has a right to damages if it be not so assigned; but they cannot properly be given for withholding dower, except for such withholding after the duty attaches to assign it. The alienage of the husband wrongfully withholds it after demand, and the heir and his alienage from the death of the husband. In her action against the heir, however, he may plead *tout temps prist*, and if he succeeds she will not recover damages because it is said the heir holds by the title and does no wrong till a demand is made.⁵⁹ If the tenant comes the first day and acknowledges the action and avows that he was at all times ready to render dower the demandant could take judgment; then she would recover only seizin *et nihil de misa quia venit primo die*. But if the defendant would have damages she may reply that she requested her dower and the tenant did not endow her, and then the judgment for damages and value will wait till the issue is tried and depend on the result.⁶⁰ She is not called on to prove such demand except upon that

establishes the contrary law. The *dicta* of these writers are respectable authorities, but the court are compelled to reject them on the present occasion as not warranted by any judicial opinion, and as insufficient to weigh against the law as it has long been established." See Sheppard v. Wardell, 1 N. J. L. 452; Martin v. Martin, 14 id. 125 (1833); O'Flaherty v. Sutton, 49 Mo. 583;

Thomas v. Mallinekrodt, 43 Mo. 58.

⁵⁶ Lloyd v. Turner, 70 N. J. Eq. 425. See Moffett v. Trent, 66 N. J. Eq. 143, both cases ruled under a statute.

⁵⁷ McAllister v. R. Co., *supra*; Ware v. Owens, 42 Ala. 212, 94 Am. Dec. 672.

⁵⁸ Co. Litt. 32*b*, sec. 36.

⁵⁹ Co. Litt. 33*a*, sec. 36.

⁶⁰ Id., note.

issue.⁶¹ If the heir sells, he by that act denies dower, and his grantee cannot plead *tout temps prist* because he had not the land all the time since the death of the husband.⁶² That plea is available only to the heir. When he sells and thus repudiates the dower and in effect refuses it, such plea cannot be made. And the widow is entitled to recover against the feoffee of the heir damages for the whole period from the death of the husband—although such defendant has occupied and claimed the land for only a portion of that time.⁶³ Interest is allowable upon the instalments of dower as they fall due.⁶⁴ By analogy to the recovery of rents under the Kentucky statutes interest upon the gross sum allowed as dower as against a vendee should be computed only from the time suit was begun.⁶⁵ In South Carolina interest is due from the time of the death of the husband.⁶⁶ The statutory rule of damages cannot be varied by making an allowance for taxes paid or anything else.⁶⁷ In Illinois while interest will not be allowed on a widow's award from the date thereof⁶⁸ in the absence of her election to take in money,⁶⁹ where a money judgment has been entered on such award interest will be allowed from the entry of the judgment.⁷⁰

Where the children of deceased parents sought to recover damages from the estate of their father on account of the rents and profits received by him from lands of their mother, he not having demanded that his dower interest therein be set off, and the trial court allowed such estate credit for the care, support and maintenance of the children, the supreme court said: At common law the father was bound to support his children, and the strict rule was that he was entitled to no reimbursement for his

⁶¹ *Hitchcock v. Harrington*, 6 Johns. 290; *Woodruff v. Brown*, 17 N. J. L. 246.

⁶² *Co. Litt.* 33; *Park on Dower*, 303.

⁶³ *Woodruff v. Brown*, *supra*; *Seaton v. Jamison*, 7 Watts 553; *Hopper v. Hopper*, 22 N. J. L. 715.

⁶⁴ *Seitzinger's Est.*, 170 Pa. 531; *Leischner v. Kaiser*, 156 Ill. App. 123; *Ware v. Owens*, *supra*.

⁶⁵ *Hogg v. Hensley*, 100 Ky. 719.

⁶⁶ *Jefferies v. Allen*, 34 S. C. 189.

⁶⁷ *Ware v. Owens*, 42 Ala. 212, 94 Am. Dec. 672.

⁶⁸ *Field v. Field*, 215 Ill. 496.

⁶⁹ *Stunz v. Stunz*, 131 Ill. 210 (it seems).

⁷⁰ *Brown v. Burley*, 168 Ill. App. 114.

outlays. As a general rule, no allowance will be made him out of the property of his infant children if his own means are adequate for their maintenance. Where, however, the father is without any means, or is without sufficient means to maintain and educate his children suitably to their condition and prospects, equity will make him an allowance out of their estates for such purpose. In the matter of granting such an allowance courts are more inclined to be liberal than was their practice in the early history of the law. It is not necessary that the father should be actually bankrupt or insolvent in order to justify a charge against the property of his infant children for their support. The welfare and happiness of the children must be considered, and if the means of the father are inadequate to the promotion of their welfare and happiness their own property may be resorted to for their maintenance in whole or in part. Each case will depend largely upon its own circumstances.⁷¹

§ 1004. **Extinguishment of dower right.** At law, where no statutes protect her, the widow's right to damages is extinguished by her death.⁷² But it is otherwise in equity.⁷³ She has a right to ask in equity part of a fund in lieu of dower, where that fund has been produced by a sale of her husband's lands which were subject to her dower and increased by being sold clear of that incumbrance with her consent.⁷⁴ In determining the value of dower, when to be paid out of the proceeds of the land sold, so as to extinguish the right, its present worth is estimated upon the basis of an annuity of such amount as equals the legal interest on one-third of those proceeds for a period which constitutes the widow's expectancy of life according to the rules generally

⁷¹ *Bedford v. Bedford*, 136 Ill. 354. See *Schouler's Dom. Rel.*, sec. 238; 3 *Pom. Eq. Juris*, sec. 1309, n. 4; *Newport v. Cook*, 2 Ash. 332; *Gilley v. Gilley*, 79 Me. 292, 1 Am. St. 307; *Fuller v. Fuller*, 23 Fla. 236.

⁷² *Rowe v. Johnson*, 19 Me. 146; *Atkins v. Yeoman*, 6 Metc. (Mass.) 438; *Sandback v. Quigley*, 8 Watts 460; *Turney v. Smith*, 14 Ill. 242. See *Karns v. Tanner*, 74 Pa. 339.

⁷³ 1 *Story's Eq.*, § 625; *Mulford v. Hiers*, 13 N. J. Eq. 13; *Curtis v. Curtis*, 2 Bro. Ch. 632; *Dormer v. Fortesque*, 3 Atk. 130; *Park on Dower*, ch. 15, p. 330. See *McLaughlin v. McLaughlin*, 22 N. J. Eq. 505.

⁷⁴ *Macenbbin v. Cromwell*, 2 Har. & G. 443; *Bonner v. Peterson*, 44 Ill. 253.

adopted in calculating the probable time a person will live.⁷⁵ And this sum is recoverable, though she dies before its recovery and short of the time included in her expectancy. In such case the thing to be appraised, and with which the widow parts, is not the value of her interest in the land, but the value of her expectancy.⁷⁶

⁷⁵ O'Donnell v. O'Donnell, 3 Bush 216; Alexander v. Bradley, id. 667. See Shippen's App., 80 Pa. 391; How v. How, 48 Me. 428.

⁷⁶ McLaughlin v. McLaughlin, 22 N. J. Eq. 505.

The question as to whether the legal representatives of a deceased widow may recover the *mesne* profits of her dower interest, for which she had made demand in her lifetime, in land of which her husband died seized, she having died before dower was assigned, was carefully considered in *Armstrong v. Union College*, 55 App. Div. (N. Y.) 302. After discussing the cases in New York, and especially *Johnson v. Thomas*, 2 Paige 377, and *Kyle v. Kyle*, 67 N. Y. 400, respecting the scope of which there was some doubt in the mind of the writer of the opinion, he said: The decisions of the courts of the different states are conflicting in regard to the right of the administrator of a widow to recover *mesne* profits where she has died before dower has been assigned. In Maryland, if her death occurs pending the action to establish her dower, her personal representatives may recover *mesne* profits; otherwise not. *Kiddall v. Trimble*, 1 Md. Ch. 143; *Steiger v. Hillen*, 5 Gill & J. 121. In Mississippi the representatives of a widow may recover the damages, although she took no proceedings during her lifetime to recover her dower. *Harper v. Archer*, 28 Miss. 212. In Suth. Dam. Vol. IV.—5.

Paul v. Paul, 36 Pa. 270, it was held that in equity the representatives of a widow entitled to dower may recover the rents and profits, although she died before her dower was assigned and before any action had been commenced for that purpose. The same rule was laid down in North Carolina in *Peyton v. Smith*, 2 Dev. & B. Eq. 325, 352. In Ohio in *Miller v. Woodman*, 14 Ohio 518, it was held that the right to *mesne* profits was lost by the death of the widow while her action for dower was pending. Subsequently the rule in that state was changed by statute, so that now representatives of a widow in such case may recover *mesne* profits. In Illinois the question has not been settled by judicial decision. *Turney v. Smith*, 14 Ill. 242. The Kentucky courts have also refrained from making an authoritative declaration upon the subject. *Coons v. Nall*, 4 Litt. 264.

We have reviewed the decisions bearing upon the question involved in this case, directly or by analogy, thus at length because it is strenuously urged by counsel that the precise question was definitely passed upon by the court of appeals in *Kyle v. Kyle*, *supra*; that the decision in that case fully supports his contention and should be regarded as controlling. Many of the expressions contained in the opinion of the court in that case, and the line of argument adopted, give force

§ 1005. Reprisals. At common law there were certain reprisals which were made from the damages of the widow, and among these sometimes were included a deduction on account of her occupation of some part of the property. The legitimate extent of such deduction appears to have been this: Whatever part of the property the widow has been in the actual enjoyment of was thrown out of the estimation of damages, and on the simple ground that, from such property, she had not been deforced of her dower. But this rule merely excluded the claim to recover the value of her thirds in the land during the time she had so occupied it; it did not authorize the heir to set up a

to the counsel's contention. If we were of the opinion that the court of appeals held or intended to hold in that case that the representatives of a deceased dowress cannot in any case recover damages from an heir or other person for withholding dower to which she was entitled in lands of which her husband died seized solely because she died before judgment was recovered assigning her dower, but after suit brought by her for that purpose, we would not assume to criticise such decision, but would readily yield assent to it; but in view of the uncertainty as to exactly what was held in that case upon the precise question here involved, as is indicated by the language of the opinion and the *quare* in the syllabus, and considering that such holding would be in conflict with the great weight of judicial authority upon the subject, both in England and the other states of the Union, and because such a ruling is unjust and inequitable, and would encourage resistance to honest demands solely for delay, and is contrary to the rules declared to be applicable to cases similar in principle, we are of the opinion that the court did not hold or intend to hold in the Kyle case

the doctrine contended for by counsel. Especially so when we consider that the facts in that case were essentially different from those in the case at bar, and that the conclusion reached did not necessarily involve the adoption of such rule by the court. The conclusion of the whole matter is that the representatives of a deceased widow may recover the *mesne* profits of her dower interest in lands of which her husband died seized, although she may have died before such dower was assigned, especially if suit was brought by her for that purpose in her lifetime.

In Florida where land has been aliened by the husband and the widow has died pending suit for the admeasurement of dower, but before an adjudication of her contested right thereto, as against her husband's alienee, her administrator cannot proceed with the suit solely for the purpose of recovering *mesne* profits as damages. "The damage in such cases is an incident to the principal right and falls on the death of the widow at the termination of the principal demand." *Roan v. Holmes*, 32 Fla. 295.

counter-claim in the suit for dower for the other two-thirds of the value of the premises so having been occupied. If the widow had occupied the land without the assent of the heir she was a mere trespasser, and it would not be competent for him in the action for dower to set off the damages thus sustained; and if, on the other hand, he had consented to such occupation he had his action to call her to account. But in the action for dower the effect of the enjoyment by the widow was to estop her from saying that in such land she had been deforced of her dower and on that account to claim damages.⁷⁷

§ 1006. **Dower limited to husband's equitable interest.** Dower is generally confined to the beneficial interest which the husband acquired during coverture in the land.⁷⁸ If the land is subject to a paramount charge or incumbrance, as where the dowress has joined with her husband in making a mortgage; or he, on instantaneous seizin, alone mortgages it for purchase-money; or it was subject to a judgment or mortgage at the time of the marriage, or when the husband acquired it her dower is confined to the right of redemption; it is subject to the incumbrance and liable to be foreclosed, or to contribute to the payment of the debt.⁷⁹

⁷⁷ *McLaughlin v. McLaughlin*, 22 N. J. Eq. 505; *Perrine v. Perrine*, 35 Ala. 644; *Driskell v. Hanks*, 18 B. Mon. 855; *Craige v. Morris*, 25 N. J. Eq. 467; *Strawn v. Strawn*, 50 Ill. 256.

⁷⁸ *Welch v. Buckins*, 9 Ohio St. 331; *Fontaine v. Boatman's Sav. Inst.*, 57 Mo. 552; *Bullard v. Bowers*, 10 N. H. 500; *Griggs v. Smith*, 12 N. J. L. 22; *Edmundson v. Welsh*, 27 Ala. 578; *Leavitt v. Lamprey*, 13 Pick. 382, 23 Am. Dec. 685; *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243; *Nicoll v. Ogden*, 29 Ill. 323, 81 Am. Dec. 311; *Nicoll v. Miller*, 37 Ill. 387; *Nicoll v. Todd*, 70 Ill. 295; *Stow v. Steel*, 45 Ill. 328; *Stow v. Tift*, 15 Johns. 458,

8 Am. Dec. 266; *Coates v. Cheever*, 1 Cow. 460; *Gammon v. Freeman*, 31 Me. 243; *Gilliam v. Moore*, 4 Leigh 30, 24 Am. Dec. 704; *Winn v. Elliott*, *Hardin* 482; *Hale v. Munn*, 4 Gray 132. See *Barnes v. Gay*, 7 Iowa 26; *Yeo v. Mercereau*, 18 N. J. L. 387.

⁷⁹ *Carll v. Butman*, 7 Me. 102; *Richardson v. Skolfield*, 45 id. 386; *Simonton v. Gray*, 34 Me. 50; *Stribling v. Ross*, 16 Ill. 122; *Manning v. Laboree*, 33 Me. 343, 52 Am. Dec. 655; *Rawlings v. Lowndes*, 34 Md. 639; *Stewart v. Beard*, 4 Md. Ch. 319; *Birnie v. Main*, 29 Ark. 591; *Opdike v. Bartels*, 11 N. J. Eq. 133; *Hinchman v. Stiles*, 9 id. 361; *Walton v. Hargroves*, 42 Miss. 18; *Cul-*

§ 1007. **Dower right subject to incumbrance.** It has always been the policy of the law to preserve with care the right of dower when it has once attached to the property of the husband; but the right exists subject to all the equities there may be against his title at the time it attaches.⁸⁰ Payment of the incumbrance by him or his personal representative will inure to the relief of dower; but when a widow claims dower from an heir or purchaser who has discharged the lien she will be required to contribute, and must pay proportionately to the value of her dower, which will be the interest for her life on one-third of the debt that was a lien or a gross sum equivalent thereto.⁸¹ If there was a surplus on the foreclosure of a mortgage or other incum-

ver v. Harper, 27 Ohio St. 464; McMahon v. Kimball, 3 Blackf. 1; Coles v. Coles, 15 Johns. 319; Young v. Tarbell, 37 Me. 509; Mills v. Van Voorhees, 20 N. Y. 412; Clark v. Monroe, 14 Mass. 351; Lewis v. James, 8 Humph. 537; Mantz v. Buchanan, 1 Md. Ch. 202; Johnson v. Thomas, 2 Paige 377. See King v. Stetson, 11 Allen 407; Smith v. McCarty, 119 Mass. 519; Greenbaum v. Austrian, 70 Ill. 591.

⁸⁰ Nichols v. French, 83 Ohio 162; Firestone v. Firestone, 2 Ohio St. 415. See Crane v. Palme, 8 Blackf. 120.

⁸¹ Swaine v. Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318; Evertson v. Tappen, 5 Johns. Ch. 497; Atkinson v. Stewart, 46 Mo. 510; Rossiter v. Cossitt, 15 N. H. 38; Woods v. Wallace, 30 N. H. 384; Bolton v. Ballard, 13 Mass. 227; McArthur v. Franklin, 16 Ohio St. 193; Bullard v. Bowers, 10 N. H. 500; Peckham v. Hadwen, 8 R. I. 160; Coates v. Cheever, 1 Cow. 460; Creecy v. Pearce, 69 N. C. 67; Hildreth v. Jones, 13 Mass. 525; Jennison v. Hapgood, 14 Pick. 345; Snyder v. Snyder, 6 Mich. 470; Cockerill v. Armstrong, 31 Ark. 580; Danforth

v. Smith, 23 Vt. 247; Van Vronker v. Eastman, 7 Metc. (Mass.) 157; Bell v. Mayor, 10 Paige 49; Hodges v. Phinney, 106 Mich. 537. See Newton v. Sly, 15 Mich. 391; Wilson v. Davisson, 2 Rob. (Va.) 384.

In Campbell v. Campbell, 13 N. J. Eq. 415, a bill was filed by the widow of an intestate for dower in lands of three kinds: 1, that which was subject to a mortgage put thereon by the intestate; 2, that which was purchased by him subject to a mortgage, the amount of which was allowed to him as so much of the purchase-money, and the payment thereof assumed by him; and 3, that which belonged to him as a member of a partnership. The chancellor said: "It is, of course, unnecessary to speak of the real estate owned by him individually, which was not subject to any incumbrance. It is almost equally so with regard to that part of such real estate which is subject to mortgage put thereon by him. His personal estate is bound to exonerate that land from the burden of the mortgage. Keene v. Munn, 1 C. E. Green 398; McLenahan v. McLenahan, 3 id. 101. As to that which

brance to which dower in the land is subject it will attach to such surplus.⁸² The widow may redeem from a paramount mortgage; but in that case she must pay the whole debt.⁸³ But if the mortgage is held by the purchaser of the equity of redemption or, in other words, by the party bound to contribute the residue of the mortgage debt, she may redeem by paying her fair proportion

was purchased by him subject to mortgage, the amount of which was allowed to him as so much of the purchase-money, and the payment whereof he assumed, his personal estate is not bound to exoneration. In such case, to make his estate primarily liable, there must be clear evidence of an intention to make the mortgage debt his own. The weight of authority, both in this country and England, is that the personal estate is not primarily liable, unless the grantee has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own, or has in some other way manifested an intention to throw the burden on the personality. But the point under consideration was directly passed upon and decided in *McLenahan v. McLenahan*, *ubi supra*. There the amount of the mortgage had been allowed to the intestate as so much of the purchase-money. See, also, *Crowell v. Hospital of St. Barnabas*, 12 C. E. Gr. 650, and *King v. Whiteley*, 1 Hoffm. Ch. 477.

"The real estate of a partnership, purchased with partnership funds, or for the use of the firm, is subjected to the doctrine of equitable conversion so far as necessary for the purposes of the partnership, but otherwise it retains its legal character and incidents. It is, in equity, chargeable with the debts of the copartnership, and any balance which may be due from one copart-

ner to another. On the winding up of the affairs of the firm, as between the heirs at law and the personal representatives of a deceased partner, his share of the surplus of that real estate remaining after paying the debts and adjusting all the equitable claims of the different members of the firm, as between themselves, is to be considered and treated as real estate. The widow of such deceased partner will be entitled to dower in his share of any real estate of the firm not required for the payment of such debts and the adjusting of such equitable claims. *Uhler v. Semple*, 5 C. E. Gr. 288; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Shearer v. Shearer*, 98 Mass. 107; 1 Wash. on R. P. (4th ed.) 669; 1 Scribner on Dower 536; *Foster's App.*, 74 Pa. 391, 15 Am. Rep. 553." *Bopp v. Fox*, 63 Ill. 540.

But see *Murray v. Scully*, 259 Mo. 57, holding that where the defendant paid taxes due on land at the time of his purchase from the widow's husband no portion thereof should be deducted from her dower interest.

⁸² *Matthews v. Durgee*, 45 Barb. 69; *Titus v. Neilson*, 5 Johns. Ch. 452; *Smith v. Jackson*, 2 Edw. Ch. 28; *Hawley v. Bradford*, 9 Paige 200, 37 Am. Dec. 390; *Keith v. Trapier*, 1 Bailey Eq. 63; *Boyer v. Boyer*, 1 Cold. 12; *Bank v. Owens*, 31 Md. 320, 1 Am. Rep. 60.

⁸³ *Norris v. Morrison*, 45 N. H. 490.

according to her estate.⁸⁴ If the defendant in such case has been in possession under the mortgage she is entitled to an account of rents and profits, although the property may be sold pending the action for dower.⁸⁵ In computing the sum due on the mortgage it has been held that annual rests should be made; that the sums paid by the defendant the first year for repairs, taxes, etc., should be deducted from the gross rents received by him and the balance be taken as the net rents; that the interest in the mortgage debt for the first year should be added to the principal, the net rent be deducted from the aggregate, and the balance become a new principal; and so on from year to year to the time of judgment.⁸⁶

Where a mortgage, in which the wife joined, was foreclosed in the life-time of the husband against him alone and the purchaser went into possession it was held that as to the widow applying to redeem her dower interest he was to be regarded as the mortgagor and mortgagee occupying in common according to their respective interests; that, regarding the price paid at the judicial sale as representing both interests, the purchaser should account for such a proportion of the net annual rents as the amount due on the mortgage at the time of the sale bore to the price at which the land was sold, and that, in ascertaining the annual rents, the enhanced value of the land from improvements, other than ordinary repairs, should be excluded. Taxes and such repairs should be deducted to get the net rents. The plaintiff, not having been a party to the foreclosure suit, was entitled to have the amount taken in the same manner as though no decree had been rendered; therefore, in the computation there should be no rest made at the time of the rendition of the decree. In determining the amount to be paid by the widow she should be charged with such part of one-third of the debt remaining unpaid as bore the same proportion to the one-third of such debt as the value of her life-estate in one-third of the land bore to the

⁸⁴ *Isabella G. M. Co. v. Glenn*, 37 Colo. 165; *Woods v. Wallace*, 30 N. H. 384; *Van Vronker v. Eastman*, 7 Mete. (Mass.) 157; *McArthur v. Franklin*, 16 Ohio St. 193.

⁸⁵ *Witthaus v. Shack*, 38 Hun 560.

⁸⁶ *Van Vronker v. Eastman*, *supra*.

value of an unincumbered fee in one-third of the entirety; in other words, the widow should pay the present worth of an annuity for her life equal to one-third of the interest of the debt found due at the taking of the account.⁸⁷

Where land is sold to satisfy a paramount lien and there is a surplus a wife's contingent dower interest in it will be recognized. It has been held in New York that she is entitled, as against judgment creditors, to have one-third of the amount invested for her benefit and kept invested during the joint lives of herself and her husband, and during her own life in case of her surviving him, as and for her dower in such surplus moneys.⁸⁸ In a case in Ohio⁸⁹ the same interest was recognized; but the court disapproved of such an investment as a mode of protecting or preserving it; and it was held that its value, ascertained by reference to the tables of recognized authority, in connection with the state of health and constitutional vigor of the wife and her husband, be paid to her.⁹⁰

⁸⁷ McArthur v. Franklin, *supra*.

⁸⁹ Unger v. Leiter, 32 Ohio St. 210.

⁸⁸ Denton v. Nanny, 8 Barb. 618.

⁹⁰ See Bonner v. Peterson, 44 Ill. 253.

CHAPTER XXV.

INJURIES TO REAL PROPERTY.

§ 1008. Scope of chapter.

SECTION 1.

TRESPASS TO REAL PROPERTY.

- 1009. The gist of the action; who may sue.
- 1010. Definition of trespass and scope of the remedy.
- 1011. Damages confined to compensation.
- 1012. Damages where tenant, one in possession under color of title or licensee sues.
- 1013. Damages where suit by executor, etc.
- 1014. Damages measured by benefit received.
- 1015. Damages for destruction of property.
- 1016. Occupation of land by railroads.
- 1017. Damages for permanent wrong.
- 1018. Damages where injury remediable.
- 1019. Liability for destroying trees and mining ores.
- 1020. Same subject; value as affected by defendant's acts.
- 1021. Liability for additional injury to land.
- 1022. Damage to unsecured ice, and for the diversion of water.
- 1023. Destruction of and injury to growing crops.
- 1024. Destruction of fences.
- 1025. Injuries to party-walls.
- 1026. Interest on the damages.
- 1027. Mitigation of damages.
- 1028-1030. Aggravation and special damages.
- 1031. Exemplary and statutory damages.
- 1032. Same subject; mitigation.

SECTION 2.

INJURY TO INHERITANCE.

- 1033, 1034. Injury to the rights of parties not in possession.

SECTION 3.

NUISANCE.

- 1035. What is a nuisance; parties liable for.
- 1036. General principles of the law of nuisance.
- 1037. Wrong-doer liable for at least nominal damages

- § 1038. Usually a continuous wrong requiring successive actions.
1039. What recoverable in the first action.
1040. Continuing liability of the person who causes it.
1041. Damages may include future expenditures.
- 1042-1045. When nuisance not a continuous wrong.
1046. Same subject; result of the cases.
1047. Depreciation in value as damages.
1048. Other elements of damages.
1049. Injuries to crops, trees, etc.
- 1050, 1051. Liability for remoter consequences.
1052. Exemplary damages.
1053. Removal of support to land.
1054. Interference with business.
1055. Mitigation of damages.
1056. Same subject; deduction for benefits.
1057. Damages affected by interest in estate.
1058. Private remedy for public nuisance.
1059. Joint and several liability; distinction between private and public nuisance.
1060. Pleading.

§ 1008. **Scope of chapter.** The damages recoverable, after judgment for the plaintiff in ejectment, for withholding possession, or in the action for recovery of possession of real property, have been discussed in the foregoing chapter. These result from, or are connected with, the loss or suspension of the plaintiff's possession and cannot be recovered until it is regained. When there has been a re-entry, whether pursuant to a judgment of restitution or otherwise, all the damages from the ouster to the re-entry may be recovered.¹ But all injuries to real estate do not involve a loss of possession; so those to the inheritance may be redressed by action though the owner is not in possession.² These will constitute the subject of the present chapter.

¹ Cutting v. Cox, 19 Vt. 517; Smith v. Wunderlich, 70 Ill. 426; Stevens v. Hollister, 18 Vt. 294, 46 Am. Dec. 154; Holmes v. Seely, 19 Wend. 507; Smith v. Ingram, 8 Ired. 175; Allen v. Thayer, 17 Mass. 299; Illinois, etc. C. Co. v. Cobb, 32 Ill. 183; Wohler v. Buffalo, etc. R. Co., 46 N. Y. 686; Western B. & S. Co. v. Jevne, 179 Ill. 71, 78 Ill. App. 668; Alliance T. Co. v. Nettleton H. Co., 74 Miss. 584, 60 Am. St. 531, 36 L.R.A. 155. See Tracy v. Butters, 40 Mich. 406.

² Meehan v. Edwards, 92 Ky. 574; Perry v. Bailey, 94 Me. 50.

SECTION 1.

TRESPASS TO REAL PROPERTY.

§ 1009. The gist of the action; who may sue. The gist of this action is the injury to the plaintiff's possession;³ only the party actually or constructively in possession at the time the trespass was committed can sue.⁴ The refusal of a trespasser to remove a structure after a request to so do by one who has purchased the land on which it stands is such a trespass as gives the purchaser a right of action.⁵ Where the land on which the trespass is committed is not in the actual occupation of any person the plaintiff may prove constructive possession

³ Dornhoff v. Paul Stier, 157 App. Div. (N. Y.) 204; Prussner v. Brady, 136 Ill. App. 395; Davis v. Alexander, 99 Me. 40; Lavin v. Dodge, 30 R. I. 8; Lightner M. Co. v. Lane, 161 Cal. 689; Booth v. Sherwood, 12 Minn. 426; Smith v. Wunderlich, 70 Ill. 426; Reed v. Brice, 30 Mo. 442; Fore v. Western, etc. R. Co., 101 N. C. 526.

⁴ Graves v. Harris, 63 Fla. 169; Buck v. Louisville & N. R. Co., 159 Ala. 305; Henry v. Davis, 149 Ala. 359; Newman v. Mountain Park L. Co., 85 Ark. 208, 122 Am. St. 27; Price v. Greer, 76 Ark. 426; Knight v. Empire L. Co., 55 Fla. 301; Towaliga Falls P. Co. v. Washington, 136 Ga. 397; Mott v. Hopper, 116 La. 629; Feeley v. Andrews, 191 Mass. 313; Hooper v. Herald, 154 Mich. 529; Levy v. McClintock, 141 Mo. App. 593; Thurmond v. Ash Grove W. L. Ass'n, 125 Mo. App. 73; Gordner v. Blades L. Co., 144 N. C. 110; Drake v. Howell, 133 N. C. 162; Weisfield v. Beale, 44 Pa. Super. Ct. 386; Knapp v. Alexander-E. L. Co., 145 Wis. 528; Porter v. Merdeen & R. R., 148 N. C. 563; Smith v. Ingram, 8 Ired. 175;

Abbott v. Abbott, 51 Me. 575; Little v. Palister, 3 id. 6; Lyford v. Toothaker, 39 id. 28; Holmes v. Seely, 19 Wend. 507; West v. Lanier, 9 Humph. 762; Smith v. Wunderlich, 70 Ill. 426; Campbell v. Arnold, 1 Johns. 511; Wickham v. Freeman, 12 id. 183; Van Rensselaer v. Radcliff, 10 Wend. 639, 25 Am. Dec. 582; Lienow v. Ritchie, 8 Pick. 235; French v. Fuller, 23 id. 104; Owings v. Gibson, 2 A. K. Marsh. 515; Foster v. Fletcher, 7 T. B. Mon. 534, 18 Am. Dec. 208; Miller v. Fulton, 4 Ohio 433; Zimmerman v. Shreeve, 59 Md. 357; Yellow River R. Co. v. Harris, 35 Fla. 385; Wilkinson v. Connell, 158 Pa. 126; Gulf, etc. R. Co. v. Smith, 3 Tex. Civ. App. 483; Garrett v. Sewell, 108 Ala. 521; Galt v. Chicago, etc. R. Co., 157 Ill. 125; Allen v. Macon, etc. R. Co., 107 Ga. 838; Carter v. Pitcher, 87 Hun 580; Louisville & N. R. Co. v. Hall, 131 Ala. 161; Sposato v. City of New York, 75 App. Div. (N. Y.) 304.

The rule is otherwise by statute. Long v. Cummings, 156 Ala. 577.

⁵ Benjamin v. American Tel. & Tel. Co., 196 Mass. 454.

by showing his title.⁶ One person may have possession of the surface and another of the subsoil, or mines and minerals.⁷ The possession is presumed to be in the owner of the legal title in the absence of all other evidence; or, in other words, no one being shown to be in adverse possession he will be presumed to be in possession,⁸ and it will also be presumed that his possession is co-extensive with his grant.⁹ In case of a mixed possession, no other right or title being shown by either of the parties, he who first acquired the actual and exclusive possession may maintain trespass for the exportation of a fence put on the land by him.¹⁰ If the title to a dwelling is in the husband and during his absence and without the consent of his wife a person enters the same, the wife being present, her possession is exclusive to the extent that she may recover such damages as were sustained by reason of the invasion of her possession, though no direct assault was made upon her.¹¹ The Iowa court, going further, has sustained the wife's right of action for a trespass which resulted in injury to her though her husband was in the house when it was committed. "It was her home as well as that of her husband; her right to its peaceful and quiet enjoyment day or night was equal to that of her husband; and any unlawful entry or invasion thereof which produced physical injury to her was a wrong for which she ought to recover."¹² The administrator of a husband who owned

⁶ *Marbury L. Co. v. Lamont*, 169 Ala. 33; *Woll v. Voigt*, 105 Minn. 371, 23 L.R.A.(N.S.) 270; *Stone v. Perkins*, 217 Mo. 586; *Booth v. Sherwood*, 12 Minn. 426; *Yorgensen v. Yorgensen*, 6 Neb. 383; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Louisville & N. R. Co. v. Hall*, *supra*.

The owner of a cemetery lot may maintain an action for the removal of the remains of a child interred therein. *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Smith v. Thompson*, 55 Md. 5, 39 Am. Rep. 409. See *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135.

⁷ *Cox v. Glue*, 5 C. B. 533.

⁸ *West v. Pusey*, 113 Md. 569; *Knapp v. L. Co.*, *supra*; *Carroll v. Manierre*, 149 Wis. 409; *Griffin v. Creppin*, 60 Me. 270; *Smith v. Wunderlich*, 70 Ill. 426.

⁹ *Melcher v. Merryman*, 41 Me. 601.

¹⁰ *Coffin v. Lawson*, 7 Houst. 327.

¹¹ *Lesch v. Great Northern R. Co.*, 97 Minn. 503, 7 L.R.A.(N.S.) 93; *Bieri v. Fonger*, 139 Wis. 150; *Ford v. Schliessman*, 107 Wis. 479. See *Newell v. Whiteher*, 53 Vt. 389.

¹² *Watson v. Dilts*, 116 Iowa 249, 57 L.R.A. 559.

A wife may, in an action brought

land jointly with his wife cannot maintain an action for trespass committed during the life of the decedent; though the wife may do so.¹³ Mere possession,¹⁴ though it be wrongful, will sustain the action against a stranger,¹⁵ though the injury was to the fee.¹⁶ If an action is against the person in possession the burden of proving title is on the plaintiff.¹⁷ Possession at the time the trespass was committed is all that is necessary to give a right of action; it need not continue until suit is brought.¹⁸

§ 1010. Definition of trespass and scope of the remedy.

Every unauthorized intrusion into the land of another is sufficient trespass to support an action for breaking the close.¹⁹ It is immaterial to the cause of action that no actual injury is done, or that the tortious act of the defendant is even beneficial to the plaintiff,²⁰ or that the defendant in the lawful exercise

in her name and that of her husband, recover the entire damage done to their joint property notwithstanding he consented to the trespass, she being empowered by statute to sue in her own name for all the damage. *Cox v. St. Louis, etc. R. Co.*, 123 Mo. App. 356.

¹³ *Spruill v. Branning Mfg. Co.* 130 N. C. 42.

¹⁴ *Louisville & N. R. Co. v. Smith*, 141 Ala. 335.

¹⁵ *Louisville & N. R. Co. v. Higginbotham*, 153 Ala. 334; *Carter v. Maryland & P. R. Co.*, 112 Md. 599; *Reams v. Clopine*, 78 Neb. 166; *Kunkel v. Utah L. Co.*, 29 Utah 13; *Rollins v. Clay*, 33 Me. 132; *Wilder v. House*, 48 Ill. 279; *Reeder v. Purdy*, 41 Ill. 279; *Meador v. Stone*, 7 Mete. (Mass.) 147; *Yeates v. Allin*, 2 Dana 134; *Ives v. Ives*, 13 Johns. 235; *Reed v. Price*, 30 Mo. 442; *Jenkins v. McCoy*, 50 Mo. 348; *Doty v. Burdick*, 83 Ill. 473; *Oklahoma v. Hill*, 6 Okla. 114; *Northern Pac. R. Co. v. Lewis*, 51 Fed. 658; *Gulf, etc. R. Co. v. Johnson*, 54 Fed. 474, 4 C. C. A. 447; *Davenport v.*

Newton, 71 Vt. 11; *Haws v. Victoria C. M. Co.*, 160 U. S. 303, 40 L. ed. 436, and cases cited; *Bass v. West*, 110 Ga. 698, citing the text.

¹⁶ *Southern R. Co. v. Thompson*, 129 Ga. 367.

¹⁷ *Miller v. Wellman*, 75 Mich. 353.

¹⁸ *Carner v. Chicago, etc. R. Co.*, 43 Minn. 375; *Natchez, etc. R. Co. v. Currie*, 62 Miss. 506.

The use of force by the owner of the title against a person in possession of the premises must be recovered for in some other form of action. *Southern R. Co. v. Hayes*, 183 Ala. 465.

¹⁹ *Stanton v. Lapp*, 113 Md. 324; *Wood v. Pacolet Mfg. Co.*, 80 S. C. 47; *Wetzel v. Satterwhite* (Tex. Civ. App.), 125 S. W. 93; *Triscony v. Brandenstein*, 66 Cal. 514; *Dougherty v. Stepp*, 1 Dev. & B. 371. See *Forbell v. New York*, 164 N. Y. 522.

A licensee becomes a trespasser from the time his license expires. *Snedecor v. Pope*, 143 Ala. 275.

²⁰ *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181; *Parker*

of its powers might have caused greater damage to the plaintiff than was sustained by the act complained of.²¹ His legal right being invaded by the intrusion, he is entitled at least to nominal damages in order to vindicate that right and recover his costs.²² When the plaintiff's land is illegally entered²³ a cause of action at once arises; whatever is done after the breaking and entry is but an aggravation of damages.²⁴ The action of trespass *quare clausum fregit*, therefore, may embrace, for the purpose of compensation to the owner, as well as punitive damages, all the things done and said by the defendant in the course and forming part of the *res gestæ* of such breaking and entry, and all the natural and proximate effects which ensue.²⁵ Where an

v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; *Blair v. Avon C. Co. v. McCulloch*, 59 Md. 403; *Fisher v. Dowling*, 66 Mich. 370. See §§ 9, 10, 1022, 1037.

²¹ *Knapp & C. Mfg. Co. v. New York, etc. R. Co.*, 76 Conn. 311, 100 Am. St. 994.

²² *Checkley v. Illinois Cent. R. Co.*, 257 Ill. 491, 44 L.R.A.(N.S.) 1127; *Puroto v. Chieppa*, 78 Conn. 401; *Phillips v. Brittingham*, 2 Boyce (Del.) 173; *Chase v. Cochran*, 102 Me. 431; *Whittaker v. Stangvick*, 100 Minn. 386, 117 Am. St. 703, 10 L.R.A.(N.S.) 921; *Bathgate v. North Jersey St. R. Co.*, 75 N. J. L. 763; *Brame v. Clark*, 148 N. C. 364, 19 L.R.A.(N.S.) 1033; *Scheinle v. Eckels*, 227 Pa. 305; *Southwestern Tel. & T. Co. v. Whiteman*, 36 Tex. Civ. App. 163; *Moore v. Duke*, 84 Vt. 38, 48 L.R.A.(N.S.) 302; *Empire G. M. Co. v. Bonanza G. M. Co.*, 67 Cal. 406; *Baltimore & O. R. Co. v. Boyd*, 67 Md. 32, 1 Am. St. 362; *United States v. Mock*, 149 U. S. 273, 37 L. ed. 732; *Howard v. Dayton C. & I. Co.*, 94 Ga. 416. See *Stewart v. Sefton*, 108 Cal. 197.

Plaintiff cannot secure the reversal of a judgment in its favor

on the ground that the verdict for six cents was inadequate where it introduced no evidence of any actual injury resulting to it from the trespass of the defendant, nominal damages being sufficient to vindicate a legal title or right. *Diana Shooting Club v. Kohl*, 156 Wis. 257.

Plaintiff can recover nominal damages only where, although he makes out a technical case of trespass, he fails to establish any special damage from defendant's act. *Zehner v. Shepp*, 54 Pa. Super. Ct. 529.

²³ *Garrett v. Sewell*, 108 Ala. 521.

²⁴ *Cook v. Redman*, 45 Mo. App 397; *Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569; *Brown v. Manter*, 22 N. H. 468; *Ferrin v. Symonds*, 11 id. 365; *Kolb v. Bankhead*, 18 Tex. 229.

One who wrongfully enters and sets out a fire on the land of another will be liable for the damages resulting from the consequential destruction of a building on such land regardless of any negligence on his part either in setting out the fire or in caring for it afterwards. *Cribbs v. Stiver*, 181 Mich. 82.

²⁵ *Chicago v. Troy L. Mach. Co.*, 162 Fed. 678, 89 C. C. A. 470;

excavation was made in a street in disregard of the statute respecting the establishment of grades it was right to receive evidence as to the damage done to trees, shrubbery, grass and the well on the premises.²⁶ If only one joint trespasser is sued the plaintiff cannot prove, in aggravation of damages, the distinct and unconnected acts of the other.²⁷

There is a disposition to extend the scope of actions for trespass so as to include damages done to property by concussion or vibration of the earth through the use of powerful explosives which are intrinsically dangerous, regardless of the skill used. In a case in which a stone was thrown by a blast against a building the city for which the work was being done was liable for the injury resulting to the building.²⁸ In a later case, in which there was no actual invasion of the plaintiff's property, all the damage being done by concussion or vibration caused by explosives, the same court said, referring to the case stated: It is true that in that case there was an actual invasion of the property of the plaintiff, the explosion having precipitated a rock against his building; but liability for injuries caused by actual invasion of the property or by the concussion or vibration

Haines v. Haines, 104 Md. 208; Wright v. Willoughby, 79 S. C. 438; Damron v. Roach, 4 Humph. 134; Tissot v. Great Southern Tel. & T. Co., 38 La. Ann. 996, 4 Am. St. 248; Carter v. Bedortha, 124 Mich. 548; Stevens v. Stevens, 96 Ga. 374

²⁶ Brown v. Webster City, 115 Iowa 511; Millard v. Same, 113 Iowa 220.

²⁷ Joliet v. Harwood, 86 Ill. 110, 29 Am. Rep. 17.

²⁸ Fitz Simons & O. Co. v. Braun, 199 Ill. 390, 13 Am. Neg. Rep. 9; Bradford G. Co. v. St. Mary's W. Mfg. Co., 60 Ohio St. 560, 6 Am. Neg. Rep. 674, 71 Am. St. 740, 45 L.R.A. 658; Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556; Munroe v. Pacific Coast D. & R. Co., 84 Cal. 515, 18 Am. St. 248; Langhorne v.

Turman, 141 Ky. 809, 34 L.R.A. (N.S.) 211; Faust v. Pope, 132 Mo. App. 287; Hall v. Sundstrom, 138 App. Div. (N. Y.) 548. *Contra*, as to consequential damages if the work is done with due care, Benner v. Atlantic D. Co., 134 N. Y. 156, 30 Am. St. 649, 17 L.R.A. 220; Murphy v. Lowell, 128 Mass. 396, 35 Am. Rep. 381; Thurmond v. Ash Grove W. L. Ass'n, 125 Mo. App. 73; Whitehouse v. Androscoggin R. Co., 52 Me. 208; Blackwell v. Lynchburg, etc. R. Co., 111 N. C. 151, 17 L.R.A. 729, 32 Am. St. 786; Sabin v. Vermont Cent. R. Co., 25 Vt. 363; Watts v. Norfolk, etc. R. Co., 39 W. Va. 196, 45 Am. St. 894, 23 L.R.A. 674; Forrester v. O'Rourke Eng. C. Co., 48 N. Y. Misc. 390.

of the earth or air are within the doctrine there announced. If one who, for his own purposes and profit, undertakes to perform a work by means of explosives, inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by these explosives on the property of such other, it is only by the merest subtlety of reasoning he should be held not liable to respond for equal or greater damages caused by concussion of the air or of the earth.²⁹ As will be seen by the note, there are courts of high standing which do not fully acquiesce in this doctrine. In Iowa an action of trespass lies against a city where it injures abutting property by cutting down a street without having established a grade therefor as required by statute, though there was no trespass or direct encroachment on the plaintiff's premises and the fee to the street was in the city.³⁰ Claims for temporary and permanent damages may be united in the same declaration or count. No injury from the confusion of the issues need arise because the court will direct the jury as to the facts and circumstances which call for temporary and permanent damages.³¹

§ 1011. **Damages confined to compensation.** If the nature of the wrong done and the circumstances connected with it are such as do not authorize the imposition of exemplary damages the recovery must be for such sum as will compensate for the injury done. This cannot be increased in the discretion of the jury,³² nor will less than that be awarded merely because the wrong was unwittingly done.³³ In trespass for taking animals *feræ naturæ* the land-owner can recover for the trespass

²⁹ Scherrer v. Baltzer, 84 Ill. App. 126; Highby v. Williams, 16 Johns. 214.

³⁰ Richardson v. Webster City, 111 Iowa 427; Millard v. Same, Brown v. Same, *supra*.

³¹ Lyons v. Fairmont R. E. Co., 71 W. Va. 754.

³² Batson v. Higginbotham, 7 Ga. App. 835; Ostrom v. San Antonio, 33 Tex. Civ. App. 683; Steele v.

Davis, 75 Ind. 191; Flynt v. Chicago, etc. R. Co., 38 Mo. App. 98; Thompson v. Evans, 49 Ill. App. 289; Tome Institute v. Crothers, 87 Md. 569; McArthur v. Cornwall, [1892] App. Cas. 75.

³³ Gosdin v. Williams, 151 Ala. 592; Bolton v. Hendrix, 84 S. C. 35; Atlantic, etc. C. Co. v. Maryland C. Co., 62 Md. 135; Garrett v. Sewell, 108 Ala. 521.

only.³⁴ As will more fully appear in the course of this chapter, there is not entire agreement in the application of the universally accepted principle that the recovery must only be commensurate with the damage inflicted. It is only necessary to note here one phase of this conflict of authority. Thus, it is laid down that the rental value of land which is unlawfully entered upon and cultivated is the measure of the trespasser's liability, added to which may be compensation for such other damages as resulted from the entry and the improper use and cultivation of the land.³⁵ In a case in the privy council the trespasser was held liable for the value of the produce which the lands were capable of yielding at the time they were taken possession of, less the expenses of management. It was also ruled that there was no law authorizing the disallowance of such expenses, no matter how wilful and long continued the trespass may have been.³⁶ The Iowa court has taken a different view, and ruled that where the trespass was wilful the damages are measured by the value of the crops and hay secured by the trespasser. "The theory of the rule seems to be that a crop produced by a trespassing act is the property of the owner of the soil, and the trespasser has no such interest in it that he can deprive the owner of it, or of its possession, and that the owner of property is entitled to its value if converted by another."³⁷ The government may recover from one who wrongfully encloses its land the reasonable value of its use, though no injury was done it and it would not have been leased if the trespass had not been committed.³⁸ Any doubt as to the extent of the damage done by a wilful trespasser will be resolved against him.³⁹

§ 1012. **Damages where tenant, one in possession under color of title or licensee sues.** Damages in this action may be such as are appropriate to the tenure by which the plaintiff holds, and such as result from the injury suffered. Possession alone will

³⁴ *Beach v. Morgan*, 67 N. H. 529.

³⁵ *Johnson v. Park*, 13 Ky. L. Rep. 437; *Frizzell v. Duffer*, 58 Ark. 612.

³⁶ *McArthur v. Cornwall*, *supra*.

³⁷ *Kiernan v. Heaton*, 69 Iowa 136; *Negley v. Cowell*, 91 Iowa 256, 51 Am. St. 345.

³⁸ *United States v. Bernard*, 121 C. C. A. 190, 202 Fed. 728; *Baltimore & O. R. Co. v. Boyd*, 67 Md. 32. See § 1014.

³⁹ *Adams v. Lorraine Mfg. Co.*, 29 R. I. 333.

entitle him to recover damages for any injury solely affecting it.⁴⁰ If he seeks to recover for the future he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right,⁴¹ unless he holds in such relation to the other parties interested that his recovery will bar their claim.⁴² The same act may be injurious to several persons having different interests: to a tenant, or one having a limited estate in possession, by the interruption of his enjoyment and the diminution of his profits;⁴³ to a landlord, or one having an expectant estate in reversion or remainder, by the more permanent injury to his property. Both may have separate actions for their several damages.⁴⁴ Where a stranger cuts down trees a tenant can

⁴⁰ *Chicago, etc. R. Co. v. Watkins*, 43 Kan. 50, citing the text; *Snedecor v. Pope*, 143 Ala. 275; *Daniel v. Perkins L. Co.*, 9 Ga. App. 842; *Blunck v. Chicago & N. R. Co.*, 142 Iowa 146; *Stanton v. Lapp.*, 113 Md. 324; *Cleveland, etc. R. Co. v. Born*, 49 Ind. App. 62; *Tobin v. French*, 93 Ill. App. 18 (possession pending appeal from a judgment against the tenant in forcible detainer); *Frisbee v. Marshall*, 122 N. C. 760; *Townley v. Oregon R. Co.*, 33 Ore. 323; *Johnson v. Chapman*, 43 W. Va. 639.

⁴¹ *Staudt v. Murphysboro E. R., L., H. & P. Co.*, 169 Ill. App. 276; *Atlanta & B. A. L. R. Co. v. Brown*, 158 Ala. 607; *Seaboard A. L. R. v. Brown*, 158 Ala. 630 (a landlord who has received rent cannot recover for injury to crops); *Baldwin v. Richardson*, 39 Tex. Civ. App. 406; *Texas, etc. R. Co. v. Smith*, 35 Tex. Civ. App. 351; *Zimmerman v. Shreeve*, 59 Md. 357; *Salisbury v. Western, etc. R. Co.*, 98 N. C. 465; *I. & G. N. R. Co. v. Benitos*, 59 Tex. 326; *International, etc. R. Co. v. Ragsdale*, 67 id. 24; *Stratton v. Lyons*, 53 Vt. 641; *Gilbert v. Ken-Suth. Dam. Vol. IV.*—6.

nedy, 22 Mich. 117; *Elliott v. Missouri Pac. R. Co.*, 8 Kan. App. 191; *Frisbee v. Marshall*, 122 N. C. 760; *Gwaltney v. Scottish Carolina T. Co.*, 115 N. C. 579; *Winborne v. Elizabeth City L. Co.*, 130 N. C. 32.

Damages to the time of the trial may be recovered. *Stanton v. Lapp*, 113 Md. 324.

⁴² *Lightner M. Co. v. Lane*, 161 Cal. 689; *Woods v. Banks*, 14 N. H. 101; *Hibbard v. Foster*, 24 Vt. 542; *Bigelow v. Rising*, 42 Vt. 678; *Nims v. Troy*, 59 N. Y. 500; *Jackson v. Todd*, 25 N. J. L. 121; *Harker v. Dement*, 9 Gill, 7; *Hueston v. Mississippi & R. R. B. Co.*, 76 Minn. 251, quoting the text. See § 1057.

A tenant in common may recover the whole damage done by a stranger for his own and cotenant's benefit. *Davis v. Moyles*, 76 Vt. 25.

⁴³ *Pye v. Faxon*, 156 Mass. 471, citing *Stetson v. Faxon*, 19 Pick. 147; *French v. Connecticut River L. Co.*, 145 Mass. 262; *Fritz v. Hobson*, 14 Ch. Div. 542. To the same effect, *Hueston v. R. R. B. Co.*, *supra*.

⁴⁴ *Dale v. Southern R. Co.*, 132 N. C. 705; *Nashville, etc. R. Co. v.*

recover only in respect of shade, shelter and fruit; for he is entitled to no more.⁴⁵ A tenant at will may recover for the destruction of standing grass to the extent that the usable value of the land is thereby lessened.⁴⁶ The damages recoverable by a tenant for an injury to the leased land are measurable by the decrease in the rental value thereof for such time as he is entitled to the use of it,⁴⁷ or at least all that will accrue up to the time of the trial.⁴⁸ A tenant with only the right to pasture and cut hay may not recover the difference between the value of the crop secured and the value it would have had but for the trespass; his recovery is to be measured by the value of the crop when it was destroyed.⁴⁹ For an injury to fruit trees, though it was inflicted before the fruit appeared, a tenant may recover for the diminished value of the crop immediately before and immediately after the trespass.⁵⁰ Though a life tenant may not recover for timber cut, if the cutting and removal of it rendered the land less accessible his damages may be substantial.⁵¹ A tenant may recover for an injury which impairs the value of his possession; also for one which imposes an additional

Heikens, 112 Tenn. 378, 65 L.R.A. 298; Putnam v. St. Louis S. R. Co., 43 Tex. Civ. App. 448; George v. Fisk, 22 N. H. 32-45; Lane v. Thompson, 43 id. 320; Jesser v. Gifford, 4 Burr. 2141; Hamden v. Rice, 24 Conn. 350; Reeder v. Purdy, 41 Ill. 279; Starr v. Jackson, 11 Mass. 519; Jackson v. Todd, 25 N. J. L. 121; Bennett v. Thompson, 13 Ired. 146; Zimmerman v. Shreeve, 58 Md. 357; Anthony v. New York, etc. R. Co., 162 Mass. 60; Bailey v. Siegel G. F. Co., 54 Mo. App. 50.

⁴⁵ Zimmerman Mfg. Co. v. Daffin, 149 Ala. 380, 123 Am. St. 58, 9 L.R.A.(N.S.) 663; Bedingfield v. Onslow, 3 Lev. 209.

While a lessee for years may maintain an action for trespass by cutting trees on the leased premises, he cannot recover treble damages

under a statute imposing that measure of liability in favor of the "owner." Lewis v. Thompson, 3 App. Div. (N. Y.) 329; Edwards v. Hill, 11 Ill. 22; Achey v. Hull, 7 Mich. 423; McCleary v. Anthony, 54 Miss. 708.

⁴⁶ St. Louis, etc. R. Co. v. Hall, 71 Ark. 302.

⁴⁷ Elliott v. Missouri Pac. R. Co., 8 Kan. App. 191; Daniel v. Perkins L. Co., 9 Ga. App. 842; Cleveland, etc. R. Co. v. Born, 49 Ind. App. 62, quoting the text.

⁴⁸ Dale v. Southern R. Co., 132 N. C. 705, under a statute.

⁴⁹ Carter v. Wabash R. Co., 128 Mo. App. 57; Atlantic O. L. R. Co. v. Davis, 5 Ga. App. 214.

⁵⁰ Putnam v. St. Louis S. R. Co., 43 Tex. Civ. App. 448.

⁵¹ Daffin v. Zimmerman Mfg. Co., 158 Ala. 637.

burden in the performance of his covenant to repair.⁵² If an injury is done to a building which he must keep in repair that liability entitles him to recover damages therefor.⁵³ And where a lessee is bound to rebuild destroyed buildings, and may remove those on the premises and erect others he has such an interest in those burned by a third party as entitles him to recover their value.⁵⁴ It may be assumed that improvements made by a lessee are without market value and a recovery allowed to the extent of their real value.⁵⁵

A tenant for years has a right to be compensated for all injury done to his possession and to his rights as lessee; and in ascertaining such injury the expense necessary to restore the building to such a state as would make the possession as beneficial for his purposes as it was before the trespass was committed should be allowed.⁵⁶ The allowance of damages in his favor on account of injury to the estate, however, should not exceed the value of his term, including the rent he is bound to pay.⁵⁷ Where T. demised land to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually, the lessee covenanting that he would not dig more, or, if he did, to pay an increased rent of 375ℓ. per half-acre, being after the same rate that the whole brick earth was sold for, and a stranger dug and took away brick earth, the lessee was entitled to recover against him and retain the full value of it.⁵⁸ It is laid down as a general rule that if a trespass necessitates the abandonment of leased premises the tenant may recover the value of them for rent during the remainder of the term. If an established business was con-

⁵² Hardrop v. Gallagher, 2 E. D. Smith, 523; Buddin v. Fortunato, 16 Daly, 195; Weston v. Gravlín, 49 Vt. 507.

⁵³ Gourdier v. Cormack, 2 E. D. Smith 200.

⁵⁴ Anthony v. New York, etc. R. Co., 162 Mass. 60; Ohio & M. R. Co. v. Trapp, 4 Ind. App. 69.

⁵⁵ Steger v. Barrett (Tex. Civ. App.), 124 S. W. 174.

⁵⁶ Willis v. Branch, 94 N. C. 142.

⁵⁷ Walter v. Post, 4 Abb. Pr. 382.

For circumstances under which the probability of the tenant's securing a renewal of his lease and under which he recovered the value of a building destroyed, see McPhillips v. Fitzgerald, 76 App. Div. (N. Y.) 15.

⁵⁸ Attersoll v. Stevens, 1 Taunt. 183.

ducted thereon the value of the good-will and the loss of profits resulting, if ascertainable with a reasonable degree of certainty, may be considered in estimating the rental value of the premises.⁵⁹ Where the trespass resulted in ousting a tenant of his possession of part of a farm, no injury being done to his crop, the diminution of rental value was measured by the injury done to the entire farm. "The loss of a single field, by disarranging the operations of a farm as a whole, may cause an injury much greater than the rental value of the acres taken. The real loss is the value of the use of the part taken in connection with that which remains, and it is measured by the difference in rental value. This measure is reasonably free of uncertainty, it is easy of ascertainment and of general application."⁶⁰ If the tenancy is on shares the value of the crop recoverable by the tenant is limited to his share thereof.⁶¹

Where it appears that the plaintiff entered as tenant he must prove his lease in order to recover more than nominal damages for other than past injury to his possession.⁶² Where the defendant, sued for pulling down a wall on the premises, received a lease five days after the trespass the plaintiff was only allowed nominal damages, it appearing that he entered under the same lessor and did not think proper to show his lease.⁶³ Under a statute making an unrecorded lease void a lessee in possession may prove his right if the lease is recorded before the trial is finished, or perhaps before judgment if there was no intervening title of record.⁶⁴

A plaintiff in possession under color of title to the fee can

⁵⁹ *Bass v. West*, 110 Ga. 698; *Daniel v. Perkins L. Co.*, *supra*.

⁶⁰ *Irwin v. Nolde*, 176 Pa. 594.

In *Daniel v. Perkins L. Co.*, 9 Ga. App. 842, it is said the value of the crop the tenant might have grown on the part of the land the use of which was lost is not ordinarily the measure of damages. Its value can best be ascertained by taking the value of the whole tenancy at the date of the trespass and then de-

termining how much that value has been lessened by the whole trespass, or the rental value of that part may be shown.

⁶¹ *Teller v. Bay & R. D. Co.*, 151 Cal. 209, 12 L.R.A.(N.S.) 267.

⁶² *Gilbert v. Kennedy*, 22 Mich. 117; *Bass v. West*, 110 Ga. 698, 705, citing the text.

⁶³ *Twyman v. Knowles*, 13 C. B. 222.

⁶⁴ *Anthony v. New York, etc. R. Co.*, 162 Mass. 60.

recover against a stranger as owner. If the defendant be a mere intruder he cannot set up title in a third person, either to affect the cause of action or in mitigation.⁶⁵ One in possession under a contract of purchase and entitled to a conveyance is virtually the owner; ⁶⁶ and though the whole purchase-money has not been paid, may recover all the damages done by a trespasser.⁶⁷ A licensee of mine ores has no interest or estate in the soil or mine containing them, nor in the mineral so long as they remain in place. In an action against a trespassing stranger who has dug ore from the land covered by the plaintiff's license the latter cannot recover the value thereof, though he might recover damages if the trespasser so diminished the supply of ore that enough did not remain to satisfy his right.⁶⁸ One who has contracted to buy timber land for a given sum for the land and for the timber per measure as it should be scaled after cutting and removal and has paid for the land only may, after suit by his grantor for the trespass and conversion of the timber, recover only the payment made, with interest, and the difference between the price he was to pay for the timber and its value as standing timber when it was cut.⁶⁹ Nominal damages will compensate a lessee of mining land for the removal of ore which he could not have extracted during the life of his lease.⁷⁰

§ 1013. **Damages where suit by executor, etc.** An executor may sue for a trespass committed on his testator's lands during the latter's life-time; and where such lands are devised to him in trust for defined purposes he may sue for a trespass committed on them after the testator's death. Both causes of action may be united.⁷¹ A personal representative who has not

⁶⁵ Reed v. Price, 30 Mo. 442-447; Illinois, etc. R. Co. v. Cobb, 94 Ill. 55; First Parish of S. v. Smith, 14 Pick. 297; Ganter v. Atkinson, 35 Wis. 48; Todd v. Jackson, 26 N. J. L. 525; Hebert v. Lege, 29 La. Ann. 511.

⁶⁶ Honsee v. Hammond, 39 Barb. 89.

⁶⁷ Hueston v. Mississippi & R. R. B. Co., 76 Minn. 251.

⁶⁸ Arnold v. Bennett, 92 Mo. App. 156; Baker v. Hart, 123 N. Y. 470, 12 L.R.A. 60.

⁶⁹ Conn v. Rice, 122 C. C. A. 417, 204 Fed. 181.

⁷⁰ Chappel v. Foster, 87 Kan. 203.

⁷¹ Pittsburgh, etc. R. Co. v. Swinney, 97 Ind. 586.

asserted his statutory right to the possession of the decedent's realty cannot maintain an action for injuries thereto committed *post mortem decedentis*; his right to do so is limited to the property in his control or possession. But if he has asserted his rights by taking possession his possession relates back to the decedent's death, although the wrong complained of was committed intermediate these events and before administration was granted. If the land is vacant bringing an action for the trespass is equivalent to taking possession.⁷² In such a case the personal representative may recover the full amount of damage done the premises, regardless of the amount of claims against the estate or any rights the defendant may have acquired through the decedent's heirs.⁷³ In a suit brought by the heirs it is proper to make their father, the owner of a life estate in a portion of the injured property, a party. If they are minors and he alleges ownership in them he thereby estops himself from afterwards recovering for the injury done to his interest, and damages may be recovered for the injury done to the whole estate.⁷⁴ One who has conveyed land to a trustee cannot, on the annulment of his conveyance subsequent to the committal of a trespass on the premises, recover damages on the theory that the cancellation operated retrospectively to restore his rights as owner.⁷⁵

§ 1014. **Damages measured by benefit received.** The damages will be such as result from the injury the plaintiff has suffered. If the defendant derives a benefit from the tortious use of the plaintiff's premises the latter will be entitled to damages measured thereby.⁷⁶ Where the defendant tortipously used a

⁷² *Noon v. Finnegan*, 29 Minn. 418.

⁷³ Same Case, 32 Minn. 81.

⁷⁴ *Ft. Worth, etc. R. Co. v. Pearce*, 75 Tex. 281.

On the death of the owner of land after a referee has made a report in his favor, on the substitution of the administrator as plaintiff, the damages recoverable cannot exceed those sustained before the ac-

tion was begun. *Mitchell v. White Plains*, 91 Hun 189.

⁷⁵ *Salisbury v. Western, etc. R. Co.*, 98 N. C. 465.

⁷⁶ *United States v. Bernard*, 202 Fed. 728; *Bunke v. New York Tel. Co.*, 110 App. Div. (N. Y.) 241, affirmed, no opinion, 188 N. Y. 600; *Merriwether v. Bell*, 139 Ky. 402; *Mueller v. St. Louis, etc. R. Co.*, 31 Mo. 262; *Texas, etc. R. Co. v.*

canal the court said trespass could be brought for entering and breaking the plaintiff's close, and he could allege and prove the use of the canal as special damages.⁷⁷ He will be entitled to recover the value of the use.⁷⁸ In a decision in England it appeared that the defendant had trespassed on the plaintiff's land by tipping spoil thereon from his colliery. It was contended for the former that his liability was measured by what the plaintiff had lost—the diminution in the value of the land. The court was of a contrary opinion and ruled that the amount of damages was not to be assessed by ascertaining merely the diminution in value of the land, but that the principal of what it designated as the way-leave cases⁷⁹ applied: namely, that if one person without leave of another uses the other's land for his own purposes, he ought to pay for such user; and that therefore, as to so much of the land as was covered with spoil, the value of the land for the purpose for which it was used ought to be taken into account, and that as to the rest of the land the measure of damages was the diminution of the value thereof to the plaintiff.⁸⁰ Where land was let, but the right to the

White, 25 Tex. Civ. App. 278; Curtis v. Baugh, 79 Ill. 242; Bunke v. New York Tel. Co., 110 App. Div. (N. Y.) 241, 46 N. Y. Misc. 97; Haskins v. Andrews, 12 Wyo. 458; McIsaac v. Inverness R. Co., 40 Nova Scotia, 579 (trespass was wilful and consisted of removing gravel for which there was no market value when the original entry was made; defendant thereafter created such value). See § 1022.

In Maryland the benefit derived from the use of land does not measure the damage; the fair rental value is the rule. Jacob Tome Inst. v. Crothers, 87 Md. 569; Baltimore & O. R. Co. v. Boyd, 67 Md. 32.

⁷⁷ Ward v. Warner, 8 Mich. 508-525.

⁷⁸ Gergens v. McCollum, 27 Okla. 155; McWilliams v. Morgan, 75 Ill. 473; Weaver v. Mississippi & R. R. B. Co., 28 Minn. 534; Houston, etc. R. Co. v. Adams, 63 Tex. 200; Baltimore & O. R. Co. v. Boyd, 67 Md. 32, 1 Am. St. 362. The text is quoted in De Camp v. Bullard, 159 N. Y. 450.

⁷⁹ Martin v. Porter, 5 M. & W. 351; Jegon v. Vivian, L. R. 6 Ch. 742; Phillips v. Homfray, L. R. 6 Ch. 770. The second case cited has been approved of by the House of Lords in Livingstone v. Raywards C. Co., 5 App. Cas. 25. See Cleveland, etc. R. Co. v. Patton, 203 Ill. 376.

⁸⁰ Whitwham v. Westminster Brymbo C. & C. Co., [1896] 2 Ch. 538, affirming [1896] 1 Ch. 894; Lord v. Maine Cent. R. Co., 105 Me.

minerals remained in the landlord, who, however, could not get them without the tenant's consent, but who had, nevertheless, got them without it, it was held that as the tenant had an absolute veto it was equal in value to that of the minerals, less so much money as would induce a third person to get them; in other words, the measure of damages against the landlord would be the net returns from the sales, less such a sum by way of profit as would induce a third person to undertake the enterprise.⁸¹ The general rule which governs the court of claims in passing upon claims against the government for war damages is that the amounts allowed are limited to the extent of the benefit which the government received by the taking, not for the injury which the owner suffered.⁸² The right to recover on the basis of the benefit received is not dependent upon the receipt by the plaintiff of any income from the land.⁸³

§ 1015. **Damages for destruction of property.** All the facts and circumstances constituting or proximately connected with the trespass and tending to show its character and immediate consequences may be proved, both to show the amount necessary to a just compensation for the injury and the motive of the defendant, to enable the jury to determine whether the wrong is such that punitive damages should be given, and, if so, to what extent.⁸⁴ In the absence of facts warranting such damages the principle of compensation governs,⁸⁵ and to ascertain the amount the mode of proof must be adapted to the facts of each case. If the wrong consists in destroying some improvement on the property, not essential to its enjoyment and not appreciably affecting its value as a whole, or any special interest of the plaintiff therein, the damages may be estimated on the value of the thing destroyed or removed.⁸⁶ Thus, the removal

255; *Lancaster & J. E. L. Co. v. Jones*, 75 N. H. 172, citing the text.

⁸¹ *Attorney-General v. Tomline*, 5 Ch. Div. 750; *Mayne on Dam.* 387.

⁸² *Presbyterian Church v. United States*, 33 Ct. of Cls. 339.

⁸³ *Lancaster, etc. Co. v. Jones*, *supra*.

⁸⁴ *Day v. Holland*, 15 Ore. 464;

St. John's G. Co. v. San Juan, 1 Porto Rico Fed. 160.

⁸⁵ *McCormack v. Showalter*, 11 Ind. App. 98.

⁸⁶ *Kaw F. & C. Co. v. Atchison, etc. R. Co.*, 129 Mo. App. 498; *Chicago & N. W. R. Co. v. Kendall*, 108 C. C. A. 251, 186 Fed. 139; *Norfolk & W. R. Co. v. Thomas*, 110

by the village authorities of a sidewalk which had been laid by the village at its own expense in front of the plaintiff's lot and used there for two years, and kept in repair by the plaintiff, was a trespass, for which he was entitled to recover to the extent of his loss, but not in excess of the value of the structure.⁸⁷ But where the trespass suspends or impairs the enjoyment of the premises compensation may be given on the basis of the rental value in the absence of any ground for special damages,⁸⁸ or in addition to such damages; and if the premises are put out of repair the cost of repair will be an additional item, including interest on the amount paid. Where the trespass was the removal of a fence it was held that the plaintiff was entitled to recover such sum as would, properly expended, restore the premises to the condition they were in before the interference of the defendant.⁸⁹ Where the gas fixtures in a hall used for theatrical purposes were removed and the furniture damaged the tenant was were removed and the furniture damaged the tenant was entitled to the same measure of compensation, and also to damages for consequential injuries, such as his inability to use the hall for entertainments already arranged for.⁹⁰ One who destroys a private irrigating ditch is liable for the difference

Va. 622; *Carter v. Maryland & P. R. Co.*, 112 Md. 599.

The plaintiff's financial inability to remove the property destroyed is immaterial. *Balbas v. Rogers*, 4 Porto Rico Fed. 82.

⁸⁷ *Rogers v. Randall*, 29 Mich. 41; *Kent County A. Soc. v. Ide*, 128 Mich. 423. See *Clark v. St. Clair*, etc. I. Co., 24 Mich. 508.

⁸⁸ *Oklahoma City v. Hill*, 6 Okla. 114, citing the text; *Marks v. Culmer*, 6 Utah 419.

It is not necessary to the recovery of such value that the party entitled thereto should have recovered possession; nor is the recovery limited to the time the action was brought, but may extend to the time of the verdict, notwithstanding

a statute provides that the detriment caused by the wrongful occupation of real property is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages. *Oklahoma City v. Hill*, 6 Okla. 114.

⁸⁹ *Boise Valley C. Co. v. Kroeger*, *infra*, *Wiggins v. St. Louis*, etc. R. Co., 119 Mo. App. 492; *Marvin v. Pardee*, 64 Barb. 353; *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556; *Gwaltney v. Scottish Carolina T. Co.*, 115 N. C. 579, quoting the text; *Galveston*, etc. R. Co. v. *Chittim*, 31 Tex. Civ. App. 40.

⁹⁰ *Willis v. Branch*, 94 N. C. 142.

in the value of the land belonging to the owner without the ditch and with it.⁹¹ That measure of liability has been approved where a house was destroyed,⁹² and where one was sawed into two parts.⁹³ Where a house was partially burned and the owner of it had title to the land on which it stood, the cost of repairing was rejected as the measure of damages, and the difference in value of the whole premises before and after the fire, with interest thereon, was adopted as the proper measure of relief.⁹⁴ It is no doubt a rule of general application that if the destruction of or injury to property injuriously affects other property of the plaintiff he may recover for both elements of damage.⁹⁵

⁹¹ *Denver, etc. R. Co. v. Dotson*, 20 Colo. 304; *Boise Valley C. Co. v. Kroeger*, 17 Idaho 384.

⁹² *Jeffress v. Norfolk-S. R. Co.*, 158 N. C. 215; *Wetzel v. Satterwhite*, — Tex. Civ. App. —, 125 S. W. 93.

⁹³ *Bollinger v. McMinn*, 47 Tex. Civ. App. 89.

Where the plaintiff owned the land and the buildings destroyed, and these, apart from the land, were valueless as buildings, the value of the property as a whole before and after the loss, measured the damages. *C. C., C. & St. L. R. Co. v. McKelvey*, 12 Ohio C. C. 426.

⁹⁴ *Pacific Exp. Co. v. Lasker R. E. Assn*, 81 Tex. 81. As to the rejected rule it was said: If the house was old it would be difficult to apply this measure, for in addition to the deterioration in value of the materials in such a case there would necessarily be much dilapidation in the structure itself, and it would be impracticable in the nature of things to reconstruct in the same form and dimensions without betterment, both in material and structure, and the cost of this would fall on the defendant. Δ

business house, residence, or house adapted to any other purpose when erected in a given locality may then have a value by reason of the adaptation of the place where it is built to the use for which it is intended which it ceases to have in after time by the change of business, residence or other centers whereby at the later period the property could not be sold with the land on which it stands for one-fourth of what it would cost to reconstruct it if destroyed. In such a case to give to the owner of a house what it would cost to rebuild it if partially or entirely destroyed would be to give him more than just compensation.

⁹⁵ *Frostburg v. Hitchins*, 99 Md. 617; *Wetzel v. Satterwhite* (Tex. Civ. App.), 125 S. W. 93; *Badu v. Same* (Tex. Civ. App.), 125 S. W. 929; *Monson & B. Mfg. Co. v. Fuller*, 15 Pick. 554; *Duncan v. Nassau E. R. Co.*, 127 App. Div. (N.Y.) 252.

The liability of the owner of land who has licensed the erection of a flume thereon for its destruction is not confined to its value or the cost of replacing it, the destruction being for the purpose of revoking the license, and the effect

Where the unfinished house of the plaintiff, being built under contract, was injured and its completion delayed by the defendant's tortious act the plaintiff was not only entitled to recover for the injury to the building, but also its rental value during the delay thus occasioned. The court said: "There was no valid objection to recovery by the plaintiff for the injuries to the dwelling-house. It was part of the realty and the property of the plaintiff. The fact that it was built by contract and was not completed did not detract from his right to the house as it was, or to recover for its destruction. A recovery by him would bar an action by the contractors, even if it be conceded they would have a remedy against the defendant. * * *

But no legal objection exists to a recovery by the plaintiff for that which was clearly his, although he might have an action against a third person, who in turn would have a remedy over against the city."⁹⁶ If the thing destroyed, although it is part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows the recovery may be of the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction.⁹⁷ By value, in such a case, is meant the actual, not the market, value.⁹⁸ The real

being to render a ditch of the licensee valueless; liability extended to the damage done to the flume and the ditch. *Jones v. Bondurant*, 21 Colo. App. 24.

⁹⁶ *Nims v. Troy*, 59 N. Y. 508.

⁹⁷ *Pittsburgh, etc. R. Co. v. Indiana H. Co.*, 154 Ind. 322; *Cincinnati, etc. R. Co. v. Falconer*, 30 Ky. L. Rep. 152 (cost of restoring building regardless of existence of a demand for it at the place it was located); *Matthews v. Missouri Pac. R. Co.*, 142 Mo. 645; *White v. Chicago, etc. R. Co.*, 1 S. D. 326, 9 L.R.A. 824; *Missouri, etc. R. Co. v. Murray (Tex. Civ. App.)*, 150 S. W. 217; *Koonz v. Hempy*, 142 Iowa 337, citing the text; *Jones v. Sani-*

tary Dist., 252 Ill. 591, quoting the text; *Chicago & N. R. Co. v. Kendall*, 186 Fed. 139, 108 C. C. A. 251; *Southern Oil Works v. Bickford*, 14 Lea, 651; *Houston, etc. R. Co. v. Adams*, 63 Tex. 200; *Marks v. Culmer*, 6 Utah 419; *Whitbeck v. New York, etc. R. Co.*, 36 Barb. 647; *Clark v. St. Clair, etc. I. Co.*, 24 Mich. 508; *McMahon v. Dubuque*, 107 Iowa 62, 5 Am. Neg. Rep. 147, 70 Am. St. 143, quoting the text; *Anderson v. Miller*, 96 Tenn. 35, 54 Am. St. 812, 31 L.R.A. 604; *Galveston, etc. R. Co. v. Chittim*, 31 Tex. Civ. App. 40, quoting the text.

⁹⁸ *Kilgore v. Lyle*, 30 Okla. 596, quoting the text; *McMahon v. Dubuque, supra*; *Wall v. Platt*, 169

value of a building is to be ascertained by taking into account the original cost and the cost of replacing it, and making allowance for depreciation from use, age, and other like causes, as the condition in which it was required.⁹⁹ The right to compensation is not affected by evidence showing that if the property injured were put to other uses the damages would be thereby lessened. The use made of it when the injury was done is the basis for estimating the damages.¹ One who destroyed the sluiceway to a mill was held liable for the value of it and the consequential damages of the plaintiff for having his mill stopped.² In an action to recover for damages to a dam and fishtrap evidence of the annual output of the fishery is admissible to show the extent of the injury.³ If for the purpose of staying a conflagration a building has been blown up without right the jury in estimating the damages should consider the circumstances under which it and its contents were situated and their chance of being saved, even though they were not actually on fire; and should determine their value with reference to the peril to which they were exposed.⁴

Where a building injured by the removal of its lateral support was constructed with defective materials, upon an insufficient foundation, thereby increasing its liability to fall, the facts were material in fixing the damages, but did not bar the action.⁵ The right of the owner of property to recover on the basis of its value at the time it was destroyed is not affected by the fact that it was put to a wrongful use, not being a nuisance in and of itself.⁶ The destruction of a building because it was within the fire limits involves liability only for unnecessary damage to the

Mass. 398; *Pascal v. Chicago, etc. R. Co.* (Iowa), 139 N. W. 279 (value of manure on farm for which there was no local market).

⁹⁹ *Hearn v. McDonald*, 69 W. Va. 435, citing the text; *Close v. Ann Arbor R. Co.*, 169 Mich. 392; *Matthews v. R. Co.*, *supra*; *Wall v. Platt*, *supra*.

¹ *Bissell v. Ford*, 176 Mich. 64.

² *Hammat v. Russ*, 16 Me. 171;

Hueston v. Mississippi & R. R. B. Co., 76 Minn. 251.

³ *Gwaltney v. Scottish Carolina T. Co.*, 115 N. C. 579.

⁴ *Parsons v. Pettingill*, 11 Allen 507.

⁵ *Stevenson v. Wallace*, 27 Gratt. 77.

⁶ *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711.

material of which it was composed and to the contents.⁷ A person who sues in behalf of an insurer may recover only the sum paid on account of the loss.⁸ Where part of a building, the removal of which from the land of another had been begun was burned its value was to be fixed with reference to its removal; the price paid for it did not necessarily measure that value, nor did the value of the materials of which it was composed.⁹ The actual value of a house which stood on the land of another, not its value to the plaintiff, is the measure of his recovery; he may not show that its location was a good one for conducting a business.¹⁰ In determining, under the Indian indemnity acts, the value of improvements put upon public lands and destroyed by Indians account will be taken of the fact that the materials used in making the improvements were taken from such lands and that the improvements represented only the claimant's labor.¹¹

§ 1016. **Occupation of land by railroads.** A railroad company which unauthorizedly lays its track upon land is liable, in the absence of all claim for other damages, for the difference between the annual rental value of the premises with the track down and the road operated as it is and what the rental value would have been if the road had not been there.¹² In estimating the rental value the entire premises of the plaintiff must be considered. He cannot show the rental value of the land occupied by the defendant in a street as disconnected from the land not in the street.¹³ The owner of the fee in a street on which a

⁷ *Wheeler v. Aberdeen*, 45 Wash. 63.

⁸ *Cumberland Tel. & T. Co. v. Doo-ley*, 110 Tenn. 104.

⁹ *Tighe v. Atchison, etc. R. Co.* (Mo. App.) 107 S. W. 1034.

¹⁰ *Sinclair v. Stanley*, 64 Tex. 67.

¹¹ *Osborn v. United States*, 33 Ct. of Cls. 304.

¹² *Jarrett L. Corp. v. Christopher*, 65 Fla. 379; *Pine Bluff & W. R. Co. v. Kelly*, 78 Ark. 83; *Blesch v. Chicago, etc. R. Co.*, 43 Wis. 183, 48 id. 168; *Brakken v. Minneapolis,*

etc. R. Co., 20 Minn. 41, 31 Minn. 45; *Carli v. Union Depot, etc. Co.*, 32 Minn. 101; *Larsen v. Oregon R. & N. Co.*, 19 Ore. 240; *Rumsey v. New York, etc. R. Co.*, 133 N. Y. 79, 28 Am. St. 600, 15 L.R.A. 618.

¹³ *Kenyon v. New York Cent., etc. R. Co.*, 29 App. Div. (N. Y.) 80; *Leigh v. Graysburg Mfg. Co.*, 132 N. C. 167.

In fixing the rental value of property which had but a nominal value when vacant equity will give it the value which it acquires by occupa-

railroad track is laid without compliance with the statute may recover for depreciation of the market, rental or usable value of the abutting property, and for annoyances to his business or to his family.¹⁴ In Pennsylvania the latter considerations are ignored and the damages limited to the depreciation in value of the abutting property.¹⁵ The damages cannot be increased because property on land adjacent to land so occupied has been exposed to extra hazard from fire.¹⁶ There cannot be a recovery for an anticipated loss of rental value.¹⁷ If consequential damage has been sustained as the result of the trespass compensation therefor is recoverable.¹⁸ If the occupation of a street for a temporary purpose is lawful the recoverable damages may thereby be lessened; but that fact does not affect liability for the diminished rental value of the abutting premises. That is to be ascertained by the reasonably necessary loss to the plaintiff, resulting either from lessened profits or additional labor and expense prudently incurred to ward off other loss. Besides such losses the plaintiff may recover for injuries to his property in so far as the defendant could have prevented them by reasonable conduct.¹⁹ If a mill-race is so obstructed as to destroy the use of the mill the damages are measured by the difference between the value of the mill site and machinery before and after the obstruc-

tion and fix it at such sum as live properties should produce; it will also take account of the varying value of the property in fixing its rental value for a series of years. *Porter v. International B. Co.* (Misc.), 137 N. Y. Supp. 214.

¹⁴ *Thompson v. Citizens' T. Co.*, 181 Pa. 131 (except as to annoyances); *Florida Southern R. Co. v. Brown*, 23 Fla. 104; *Jacksonville, etc. R. Co. v. Lockwood*, 33 Fla. 573; *Vincent v. New York, etc. R. Co.*, 77 Conn. 431; *Duncan v. Nassau E. R. Co.*, 127 App. Div. (N. Y.) 252.

¹⁵ *Becker v. Lebanon & M. St. R. Co.*, 30 Pa. Super. Ct. 546.

¹⁶ *Fore v. Western, etc. R. Co.*, 101 N. C. 526. See § 1066.

¹⁷ *Duncan v. Nassau E. R. Co.*, *supra*.

¹⁸ *Southern R. Co. v. McEntire*, 169 Ala. 42 (interference with access to river); *Gulf, etc. R. Co. v. Richards*, 11 Tex. Civ. App. 95 (ruling in favor of the admissibility of evidence showing that stagnant water formed near the plaintiff's residence and caused sickness in his family).

Inconvenience in the use of adjoining premises is an element of damage except in so far as it resulted from such acts as an adjoining proprietor might have lawfully done. *McKeon v. New York, etc. R. Co.*, 75 Conn. 343, 61 L.R.A. 730.

¹⁹ *Vincent v. New York, etc. R. Co.*, 77 Conn. 431.

tion was made.²⁰ In Mississippi the increased value of adjacent lands resulting from the construction of a railroad cannot affect the amount recoverable for the trespass.²¹ The same rule was applied in North Carolina in a case which holds that the damages resulting from the negligent construction of a railroad are ascertainable by the difference in the value of the plaintiff's land with the road constructed as it was and what would have been its value had it been properly constructed.²²

In some states the statutory rule for awarding damages in condemnation proceedings is applied in actions to recover compensation for unlawful entry, if neither special nor vindictive damages are claimed. The recovery is fixed by the value of the land appropriated on the day it was taken, to be increased or diminished as the value of the part not taken has been affected by the appropriation.²³ No separate account should be taken of the value of trees cut; their worth should be assessed with the land.²⁴ In Kentucky there may be a recovery for the value of the land taken, for the depreciation in the value of that not taken and for the forcible entry or trespass.²⁵ In Connecticut if both parties treat the appropriation of a strip of land adjoining a street as a permanent and final taking of it for street uses its value may be recovered without any deduction for benefits resulting to the owner.²⁶ In some cases the damages are measurable by the difference in the value of the plaintiff's property immediately before it became generally known that the road was

²⁰ Hot Springs R. Co. v. Tyler, 36 Ark. 205.

²¹ Natchez, etc. R. Co. v. Currie, 62 Miss. 506.

²² Carson v. Railroad, 128 N. C. 95.

²³ Brand v. Union E. R. Co., 169 Ill. App. 449; Keil v. Grays Harbor, etc. R. Co., 71 Wash. 163; Southern R. Co. v. McEntire, 169 Ala. 42; Beasley v. Aberdeen & R. R. Co., 147 N. C. 362; Wade v. Carolina Tel. & T. Co., 147 N. C. 219; Texas, etc. R. Co. v. Matthews, 60

Tex. 215; Jones v. New Orleans & S. R. Co., 70 Ala. 227; Cowan v. Southern R. Co., 118 Ala. 354; Memphis, etc. R. Co. v. Organ, 67 Ark. 84; Chicago, etc. R. Co. v. O'Neill, 58 Neb. 239; Florida S. R. Co. v. Parsons, 33 Fla. 631.

²⁴ Texas, etc. R. Co. v. Matthews, 60 Tex. 215.

²⁵ Pollock v. Maysville, etc. R. Co., 103 Ky. 84; Pine Bluff & W. R. Co. v. Kelly, 78 Ark. 83.

²⁶ Pinney v. Winsted, 83 Conn. 411.

to be built thereon and its value immediately after it was built.²⁷ The damages to property abutting on a street which is unauthor- izedly occupied by a railroad company are the difference in its market value with and without the road, regardless of the fact that property along the line of the railroad has increased in value because of its construction.²⁸ The successor of a railroad company which unauthor- izedly took land part of which was washed away before it came into possession of the successor is liable for the value of only so much as it received.²⁹ Where the value of the land is a material inquiry the difference therein is to be ascertained as of the time the defendant took possession though the road was previously laid.³⁰ The recovery by one who acquires title to the land after the road is laid must be limited to the value of the land taken; incidental damage done to it by the taking is not involved.³¹ Where the trespasser has instituted condemnation proceedings the damages for the trespass should not include such elements as will be made the basis of the award therein, but should be limited to the loss resulting from the invasion of the right of possession.³²

The damages resulting from the destruction of a pass-way from one part of a farm to another part are not always confined to such as result to the value of the part made inaccessible to the owner. Where such a way was obstructed by debris the court instructed that the cost of the removal of the debris, if it did not exceed the value of the land, was the measure of damages; if it exceeded such cost and the land was destroyed, then its value would be recoverable, and that if any part of the pass-

²⁷ *Jeffersonville, etc. R. Co. v. Esterle*, 13 Bush 667; *Maysville & B. S. R. Co. v. Connor*, 16 Ky. L. Rep. 635.

²⁸ *Highland Ave. & B. R. Co. v. Matthews*, 99 Ala. 24, 34 Cent. L. J. 267, 14 L.R.A. 462.

²⁹ *Memphis, etc. R. Co. v. Organ*, 67 Ark. 84.

The grantor's liability is not affected by a transfer of the property except in so far as its grantee may

be liable to the owner for putting the property to the intended uses. *Keil v. R. Co.*, 71 Wash. 163.

³⁰ *Buck v. Louisville & N. R. Co.*, 159 Ala. 305.

³¹ *Whitecotton v. St. Louis & H. R. Co.*, 104 Mo. App. 65; *Livermon v. Roanoke, etc. R. Co.*, 109 N. C. 52.

³² *Great Northern R. Co. v. McCord*, 143 Wis. 589.

way was necessary to reach adjoining lands of the owner the cost of opening such way over his land could be considered, or the cost of constructing a different way, if practicable and less expensive.³³ A trespassing railway company cannot lessen its liability for the depreciation in the market value of the property by proof that the ties and rails placed upon it became part of the realty and the property of the plaintiff.³⁴ If a single trespass is committed upon two contiguous lots owned by the plaintiff the damages to both may be assessed together, although they have not been so used as to be considered as one tract within the rule which governs in condemnation proceedings.³⁵ The rental or usable value of the property is to be determined with reference to the purpose it was used for before the wrong was done; not what such value would have been if the land had been devoted to some other use or if the improvements upon it were different.³⁶ In an action to restrain the operation in a street of an elevated railroad and to recover damages because of its operation the loss of the easements of light, air and access are to be considered, and in estimating past damages the question of noise may be an element in the award. The damages and the compensation are to be measured by the balance of injury over benefits, and in ascertaining them the advantages and the disadvantages are to be considered, and the benefits, whether general or special, from the construction and operation of the road, which tend to counterbalance the disadvantages, are to be taken into account.³⁷ In an action on the case against a street railroad company to recover damages for the unlawful occupation of a street there cannot be a recovery of the costs and attorney's fees and for time used in and about a previous chancery suit involving the company's right to occupy the street. Such costs were related to that suit, and such of them as the law allows were presumably taxed

³³ *Bigham v. Pittsburg C. Co.*, 29 Pa. Super Ct. 86; *Norfolk & W. R. Co. v. Carter*, 91 Va. 587.

³⁴ *Schroeder v. De Graff*, 28 Minn. 299.

³⁵ *Lamm v. Chicago, etc. R. Co.*, 45 Minn. 71, 18 L.R.A. 670.

Suth. Dam. Vol. IV.—7.

³⁶ *Rumsey v. New York, etc. R. Co.*, 133 N. Y. 79, 28 Am. St. 600, 15 L.R.A. 618. The same rule is applied in actions to recover for a nuisance. See § 1047.

³⁷ *Bischoff v. New York E. R. Co.*, 138 N. Y. 257.

therein. It was also improper to receive testimony to the effect that drays and teams could not stand at right angles with the sidewalk in front of the plaintiff's lot, because he has no inalienable right to have them so stand if public travel would thereby be interfered with.³⁸ In Iowa one who purchases land with a railroad upon it may recover attorney's fees, but not interest anterior to the date of his title.³⁹ In a proceeding by the public to recover for the destruction of a highway the inconvenience or injury sustained by individuals is not involved; the cost of restoring the highway to its former condition is the measure of damages.⁴⁰ A person who acquires title to land with a railroad track upon it may not recover the expense which it may be necessary to incur to protect his animals from injury because of the operation of trains thereon. The question was ruled independently of the time title was acquired, and disposed of as though the protection of the animals was from an imaginary or possible result of the trespass, a conclusion, it is believed, which is altogether untenable in view of the prevalence of statutes requiring railroad companies to fence their tracks.⁴¹ The same case announces as a general rule that in an action of trespass the plaintiff may not recover the value of the land, thereby making the trespasser an involuntary purchaser.⁴² In this connection a Canadian case may be noted. The defendant was in possession of a strip of the plaintiff's land upon which a sidewalk was made. Suit was brought to recover the value of the land and was dismissed by the trial court, which action was affirmed by the intermediate courts on the ground that the plaintiff had mistaken the form of his action. The supreme court ended the controversy by directing that the land be restored to the plaintiff in the state it was before the sidewalk was made.⁴³

There is a marked diversity of opinion concerning the nature

³⁸ *Taylor v. Bay City St. R. Co.*, 101 Mich. 140, citing, to the last proposition, *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194, 9 Am. Rep. 461.

³⁹ *Clark v. Wabash R. Co.*, 132 Iowa 11.

⁴⁰ *Big Sandy R. Co. v. Boyd County*, 125 Ky. 345.

⁴¹ *Allen v. Macon, etc. R. Co.*, 107 Ga. 838.

⁴² *Id.*

⁴³ *Burland v. Montreal*, 33 Can. Sup. Ct. 373.

of the trespass by railroads occupying land. Some courts hold that the wrong is a continuing one and that successive actions may be brought in which prospective damages cannot be recovered. This is the rule in Wisconsin,⁴⁴ Minnesota,⁴⁵ New York,⁴⁶ Pennsylvania,⁴⁷ Georgia,⁴⁸ Tennessee,⁴⁹ and Connecticut.⁵⁰ In Iowa,⁵¹ Illinois,⁵² Kentucky,⁵³ Massachusetts,⁵⁴ Kansas,⁵⁵ Indiana,⁵⁶ Texas,⁵⁷ New Hampshire,⁵⁸ Alabama,⁵⁹ Flor-

⁴⁴ *Carl v. Sheboygan, etc. R. Co.*, 46 Wis. 625.

⁴⁵ *Brakken v. Minneapolis, etc. R. Co.*, 29 Minn. 41; *Adams v. Hastings, etc. R. Co.*, 18 Minn. 260; *Lamm v. Chicago, etc. R. Co.*, *supra*.

In *Hueston v. Mississippi & R. R. B. Co.*, 76 Minn. 251, works maintained in a river caused a log jam in April and again in July, which resulted in overflowing the lands of the plaintiff. *Held*, in the nature of a continuing trespass by the same act and that all the damages sustained were recoverable in the same action.

⁴⁶ *Uline v. New York, etc. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661; *Kenyon v. New York Cent., etc. R. Co.*, 29 App. Div. (N. Y.) 80; *Tallman v. Metropolitan E. R. Co.*, 121 N. Y. 119, 8 L.R.A. 173; *Mott v. Lewis*, 52 App. Div. (N. Y.) 558.

⁴⁷ *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42. See *O'Brien v. P. S. V. R. Co.*, 119 Pa. 184; *Hankey v. Philadelphia Co.*, 5 Pa. Super. Ct. 148. *Contra*, where a street railroad is laid on a street without the abutting owner's consent. *Becker v. Lebanon & M. St. R. Co.*, 30 Pa. Super. Ct. 546.

⁴⁸ *Savannah, etc. R. Co. v. Bourquin*, 51 Ga. 378; *Allen v. Macon, etc. R. Co.*, 107 Ga. 838 (if the land is rendered permanently useless). Compare *Cobb v. Wrightsville & T. R. Co.*, 129 Ga. 377.

⁴⁹ *Harmon v. Railroad*, 87 Tenn. 614.

⁵⁰ *Knapp & C. Mfg. Co. v. New York, etc. R. Co.*, 76 Conn. 311, 100 Am. St. 994; *New Milford W. Co. v. Watson*, 75 Conn. 237.

⁵¹ *Stodghill v. Chicago, etc. R. Co.*, 53 Iowa 341.

⁵² *Chicago, etc. R. Co. v. Loeb*, 118 Ill. 203; *Doane v. Lake St. E. R. Co.*, 165 Ill. 510, 56 Am. St. 265, 35 L.R.A. 588.

⁵³ *Jeffersonville, etc. R. Co. v. Esterle*, 13 Bush 667.

⁵⁴ *Fowle v. New Haven & N. Co.*, 112 Mass. 334, 17 Am. Rep. 106.

⁵⁵ *Kansas R. Co. v. Milman*, 17 Kan. 224.

⁵⁶ *Indiana, etc. R. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 225; *Same v. Allen*, 113 Ind. 308, 3 Am. St. 650.

⁵⁷ *Rosenthal v. Taylor, etc. R. Co.*, 79 Tex. 325.

⁵⁸ *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177.

⁵⁹ *Highland Ave. & B. R. Co. v. Matthews*, 99 Ala. 24, 34 Cent. L. J. 158, 14 L.R.A. 462. See *Louisville & N. R. Co. v. Higginbotham*, 153 Ala. 334.

The opinion in the first case contains a discussion of the New York rule and the reasons upon which it is rested, and a satisfactory answer to the argument in favor of that rule.

ida,⁶⁰ Nebraska,⁶¹ the District of Columbia,⁶² and North Carolina,⁶³ successive actions will not lie. A trespasser possessed of the power of eminent domain may exercise it and obtain exemption from liability for future damage.⁶⁴ In Idaho the value of the land may be recovered as if the action was upon an implied contract.⁶⁵

§ 1017. **Damages for permanent wrong.** Wherever, by one act, a permanent injury is done the damages are assessed once for all,⁶⁶ even though separate parcels of land are affected,⁶⁷ and any depreciation in the value of the property will be an element of damages according to the extent and duration of the plaintiff's estate. An estimate of damages on this basis presupposes that the premises are subject to the same lasting detriment, and that it is not to be averted or removed by any expenditure; for otherwise the injury would be measured upon different elements.⁶⁸ Thus, where by the wrongful act of the defendant a bar of gravel was deposited upon the plaintiff's land by a flood and was so extensive that the cost of its removal would equal or exceed the value thereby restored to the premises, that expense was held not to measure the damages; but rather the depreciation in the

⁶⁰ *Jarrett L. Co. v. Christopher*, 65 Fla. 379; *Jacksonville, etc. R. Co. v. Lockwood*, 33 Fla. 573, disapproving *Savannah, etc. R. Co. v. Davis*, 25 Fla. 917.

⁶¹ *Chicago, etc. R. Co. v. O'Neill*, 58 Neb. 239.

⁶² *District of Columbia v. Hutchinson*, 1 App. Cas. D. C. 403.

⁶³ *Porter v. Aberdeen & R. R.*, 148 N. C. 563; *Beasley v. Same*, 147 N. C. 362.

⁶⁴ *Ingleside Mfg. Co. v. Charleston L. & W. Co.*, 76 S. C. 95.

⁶⁵ *Boise Valley C. Co. v. Kroeger*, 17 Idaho 384, 28 L.R.A.(N.S.) 968, and cases cited.

⁶⁶ *Cobb v. Wrightsville & T. R. Co.*, 129 Ga. 377; *Hart v. Wabash S. R. Co.*, 143 Ill. App. 503; *Suchr v. Sanitary Dist.*, 149 id. 328; *Barry v. Chicago, etc. R. Co.*, id. 626;

Harper v. Lenoir, 152 N. C. 723; *Linton v. Armstrong W. Co.*, 29 Pa. Super. Ct. 172; *McClelland v. Schwerd*, 32 id. 313; *Ziebarth v. Nye*, 42 Minn. 541; *Lamb v. Walker*, 3 Q. B. Div. 389. See *Mitchell v. Darley Main C. Co.*, 14 id. 125; *Darley Main C. Co. v. Mitchell*, 11 App. Cas. 127, and other cases considered in §§ 114-116; *Chicago & A. R. Co. v. Robbins*, 159 Ill. 598; *Redemptionists v. Wenig*, 79 Md. 348.

⁶⁷ *Beronio v. Southern Pac. R. Co.*, 86 Cal. 415, 21 Am. St. 57.

⁶⁸ *Worden v. Bielenberg*, 119 Minn. 330; *Miller v. Hanover & M. W. Co.*, 240 Pa. 393; *Doss v. Billington*, 98 Tenn. 375, quoting the text; *Welch v. Cleveland, etc. R. Co.*, 161 Ill. App. 185.

value of the land in consequence of the deposit remaining.⁶⁹ In ascertaining the lessened value of a lot it is not competent to consider separately the value of an uninjured house thereon.

⁶⁹ *Salstrom v. Orleans B. G. M. Co.*, 153 Cal. 551; *Mustang R., C. & L. Co. v. Hissman*, 49 Colo. 308, citing the text; *Faust v. Pope*, 132 Mo. App. 287; *Linton v. Armstrong W. Co.*, 29 Pa. Super. Ct. 172; *Truby v. American N. G. Co.*, 38 id. 166 (laying gas pipes); *Easterbrook v. Erie R. Co.*, 51 Barb. 94; *Chase v. New York, etc. R. Co.*, 24 id. 273; *Hanover W. Co. v. Ashland I. Co.*, 84 Pa. 279; *Jones v. Gooday*, 8 M. & W. 146; *Honsee v. Hammond*, 39 Barb. 89; *De Costa v. Massachusetts M. Co.*, 17 Cal. 613; *Holt v. Sargent*, 15 Gray 97; *Chicago, etc. R. Co. v. Willits*, 45 Kan. 110.

The rule as stated was recognized in *Koch v. Sackman-P. I. Co.*, 9 Wash. 405, as being applicable where the injured premises are considered as land only; but it was said that where the injury consists in large part of the loss of fences, walks, out-houses, trees and shrubbery upon city residence premises it is not always applicable because it may not afford compensation for the injury.

The principle has been applied where subterranean water has been pumped to such an extent as to permanently and injuriously affect land. *Reisert v. New York*, 35 N. Y. Misc. 413 (See *Forbell v. New York*, 164 N. Y. 522); where gullies were cut alongside of a roadway, *Gosdin v. Williams*, 151 Ala. 592; where land was permanently affected by the withdrawal of artificial water, *Fin. & F. Club v. Thomas* (Tex. Civ. App.), 138 S. W. 150; where turf and fences were

burned, excluding the value of the grass, *Trinity, etc. R. Co. v. Gregory* (Tex. Civ. App.), 142 S. W. 656; and where soil was thrown on land, *Baltimore, etc. R. Co. v. Quillen*, 34 Ind. App. 330.

The same measure of liability exists where damage has been caused by the burning of grass on land. *Gulf, etc. R. Co. v. Cusenberry*, 5 Tex. Civ. App. 114, and local cases cited; *Missouri, etc. R. Co. v. Goode*, 7 Tex. Civ. App. 245; *Chicago & E. R. Co. v. Smith*, 6 Ind. App. 262; *Atchison, etc. R. Co. v. Briggs*, 2 Kan. App. 154; *Terre Haute & L. R. Co. v. Walsh*, 11 Ind. App. 13; *Baltimore & O. R. Co. v. Countryman*, 16 Ind. App. 139; *Wiggins v. St. Louis, etc. R. Co.*, 129 Mo. App. 369; § 1023; *Ft. Scott, etc. R. Co. v. Tubbs*, 47 Kan. 630.

Where manure distributed on land was burned, it was competent to show the damages either by evidence of the benefits the land would have received from the manure or the value of the land before and after the manure was burned. *Missouri, etc. R. Co. v. McDowell*, 78 Kan. 686.

In New York there cannot be a recovery on the basis of the diminished value of the land on which dirt is piled because it cannot be assumed that the trespass will be permanent. *Mott v. Lewis*, 52 App. Div. (N. Y.) 558. The measure of damages there for filling vacant lots above grade is their rental value during the period of the continuation of the trespass. *Eno v. Christ*, 25 N. Y. Misc. 24.

The plaintiff cannot increase his recovery beyond the diminished value of the lot by proving the cost of removing the earth and building a retaining wall to prevent other earth not on his land from falling thereon.⁷⁰ So where the plaintiff's land is caused to fall away in consequence of the defendant's removing its lateral support, he is entitled to damages to the extent of the injuries sustained; this is not, however, the cost of restoring the lot to its former condition or of building a wall to support it, but it is the diminution in the value of the land in consequence of the defendant's act.⁷¹ It is a damage from loss of soil; and where by any tortious act such a loss occurs the owner is entitled to be compensated according to the value of the land or soil to him.⁷² If its removal reduces the value of the lot he is entitled to recover for such depreciation.⁷³ This measure of damages was applied

⁷⁰ *Nelson v. West Duluth*, 55 Minn. 497.

⁷¹ *Hopkins v. American P. S. Co.*, 194 Mass. 582; *Schmoe v. Cotton*, 167 Ind. 364, citing the text; *Collins v. Gleason C. Co.*, 140 Iowa 114, 18 L.R.A.(N.S.) 736; *Weaver v. Berwind-W. C. Co.*, 216 Pa. 195; *Rabe v. Shoenberger C. Co.*, 213 Pa. 252, 3 L.R.A.(N.S.) 782; *Orr v. Dayton & M. T. Co.*, 178 Ind. 40, 48 L.R.A.(N.S.) 474; *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Nicklin v. Williams*, 10 Ex. 259; *Moellering v. Evans*, 121 Ind. 195; *Kopp v. Northern Pac. R. Co.*, 41 Minn. 310.

The last case holds that evidence of the cost of retaining walls is proper to show whether or not the damage could have been repaired and the lot preserved at reasonable cost. See § 1053.

The cost of restoring the lot is relevant only to show that the injury was permanent in the legal sense. *McClelland v. Schward*, 32 Pa. Super. Ct. 313.

In *Orr v. Dayton Co.*, *supra*, one

of the judges expressed the opinion that where the cost of restoring support is less than the diminution in the value of the land such cost should measure the damages. Numerous cases are cited. See *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421.

⁷² *Brinkmeyer v. Betha*, 139 Ala. 376; *Boise Valley C. Co. v. Kroeger*, 17 Idaho 384, 28 L.R.A.(N.S.) 968; *Langhorne v. Turman*, 141 Ky. 809, 34 L.R.A.(N.S.) 211; *Jones v. Gooday*, 8 M. & W. 146; *Mueller v. St. Louis*, etc. R. Co., 31 Mo. 262.

⁷³ *Southern R. Co. v. Cleveland*, 169 Ala. 22; *Parrott v. Chicago*, etc. R. Co., 127 Iowa 419; *Nelson v. Mississippi*, etc. B. Co., 99 Minn. 484; *Matteson v. New York Cent.*, etc. R. Co., 40 Pa. Super. Ct. 234; *McIsaac v. Inverness R. Co.*, 40 Nova Scotia 579; *Karst v. St. Paul*, etc. R. Co., 22 Minn. 118; *Higgins v. New York*, etc. R. Co., 78 App. Div. (N. Y.) 567; *Brinkmeyer v. Betha*, 139 Ala. 376. See § 1048.

It is immaterial to the right to recover that the property trespassed upon has rented for as much as for-

where property suitable for the site of large buildings was undermined and the proof tended to show that by the construction of foundation walls of unusual depth, which would cost less than the amount of the diminution in the market value of the property, the surface might be retained in its natural condition and safe support for such buildings afforded. The court thought that the land-owner was not bound to resort to that means to avert loss; he had the right to hold the property for sale and realize its market value. If that value had been diminished to a greater extent than the cost of building such walls the application of that cost as the measure of recovery would not afford full compensation unless the plaintiff should resort to the erection of such buildings as the property was suitable for.⁷⁴ The lessened value of the land measures the liability where negligence in making the excavation results in damage to buildings on the adjoining land as well as to the land itself.⁷⁵ Where a wall encroached upon the land of an adjoining owner and stones from it continually fell upon such land the damages

merly and that the owner has been offered the same price as he paid for it. *Penn v. Taylor*, 24 Ill. App. 292.

In *McClelland v. Schwerd*, 32 Pa. Super. Ct. 313, the contention was that the value of the displaced soil measured the damages. This view was based on *McGettigan v. Potts*, 149 Pa. 155. In answer the court said: The soil that has been lost may have very little value as a distinct marketable commodity, and a very considerable value to a proprietor when resting in its natural state in a lot of ground owned by him. If either value is to be taken as the measure of damages, it ought to be the latter, and one way to determine its value would be to ascertain how much less the land is worth in the market without it than it was with it. * * * Possibly there might arise a case in which

the loss of the soil would be so insignificant, relatively, as not to appreciably affect the selling or rental value of the lot, or the owner's use or enjoyment of it. In such a case the market value of the lost soil, treated as a separate commodity, might be adequate compensation for the injury; but there is no natural or legal presumption, either *prima facie* or conclusive, that it will be such in all cases.

⁷⁴ *Barry v. Chicago, etc. R. Co.*, 149 Ill. App. 626; *Harper v. Lenoir*, 152 N. C. 723 (the cost of erecting a retaining wall may be shown where lateral support has been removed pursuant to authority, though negligently); *Barnett v. St. Anthony Falls W. P. Co.*, 33 Minn. 265.

⁷⁵ *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285, citing this section.

were measured by the depreciation in its value and not by charging the defendant with the value of the land at the place in question. The plaintiff was also entitled to recover the loss sustained by the removal of tenants and the inability to obtain others by reason of the location of the wall.⁷⁶

The doctrine of lateral support and the measure of damages for injury thereto does not apply to deep mining claims in California which are worked by the hydraulic process. Hence, where the parties owned adjoining claims and the defendant in working its own washed away the gravel so that a portion of plaintiff's land fell upon the other's claim and was washed away the value of the gold in the portion which fell, being less than the necessary cost of securing it, there was no liability.⁷⁷ If the depreciation in market value measures the liability of the wrong-doer the entire tract of land upon which the injury was done is to be considered, although but a small portion of it has been directly and physically affected.⁷⁸ The market value of the tract may be shown for any purpose for which it could be most advantageously used and for which it would command the highest price.⁷⁹ Where an action was brought for injury to the life estate of the plaintiff as tenant by the curtesy initiate

⁷⁶ *Goldschmid v. Mayor*, 14 App. Div. (N. Y.) 135, 1 Am. Neg. Rep. 508, citing this section.

⁷⁷ *Hendricks v. Spring Valley M. & S. Co.*, 58 Cal. 190, 41 Am. Rep. 257; *Artherholt v. Erie E. M. Co.*, 27 Pa. Super. Ct. 141.

⁷⁸ *Gosdin v. Williams*, 151 Ala. 592; *Parrott v. Chicago, etc. R. Co.*, 127 Iowa 419; *Chicago, etc. R. Co. v. Willits*, 45 Kan. 110. But compare *Hord v. Holston River R. Co.*, 122 Tenn. 399.

⁷⁹ *Chicago, etc. R. Co. v. Willits*, *supra*; *Farnandis v. Great Northern R. Co.*, 41 Wash. 486, 5 L.R.A. (N.S.) 1086, 111 Am. St. 1027; *Salstrom v. Orleans B. G. M. Co.*, 153 Cal. 551. It is not competent to show the value of the land washed away for both mining and

agricultural purposes if its use for the former would destroy it for the latter purpose. *Id.*

Where the construction of a railroad cut off the owner's access to a navigable river forming a boundary to his land he was not limited to proof of its rental value as it was used when the obstruction was made, but could show its fair rental value without the obstruction, and the condition the land was in to lease for a purpose for which it was adapted, though it was not leased at that time. *Ramsey v. New York, etc. R. Co.*, 136 N. Y. 543, distinguishing *s. c.*, 133 N. Y. 79, 15 L.R.A. 618; *Tallman v. Metropolitan E. R. Co.*, 131 N. Y. 119, 8 L.R.A. 173.

it was erroneous to assess the value of the estate by the present value of the rents and profits, without deduction for annual charges or rebate of interest.⁸⁰ If a large quantity of earth is placed upon the land the benefits resulting to the latter may be considered under a general denial. An allowance therefor is not in the nature of recoupment or set-off, but a method of determining the damage sustained.⁸¹ Where the injury complained of consists in the erection of a telephone pole in a footway in front of the plaintiff's premises, no land of his being actually taken nor any of his soil being invaded, the damage is measured either by the extent of the depreciation in the usable or rental value of the property, or by the difference in its value before and after such erection so far as the value has been affected by that act.⁸² Evidence of the rental value is admissible to show market value before and after the trespass.⁸³

The liability for the destruction of a private right of way extends to the losses suffered by the destruction of crops and the diminished value of the land.⁸⁴ If the land to which access was prevented was kept for rent the lessened rental value of it might furnish compensation; otherwise there may be a recovery for the loss proximately resulting, including the loss of crops and pasturage and the loss of the use of the land.⁸⁵ The removal of gravel from land entitles the owner to recover its value *in situ* and such other damages to the land as the taking caused. In determining the value of the gravel it is proper to prove any purpose for which it could be used.⁸⁶ No allowance will be made the defendant for any resulting benefit to the land made through bringing it to grade. If the plaintiff had sold the soil

⁸⁰ Greer v. Mayor, etc., 1 Abb. Pr. (N.S.) 206.

⁸¹ Mayo v. Springfield, 138 Mass. 70; Koch v. Sackman-P. I. Co., 9 Wash. 405.

⁸² Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36.

⁸³ Central R. Co. v. Kelley, 7 Ga. App. 464.

⁸⁴ Redemptionists v. Wenig, 79 Md. 348.

⁸⁵ Weller v. Heimbruck, 145 Wis. 217.

⁸⁶ Langhorne v. Turman, 141 Ky. 809, 34 L.R.A.(N.S.) 211; Illinois Cent. R. Co. v. Le Blanc, 74 Miss. 626; Patterson v. Waldman, 20 Ky. L. Rep. 514; District of Columbia v. Robinson, 14 App. Cas. (D. C.) 512, 547; Providence & W. R. v. Worcester, 155 Mass. 35; Handforth v. Maynard, 154 Mass. 414.

which the defendant removed he would have received its value, and have had the resulting benefit of grading besides. The rule which governs when an addition is made to property has no application in such a case.⁸⁷ In the absence of any permanent injury done to land by the trespass depreciation in its market value, which could have been effected by a variety of causes, is not the measure of damages, though it may be considered in connection with other evidence tending to show the injury done by the trespass.⁸⁸ The value of a spring of water which has been destroyed by the removal of lateral support to land is not to be regarded as a separate item of damage, but as an element in determining the value of the land.⁸⁹ The results following the trespass may be shown; as evidence these are more satisfactory than the opinions of witnesses.⁹⁰

§ 1018. **Damages where injury remediable.** If the wrong consists in the destruction or removal of some addition, fixture or part of the premises the loss may be estimated upon the diminution of their value if any results,⁹¹ or upon the value of the part severed considered either as a part of the premises or detached; and that valuation should be adopted which will be most beneficial to the injured party, for he is entitled to the

⁸⁷ *Williams v. Hathaway*, 21 R. I. 566.

⁸⁸ *Abercrombie v. Windham*, 127 Ala. 179.

The loss of the easement of burial in a cemetery lot caused by the removal of the remains of a person buried therein and the use of the lot for the burial of another body must be compensated for by its value, and by the expense of another lot and of a coffin, grave and the cost of reintering the remains therein. *McDonald v. Butler*, 10 Ga. App. 845.

⁸⁹ *Weaver v. Berwind-W. C. Co.*, 216 Pa. 195.

⁹⁰ *Suehr v. Sanitary Dist.*, 149 Ill. App. 328.

⁹¹ *Pittsburgh, etc. R. Co. v. Welch*, 54 Ind. App. 335; *Waldrons*

v. Wells, 84 N. J. L. 245; *Noceto v. Weill*, 166 Ill. App. 162; *Mandery v. Mississippi, etc. B. Co.*, 105 Minn. 3; *Philbrook v. Berlin-S. P. Co.*, 75 N. H. 599 (the availability of the property for business uses may be shown); *Hall v. Sundstrom*, 138 App. Div. (N. Y.) 548; *Pedclty v. Wisconsin Z. Co.*, 148 Wis. 245; *Freeborn v. Perth G. Co.*, 6 West Aust. L. R. 193; *Rhoda v. Alameda County*, 58 Cal. 357; *Oregon & C. R. Co. v. Jackson*, 21 Ore. 360; *Burtraw v. Clark*, 103 Mich. 383; *Hueston v. Mississippi & R. R. B. Co.*, 76 Minn. 251; *Millard v. Webster City*, 113 Iowa 220; *Brown v. Same*, 115 Iowa 511; *Sweeny v. Montana Cent. R. Co.*, 25 Mont. 543. See *Bailey v. Siegel G. F. Co.*, 54 Mo. App. 50.

benefit of the premises intact and to the value of any part separated.⁹² The damages for injuries to buildings and fences are measured by the cost of restoring them to their previous condition,⁹³ regardless of what some other kind of a fence which

⁹² *Donk C. & C. Co. v. Novero*, 135 Ill. App. 633, quoting the text; *Gilman v. Brown*, 115 Wis. 1; *Hoyt v. Southern*, etc. Tel. Co., 60 Conn. 385, quoting and approving the text, and holding that an estimate of the damages resulting from the probable injury to the sale of a lot by cutting a shade tree in front of it was not speculative or remote. *Fitz Simons & C. Co. v. Braun*, 199 Ill. 390, 13 Am. Neg. Rep. 9, quoting the text; *Baker v. Mims*, 14 Tex. Civ. App. 413, quoting the two preceding propositions and saying that the rules of law are correctly stated; *Matthews v. Missouri Pac. R. Co.*, 142 Mo. 645. Compare *Burtraw v. Clark*, *supra*.

In *Reisert v. City of New York*, 69 App. Div. (N. Y.) 302, it is laid down that if there is more than one mode of assessing damages that which is most definite and certain should be adopted if the compensation thereby made will not be grossly inadequate though it may not be full.

⁹³ *Hearn v. McDonald*, 69 W. Va. 435 (declining to make any allowance for the difference between new and old under the circumstances); *Sloss-S. S. & I. Co. v. Mitchell*, 161 Ala. 278, citing the text; *Chicago v. Murdock*, 212 Ill. 9, 103 Am. St. 221; *Donk C. & C. Co. v. Novero*, 135 Ill. App. 633; *Same v. Slata*, 133 id. 280; *Swanson v. Nelson*, 127 id. 144; *Hilligess v. Missouri*, etc. R. Co., 84 Kan. 372; *Meyer v. Rose-dale*, 84 Kan. 302; *Haramon v. Krause*, 93 Minn. 455; *Gulf*, etc. R. Co. v. *McMurrrough*, 41 Tex. Civ. App. 216; *Louisville & N. R. Co. v.*

Home Ins. Co., 146 Ky. 281; *Cincinnati*, etc. R. Co. v. *Falconer*, 30 Ky. L. Rep. 152; *Harrison v. Kiser*, 79 Ga. 588; *Childs v. O'Leary*, 174 Mass. 111; *Consolidated G. Co. v. Getty*, 96 Md. 683; *Central R. & B. Co. v. Murray*, 93 Ga. 256; *Bailey v. Chicago*, etc. R. Co., 3 S. D. 531, 19 L.R.A. 653, citing the text; *Fitz Simons & C. Co. v. Braun*, 199 Ill. 390, 13 Am. Neg. Rep. 9; *Shreves v. Stokes*, 8 B. Mon. 453; *Hide v. Thornborough*, 2 C. & K. 250.

Plaintiff, suing for injury to his buildings caused by rock thrown thereon during the construction of a railroad, can recover, the injury not being permanent, only an amount sufficient to restore the property to the condition it was in prior to the injury and to compensate him for the diminution in the value of the use of the property during the continuance of the injury. *Lexington & E. R. Co. v. Baker*, 156 Ky. 431.

Forcibly entering a dwelling and murdering therein a servant of the owner does not warrant a recovery of the value of the premises on the theory that the plaintiff's family abandoned and refused to live in the house, in consequence of which it became worthless. *Clark v. Gay*, 112 Ga. 777.

Under a complaint alleging damage by reason of breaking in and destroying glass to the value of a sum stated the recovery should not include the expense of putting the glass in the building. *Fidelity & C. Co. v. Seattle*, 16 Wash. 445, 1 Am. Neg. Rep. 384; *Stoner v. Texas & P. R. Co.*, 45 La. Ann. 115. This

might be as efficient would cost; the plaintiff may use such a fence as he chooses, and the defendant may not pay the damage done, or lessen it by showing that another kind of fence, less expensive, would be as effective.⁹⁴ For encroaching upon land, the measure of damages is the value of its use for past time.⁹⁵ When occasion requires it the rule is generally announced to be that when the reasonable cost of repairing the injury by restoring the premises is less than the damage done such cost measures the damages,⁹⁶ but if the cost of restoration is more than the diminished value the latter generally determines the amount of the recovery.⁹⁷ Where a pipe supplying the plaintiff with water was cut on the defendant's premises the cost of obtaining water and compensation for the inconvenience endured measured the liability.⁹⁸ If trees are cut so as to fall across a line fence and

view, unless based on a rule of pleading, may be respectfully questioned.

⁹⁴ *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69.

⁹⁵ *Lyons v. Fairmont R. C. Co.*, 71 W. Va. 754; *Smith v. Kansas City*, 128 Mo. 23; *Topeka v. Martineau*, 42 Kan. 388, 5 L.R.A. 775. See § 1048.

It is not an answer to the demand for damages that the land had not been put to any beneficial use and the owner had no intention to put it thereto, or no occasion to use it. *Lancaster & J. E. L. Co. v. Jones*, 75 N. H. 172.

⁹⁶ *Linforth v. San Francisco G. & E. Co.*, 156 Cal. 58, citing the text; *Manda v. Orange*, 77 N. J. L. 285 (if the cost is the only evidence); *Bates v. Warrick*, 77 N. J. L. 387; *Taylor v. Mertens*, 82 Conn. 595; *Southwestern Tel. & T. Co. v. Whiteman*, 36 Tex. Civ. App. 163.

⁹⁷ *Salstrom v. Orleans B. G. M. Co.*, 153 Cal. 551; *Swanson v. Nelson*, *supra*; *Hopkins v. American P. S. Co.*, 194 Mass. 582; *Post v. Merritt*, 85 App. Div. (N. Y.) 239; *Berkey v.*

Berwind-W. C. M. Co., 229 Pa. 417; *Weaver v. Same*, 216 Pa. 195; *Rabe v. Shoenberger C. Co.*, 213 Pa. 252, 3 L.R.A.(N.S.) 782; *Keats v. Gas Co.*, 29 Pa. Super. Ct. 480; *Welliver v. Pennsylvania C. Co.*, 23 id. 79; *Hord v. Holston River R. Co.*, 122 Tenn. 399; *Bunker v. Hudson*, 122 Wis. 43; *Enid & A. R. Co. v. Wiley*, 14 Okla. 310; *Thompson v. Citizens' T. Co.*, 181 Pa. 131; *St. Louis M. Co. v. Miller* (Ark.), 11 S. W. 958; *McGann v. Hamilton*, 58 Conn. 69; § 1048.

The cost of a new roof may be shown though that injured was old, not as the measure of recovery but as a fact to aid in fixing the damage done. *Waldrons v. Wells*, 84 N. J. L. 245.

The expense of restoration may not be recovered if the damage done may be avoided at less cost. *Lodge Holes C. Co. v. Mayor, etc.*, [1908] App. Cas. 323.

⁹⁸ *Reynolds v. Braithwaite*, 131 Pa. 416. See *Miller v. Rambo*, 66 N. J. L. 191.

Where a pipe laid in a highway was used to conduct salt water,

cover a portion of the land with brush the damages are not necessarily measured either by the expense of removing them or the value of the land they cover, because the injury may have extended to other land than that covered.⁹⁹ In a recent Iowa case the defendant entered upon and dug trenches and laid pipes through plaintiff's lot, thereby injuring his fences, walks, trees, shrubbery and house. It was assumed that these injuries could be repaired; the damages were measured by such sum as would put the property in as good condition as it was in before the injury, with the additional sum that would compensate for the deprivation of its use and enjoyment and the value of such of the property as could not be restored to its previous condition.¹ The cost of filling a drain and the damage resulting from the loss of the use of the land measured the liability of the person who dug the drain.² One who owns

some of which was discharged through the earth on the premises of the plaintiff, he was entitled to recover the loss in their rental value, and if trees or shrubs on his premises were injured he could also recover on account thereof. There was no presumption that the existing state would continue, and damages could be recovered only to the time of the trial. *Hartman v. Tully* P. L. Co., 71 Hun 367.

In an action by a vendee against his vendor to compel the repair of pipes which conducted water to a fish pond on the premises conveyed and to recover the damages sustained up to the time of the trial for wrongful interference with such pipes, there could not be a recovery of damages on account of depreciation in the value of the fee, but only of the proximate loss sustained up to the trial. *Spencer v. Kilmer*, 151 N. Y. 390.

⁹⁹ *Hutchinson v. Parker*, 64 N. H. 89.

In *Hord v. Holston River R. Co.*,

122 Tenn. 399, the value of the land affected was fixed without reference to the value of the plaintiff's other land.

A recovery for the value of timber cut and removed precludes an additional recovery for the expense of removing the limbs from the land in order to clear it for cultivation; the plaintiff would need to incur that expense if he had cut the trees himself. *Nelson v. Big Blackfoot* M. Co., 17 Mont. 553.

¹ *Graessle v. Carpenter*, 70 Iowa 166; *Lentz v. Carnegie*, 145 Pa. 612, 27 Am. St. 717; *Sweeny v. Montana Cent. R. Co.*, 25 Mont. 543; *Keats v. Gas Co.*, 29 Pa. Super. Ct. 480. See *Cherry v. Christian County*, 146 Ky. 330.

² *Sloss-S. S. & I. Co. v. Mitchell*, 161 Ala. 278; *Walters v. Chamberlain*, 65 Mich. 333; *Cavanagh v. Durgin*, 156 Mass. 466. See *Ziebarth v. Nye*, 42 Minn. 541; *Doss v. Billington*, 98 Tenn. 375.

Where the plaintiff had taken no steps towards filling a drain dug on

premises abutting upon a street and who is primarily liable for the construction and maintenance of a sidewalk in front thereof may recover for an injury to the walk to the extent of the cost of repairing or rebuilding it.³

A lower riparian proprietor from whose land water has been diverted by the upper owner may recover the expense incurred in order to obtain water to take the place of that he was entitled to.⁴ If that is impracticable in part the recovery, in case of the diversion of water from pasture lands, may include the expense incurred in watering stock, the injury thereto, loss of quantity and quality of milk and injury to the pasture.⁵ If a trespass results in preventing the leasing of property the loss of the rental value may be recovered,⁶ in addition to the cost of repairing it.⁷ It is immaterial to the right to recover the rental value of property that the plaintiff was using it for an unlawful purpose;⁸ or that he had no intention to restore the property. The loss of rent may be computed up to such time as the repairs could have been made with diligence.⁹ Where the damaged property is not leased or held for that purpose the profits lost while the repairs were being made may be recovered, in addition to the cost of making them.¹⁰ The damages recoverable against a trespasser for using a private way, no interference with the full use of it by the owner being

his land it was competent for the defendant to show that the land was benefited by the drain. If that was the fact the damages could not exceed the diminution in the value of the land by reason of the digging of the drain; but if the fact was otherwise and it was found that the plaintiff intended to fill the drain the cost of doing so might be recovered, that cost not exceeding the value of the land. *Burtraw v. Clark*, 103 Mich. 383, 107 Mich. 333.

³ *Parish v. Baird*, 160 N. Y. 302, 6 Am. Neg. Rep. 666, citing this section.

⁴ *Standard P. G. Co. v. Butler W. Co.*, 7 Pa. Super. Ct. 563; *Irving*

v. Media, 10 id. 132, affirmed on the opinion of the superior court, 194 Pa. 648.

⁵ *Craig v. Shippensburg*, 11 Pa. Super. Ct. 490.

⁶ *Wall v. Pittsburgh H. Co.*, 152 Pa. 427, 34 Am. St. 667; *Freecorn v. Perth G. Co.*, 6 West Aust. L. R. 193.

⁷ *Cooper v. Kankakee E. L. Co.*, 164 Ill. App. 581, citing the text.

⁸ *Young v. Stevenson*, 75 Ark. 181.

⁹ *Higgins v. Los Angeles G. & E. Co.*, 159 Cal. 651, 34 L.R.A.(N.S.) 717.

¹⁰ *West v. Martin*, 51 Wash. 85, 21 L.R.A.(N.S.) 324.

shown, are based on the injury done to the way or to the land, including any increase occasioned thereby in the cost of making repairs.¹¹ Where logs are cast on land the land-owner may recover for the damage caused by their remaining there an unreasonable length of time and that done by removing them, if he was not responsible for their so remaining.¹² The measure of damages, recoverable by the owner of land upon which destructive quantities of sand are thrown as a result of the manner in which a railroad company constructs and maintains an embankment on its adjoining right of way, will be the expense of removing the sand if such expense will be less than the diminution in the market value of the land if the sand were allowed to remain thereon.¹³ So, while the usual measure of damages for dumping mine tailings on land adjoining the mine is the difference in the value of the land with and without the tailings thereon, the proper measure will be the cost of removing the tailings when this cost will be less than such difference.¹⁴ Where a new channel was made which changed the course of a stream running through the plaintiff's land it was proper to receive evidence showing that the stream, subsequent to the trespass, overflowed the channel made for it, such evidence being competent to prove the difference in the market value of the premises before and after the trespass. It was not proper to use such evidence as an independent ground of damage.¹⁵

Liability for loss of the use does not extend over the period occupied in the determination of a suit against a party who is not liable for the wrong.¹⁶ The Pennsylvania court has held that a comparison of the value of the property injured cannot antedate the period which bars the right to bring an action for the wrong done.¹⁷ In an action by the owner of agricultural land to obtain equitable interposition to prevent a continuing

¹¹ *Johnson v. Arnold*, 91 Ga. 659.

¹² *Ford L. & Mfg. Co. v. McQueen*, 14 Ky. L. Rep. 521.

¹³ *Heath v. Minneapolis, St. P. & S. S. M. R. Co.*, 126 Minn. 470. See *Morgan v. City of Albert Lea*, 129 Minn. 59 (trespass in improving city street).

¹⁴ *Robinson v. Moark-Nemo Consol Min. Co.*, 178 Mo. App. 531.

¹⁵ *Sweeny v. Montana Cent. R. Co.*, 19 Mont. 163.

¹⁶ *Cavanagh v. Durgin*, 156 Mass. 466.

¹⁷ *Lentz v. Carnegie*, 145 Pa. 612, 27 Am. St. 717.

trespass by a city in withdrawing subterranean waters from his land by means of driven wells the measure of damages is the decreased fee or rental value of the property. The owner cannot recover damages resulting from the loss of a crop if he knew before it was sown that a different crop would have yielded a good return.¹⁸ This rule is not limited to damages for the loss of anticipated crops, but applies to those lost before the action was begun.¹⁹ Where the defendant threw dirt upon the plaintiff's lot, thereby increasing the expense of excavating for the purpose of building thereon and making it necessary for the plaintiff to construct a wall to prevent dirt placed on the defendant's lot from falling upon his own, the expense of doing the latter and the increased expense of building were proper subjects of proofs, though such expense did not necessarily measure the damages.²⁰ A trespasser may not mitigate his liability because of the negligence of the defendant in the erection of the damaged property.²¹ In the absence of negligence in repairing the damage done by repeated trespasses to a factory its usable value may be shown by the profits lost.²² Where the trespasser may be compelled to erect a fence on land adjoining that on which he has made an excavation the plaintiff may not show the value of the loss of the use of a pasture resulting from the trespass.²³ Under a complaint claiming damages for a trespass committed on a given day, though the proof is not limited thereto, the recovery may be only for a trespass on some one day.²⁴

§ 1019. Liability for destroying trees and mining ores. For cutting and carrying away trees or timber by a continuous act the action must be trespass *quare clausum fregit*.²⁵ Under

¹⁸ Westphal v. City of New York, 75 App. Div. (N. Y.) 252, 15 Am. Neg. Rep. 399.

¹⁹ Kinsey v. City of New York, 75 App. Div. (N. Y.) 262.

²⁰ McKnight v. Denny, 198 Pa. 323.

²¹ Freecorn v. Perth G. Co., 6 West Aust. L. R. 193.

²² Hall v. Sundstrom, 138 App. Div. (N. Y.) 548.

²³ Barry v. Chicago, etc. R. Co., 149 Ill. App. 626.

²⁴ Snedecor v. Pope, 143 Ala. 275.

²⁵ Sturgis v. Warren, 11 Vt. 433; White v. Yawkey, 108 Ala. 270, 54 Am. St. 159, 32 L.R.A. 199.

that form of action the severance of the property from the freehold is the essential fact, and so far as it diminishes the value of the land the owner is entitled to compensation. The value of the timber need not be averred, but may be proved to show the amount of damages,²⁶ as may the value of fruit raised where an orchard has been destroyed.²⁷ The plaintiff may adopt the value of the timber or fruit trees as the measure of his damages, but is not obliged to do so;²⁸ if the injury to the land exceeds the value of the timber or trees or, in other words, if the trees were worth more standing, he may recover their value as part of the lands.²⁹ Hogeboom, J., forcibly said:

²⁶ *Miller v. Neale*, 137 Wis. 426, 129 Am. St. 1077; *Reynolds v. Great Northern R. Co.*, 119 Minn. 251, 52 L.R.A.(N.S.) 91; *Williams v. Elm City L. Co.*, 154 N. C. 306; *Davis v. Wall*, 142 N. C. 450; *Spink v. New York, etc. R. Co.*, 26 R. I. 115; *Kolb v. Bankhead*, 18 Tex. 229.

²⁷ *Krejei v. Chicago, etc. R. Co.*, 117 Iowa 344.

²⁸ *Hooper v. Smith* (Tex. Civ. App.), 53 S. W. 65; *Western & A. R. Co. v. Tate*, 129 Ga. 526; *St. Louis, etc. R. Co. v. Nowland*, 75 Kan. 691; *Galveston, etc. R. Co. v. Warnecke*, 43 Tex. Civ. App. 83; *Kolb v. Bankhead*, *supra*; *Bailey v. Chicago, etc. R. Co.*, 3 S. D. 531, 19 L.R.A. 653.

A joint owner of land who cuts and removes trees therefrom, without doing any other injury thereto, is not liable *ex delicto*, but *ex quasi contractu*; his liability is measured by the value of the trees when taken at the stump. *Patureau v. Wilbert*, 44 La. Ann. 355.

By electing to sue under a statute the plaintiff binds himself to accept the rule of damages it declares. *Beidler v. Consolidated Tel. Co.*, 21 Pa. Dist. 680.

The defendant may show the
Suth. Dam. Vol. IV.—8.

value of the trees cut. *Ferriday v. Grosvenor*, *infra*.

The difficulty in growing trees in the places those destroyed were in may be shown as bearing upon their value. *Leiber v. Chicago, etc. R. Co.*, 84 Iowa 97:

Evidence as to the value of the entire premises before and after the injury should be received as a circumstance to show the value of the trees destroyed though the damages are measured thereby. *Louisville & N. R. Co. v. Beeler*, 126 Ky. 328, 11 L.R.A.(N.S.) 930.

²⁹ *Chicago & N. R. Co. v. Kendall*, 186 Fed. 139, 108 C. C. A. 251 (it seems); *Evans v. Keystone G. Co.*, 148 N. Y. 112, 30 L.R.A. 651; *Davis v. Miller-B. L. Co.*, 151 Ala. 580; *Bullock v. Porter*, 2 Boyce (Del.) 180; *Nelson v. Churchill*, 117 Wis. 10; *Park v. Northport S. & R. Co.*, 47 Wash. 597; *Jordan v. Delaware & A. Tel. & T. Co.*, 1 Boyce (Del.) 107; *Doty v. Quiney, etc. R. Co.*, 136 Mo. App. 254; *Norris v. Philadelphia*, 49 Pa. Super. Ct. 641; *Blalock v. Atwood*, 154 Ky. 394, 46 L.R.A.(N.S.) 3; *People v. New York Cent., etc. R. Co.*, 155 App. Div. (N. Y.) 699; *Layton v. Hudson*, 2 Boyce (Del.) 573; *Reynolds v.*

"Surely the damage would not be in all cases accurately measured by the market value of the wood or timber when cut. The

Great Northern R. Co., 119 Minn. 251, 52 L.R.A.(N.S.) 91; Pine Bluff & W. R. Co. v. Kelly, 78 Ark. 83; Manitou & P. P. R. Co. v. Harris, 45 Colo. 185, 132 Am. St. 140 (irrelevant to show that trees were as valuable for timber after as before they were injured); Miller v. Luekey, 132 Ga. 581; Southern R. Co. v. Herrington, 128 Ga. 438; Louisville & N. R. Co. v. Kohlruess, 124 Ga. 250; Milltown L. Co. v. Carter, 5 Ga. App. 344; Shrigley v. Chicago, etc. R. Co., 158 Ill. App. 473; Lake Erie & W. R. Co. v. Hobbs, 40 Ind. App. 511; Delaware, etc. Tel. Co. v. Fiske, 40 Ind. App. 348; Meyer v. Standard Tel. Co., 122 Iowa 514; Chicago, etc. R. Co. v. Mosher, 76 Kan. 599; Atchison, etc. R. Co. v. Geiser, 68 Kan. 281; Western U. Tel. Co. v. Ring, 102 Md 677; Bockes v. McAfee, 165 Mich. 7, quoting the text; Diggs v. Wabash R. Co., 131 Mo. App. 457; Alberts v. Husenetter, 77 Neb. 699; Mogollon G. & C. Co. v. Stont, 14 N. M. 245; Nichols v. New York & P. Tel. & T. Co., 126 App. Div. (N. Y.) 184; Kellar v. Central Tel. & T. Co., 53 N. Y. Misc. 523; Jenkins v. Montgomery L. Co., 154 N. C. 355; Williams v. Elm City L. Co., *supra* (it was said: We are not inadvertent to the cases in our reports in which it is said that the measure of damages is the value of the trees on the land after they have been severed with incidental damage caused in their removal. In those cases the trees cut were "timber trees," and no special damage to the land was shown, and in such case the amount of the recovery would be practically

the same); Cleveland School Dist. v. Great Northern R. Co., 20 N. D. 124, 28 L.R.A.(N.S.) 757; Mahaffey v. New York Cent., etc. R. Co., 229 Pa. 285; Hunter v. Pennsylvania R. Co., 45 Pa. Super. Ct. 468; Missouri, etc. R. Co. v. Neiser, 54 Tex. Civ. App. 460; Kilby v. Erwin, 84 Vt. 266; Miller v. Neale, 137 Wis. 426, 129 Am. St. 1077; Chase v. Hoosac Tunnel & W. R. Co., 85 Vt. 60; Ferriday v. Grosvenor, 86 Conn. 698; Gasque v. Ball, 65 Fla. 383 (the value of the products of land during a series of years is not the measure of damages); Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 151; Krejci v. Chicago, etc. R. Co., 117 Iowa 344; Dent v. South Bound R., 61 S. C. 329; Chicago, etc. R. Co. v. Brown, 157 Ind. 544; Wallace v. Goodall, 18 N. H. 439; Ensley v. Nashville, 2 Baxter 144; Templemore v. Moore, 15 Irish C. L. (N.S.) 14; Argotsinger v. Vines, 82 N. Y. 308; Nixon v. Stillwell, 52 Hun 353; Chipman v. Hibberd, 6 Cal. 162; White v. Stoner, 18 Mo. App. 540; Knisely v. Hire, 2 Ind. App. 86; Carner v. Chicago, etc. R. Co., 43 Minn. 375; Hayes v. Chicago, etc. R. Co., 45 Minn. 17; Disbrow v. Westchester H. Co., 164 N. Y. 415; Meehan v. Edwards, 92 Ky. 574; Marshall v. American Tel. & T. Co., 16 Pa. Super. Ct. 615; Baylor v. Stephens, *id.* 365; Missouri Pac. R. Co. v. Tipton, 61 Neb. 49; Kansas City, etc. R. Co. v. Perry, 65 Kan. 792, 14 Am. Neg. Rep. 138; Tyler Southeastern R. Co. v. Hitchins, 26 Tex. Civ. App. 400; Greenfield v. Chicago & N. R. Co., 83 Iowa 270; Burdick v. Chicago, etc. R. Co., 87 Iowa 384; McCruden v.

trees might be a highly valuable appendage to the farm for purposes of shade or ornament; there might be a very scanty supply for a farm of that size; or for other reasons they might have a special value as connected with the farm, altogether independent of, and superior to, their intrinsic value for purposes of building or fuel. As well might you remove the columns which supported the roof or some part of the superstructure of a splendid mansion and limit the owner in damages to the value of these columns as timber or cord wood as to adopt the parallel rule in this case.”³⁰ The damages for the loss of trees are not to be estimated solely with reference to the tract of land on which they were growing, that being a part of the farm of the plaintiff, though the tract was separated from the remainder of the farm by a railroad. It was observed by the writer of the opinion that each part of the farm appears to have sustained some relation to the other part. The grove, doubtless, was designed to make the farm more habitable. If it had any value we infer it consisted principally in the fact that it furnished shade and was a wind-break, and perhaps was ornamental, and so added somewhat to the value of the farm in its entirety.³¹ The diminution in the value of a tract of forest land part of which has been trespassed upon may be shown.³² The value of trees upon a large tract of woodland cannot be recovered for on the basis of the

Rochester R. Co., 5 N. Y. Misc. 59; Oregon & C. R. Co. v. Jackson, 21 Ore. 360; Bailey v. Chicago, etc. R. Co., *supra*; Warrior C. & C. Co. v. Mabel M. Co., 112 Ala. 624; St. Louis, etc. R. Co. v. Ayres, 62 Ark. 371, 8 Am. Neg. Rep. 623. Compare Fremont, etc. R. Co. v. Crum, 30 Neb. 70.

Both these rules may be charged; they are not inconsistent, but are to be applied according to the evidence. Western & A. R. Co. v. Tate, *supra*.

³⁰ Van Deusen v. Young, 29 Barb. 9.

³¹ Brooks v. Chicago, etc. R. Co.,

73 Iowa 179, approved in Rowe v. Chicago & N. R. Co., 102 Iowa 286, 3 Am. Neg. Rep. 647; Kilby v. Ervin, 84 Vt. 266; Argotsinger v. Vines, 82 N. Y. 308; Bullock v. Baltimore & O. R. Co., 235 Pa. 417 (much of the timber burned young and not marketable). See Laser v. Jones, — Ark. —, 172 S. W. 1024.

Where timber trees were destroyed the basis of the damages was the lessened value of the tract of land on which they were growing. Greenfield v. R. Co., 83 Iowa 270.

³² Morison v. American Tel. & T. Co., 115 App. Div. (N. Y.) 744.

reduced value of the land for building purposes because of the peculiar value of the trees for shade and ornament unless the facts showing such value are pleaded; in the absence of such allegations the trees are to be valued at their worth for fuel or timber.³³ Where the right to reasonably cut and trim trees is abused the value of the land as affected by the unauthorized cutting and trimming may be recovered.³⁴

In some states the destruction of growing timber, much of it young and immature, as the result of negligence, no depreciation in the market value of the land being shown, involves liability for the value of the timber as and where it was just before its destruction. That value is ascertainable by evidence as to what the owner could have realized from the timber by appropriating it to his own use to the extent of any occasion he had for it at and about the time of its loss, and by selling it. Timber which was injured, but not destroyed, is to be dealt with on the same basis, to the extent of the difference between its value before its injury and afterward.³⁵ In Pennsylvania, if there are no aggravations, the value of the timber cut, the cost of removal of the brush and compensation for the loss of land on which roadways were made measures the recovery.³⁶ In Nebraska and Illinois the damages for the destruction of trees are not measured by the depreciation in the value of the land in consequence thereof, but by the injury suffered by the timber.³⁷ This rule applies as well to trees which have been

³³ *Eldridge v. Gorman*, 77 Conn. 699.

³⁴ *Meyer v. Standard Tel. Co.*, 122 Iowa 514; *Disbrow v. Westchester H. Co.*, 164 N. Y. 415.

³⁵ *Central R. & B. Co. v. Murray*, 93 Ga. 256; *McConnell v. Slappey*, 134 Ga. 95; *Whitfield v. Rowland L. Co.*, 152 N. C. 211; *Virginian R. Co. v. Hurt*, 112 Va. 622.

³⁶ *Chase v. Clearfield L. Co.*, 209 Pa. 422; *Halstead v. Sigler*, 35 Ind. App. 419. See *Nelson v. Big Blackfoot M. Co.*, 17 Mont. 553.

³⁷ *Fremont, etc. R. Co. v. Crum*,

30 Neb. 70; *Hart v. Chicago & N. R. Co.*, 83 Neb. 652, and cases cited; *McDonald v. Illinois Cent. R. Co.*, 179 Ill. App. 242 (forest trees; action under an act of 1874 governing the fencing and operating of railroads). There is a *dictum* to the same effect in *White v. Chicago, etc. R. Co.*, 1 S. D. 326, 9 L.R.A. 824.

If trees have no value for transplanting their value with reference to the land in the situation they were in prior to injury, less their practical value later, measures the

planted and cultivated as to those of natural growth.³⁸ The inquiry should be as to the value of the trees as standing timber, and not their market value for transplantation as shade or ornamental trees.³⁹ In Delaware, when the action is trespass *quare clausum fregit*, the measure of damages is the actual value of the timber when standing.⁴⁰ In Michigan if the testimony shows the value of the land before and after the timber thereon was cut the damages may be measured by the depreciation in the value of the land notwithstanding its value consisted exclusively in the timber. The value of the stumpage may be considered, but it is not conclusive as to the amount of the recovery.⁴¹ If the timber cut was too small to have a market value the rule of depreciation in the value of the land has especial application.⁴² The intermediate court of Kansas approved the general rule that the value of trees, as part of the land, is the measure of liability for their destruction.⁴³ But in an action to recover for the loss of trees, shrubs and vines the defendant objected to testimony concerning their value as part of the freehold because it would allow the witnesses to fix the plaintiff's damages. It was contended that the testimony should have been confined to the value of the farm as a whole before and after the injury. The supreme court said: While this is undoubtedly the regular and proper method of arriving at such damages as cannot be itemized and definitely measured in detail, it does not preclude the use of the best evidence which the nature of the case affords. Where a thing, whether it be a building, a tree or shrub, is destroyed by a wrong-doer the most natural and best measure of the damage is the value of the thing destroyed as an appurtenant to, or part of, the realty;

damages. The purpose for which they were valuable may be shown. *Union Pac. R. Co. v. Murphy*, 76 Neb. 545; *Hart v. Chicago & N. R. Co.*, *supra*.

³⁸ *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 653.

³⁹ *Fremont, etc. R. Co. v. Crum*, *supra*.

⁴⁰ *Truitt v. Osler*, 4 Boyce (Del.) 555.

⁴¹ *Gates v. Comstock*, 113 Mich. 127.

⁴² *Boeckes v. McAfee*, 165 Mich. 7.

⁴³ *Missouri Pac. R. Co. v. Haynes*, 1 Kan. App. 586; *St. Louis, etc. R. Co. v. Hoover*, 3 Kan. App. 577.

and ordinarily the value of the thing destroyed would be the measure of the injury to the freehold. If for any reason the injury to the realty should be in fact less than the value of the thing destroyed the plaintiff's recovery would be limited to the actual diminution in value of the realty.⁴⁴ In Kentucky there appears to be some conflict in the cases; it has recently been laid down there that as to fully grown trees, forming part of a forest, the value of those taken or destroyed is the measure of damages, because the soil is not damaged by their removal and the owner is advantaged thereby. But this rule does not govern where the value of the timber will not compensate the owner, as where the land from which it was cut was rocky, hilly and remote from a shipping point; in such a case the difference in the fair market value of the land immediately before the cutting and immediately thereafter measures the recovery.⁴⁵ The removal of coal from under a small tract of land on which buildings were located is not cause for awarding compensation on the basis of the lessened value of either the forty acres from which it was removed or the lessened value of the entire farm on the theory that there was no other suitable site for the buildings; the defendant was not responsible for the latter fact, and estimates of the diminished value of its farm because of it would be too remote and speculative, as a guide to the jury in fixing the damages.⁴⁶

The plaintiff in an action for trespass on land in cutting and carrying away timber is entitled, first, to recover damages for the injury to the land in severing the growing timber, considering merely the act of severing it; and secondly, for the taking and carrying away the timber so severed.⁴⁷ Though the

⁴⁴ *Missouri, etc. R. Co. v. Lyan*, 57 Kan. 635, 1 Am. Neg. Rep. 48; *Wichita G., etc. Co. v. Wright*, 9 Kan. App. 730; *Missouri, etc. R. Co. v. McDowell*, 78 Kan. 686.

⁴⁵ *Kentucky S. Co. v. Page* (Ky.), 125 S. W. 170, reviewing local cases in both the court of appeals and the superior court.

⁴⁶ *Stewart v. Colfax C. C. Co.*, 147 Iowa 548.

⁴⁷ *Van Deusen v. Young*, *supra*; *Longfellow v. Quimby*, 33 Mo. 457; *Thompson v. Moiles*, 46 Mich. 42; *Miller v. Wellman*, 75 Mich. 353; *Dwight v. Elmira, etc. R. Co.*, 132 N. Y. 199, 28 Am. St. 563, 15 L.R.A. 612.

whole is but one continuous act it includes this twofold injury.⁴⁸ In some instances, however, the cutting of the trees would be the whole injury, as where ornamental trees or fruit trees are cut.⁴⁹ In the case of the latter their value, according to some authorities, is to be estimated at their worth in their growing state;⁵⁰ but it is settled in New York that where fruit trees

⁴⁸ *Spink v. New York, etc. R. Co.*, 26 R. I. 115.

In *Smith v. Smith*, 50 N. H. 218, the court say: The common mode of declaring in actions for breaking the plaintiff's close and taking and carrying away property "virtually includes two causes of action in one count—an action for the disturbance of plaintiff's possession of his real estate, and an action to recover the value of his chattels unlawfully taken and converted." *Woolley v. Carter*, 7 N. J. L. 85; *Thayer v. Sherlock*, 4 Mich. 173.

The damages for cutting and carrying away timber may be recovered without being specially alleged. *Argotsinger v. Vines*, 82 N. Y. 308.

⁴⁹ *Whitbeck v. New York, etc. R. Co.*, 36 Barb. 644; *Tissot v. Great Southern Tel. & T. Co.*, 39 La. Ann. 996, 4 Am. St. 248; *Ross v. Scott*, 15 Lea 479; *Norfolk & W. R. Co. v. Bohannon*, 85 Va. 293; *United States v. Taylor*, 35 Fed. 484.

⁵⁰ *Montgomery v. Locke*, 72 Cal. 75; *Gilman v. Brown*, 115 Wis. 1, citing the text; *Mitchell v. Billingsley*, 17 Ala. 391; *Louisville & N. R. Co. v. Beeler*, 126 Ky. 328, 128 Am. St. 291, 11 L.R.A.(N.S.) 930. The court said: "The cardinal error in the New York rule (the difference between the value of the farm with and without the destroyed trees) seems to us to lie in this: That, while the railroad company has the right to take private property for

public uses, it has no right to take or destroy private property by negligence. Ordinarily, where one person has negligently destroyed the property of another he is required to compensate the person injured for the fair value of the property destroyed, and it does not lie in his mouth to say that in destroying your property, which represented a large investment, I did you a service, rather than an injury. The owner of an estate is entitled to have his estate in such a condition as he wants it, and to keep upon it such things as he pleases. An aviary, a skating rink, a dancing pavilion or the like might, in the judgment of the average person, add very little to the value of an estate in land; and yet these things might represent a considerable investment of money. An orchard cannot be grown in a day. It requires patience and an outlay of money or labor to produce an orchard. Yet there are not a few persons who would think that the land without the fruit trees would be worth more than with them. Still the person who wants an orchard and has invested his money in it cannot be deprived of his property by the act of a wrongdoer and left without remedy for the loss sustained, simply because his land, for other purposes or to other people, might be worth as much without the orchard as with it. The railroad company here did not take the land. It simply

are destroyed or injured and their owner asserts his right to go beyond their value after severance from the land, so as to obtain compensation for the damage done the latter, his recovery is measured by the difference between the value of the land before and after the injury.⁵¹ This measure of liability is recognized in Illinois,⁵² Indiana,⁵³ Iowa,⁵⁴ Missouri,⁵⁵ Texas,⁵⁶ and Arkansas,⁵⁷ and is applied to hedges in Iowa and Texas,⁵⁸ and to grass or brush in Delaware.⁵⁹ The damages for injury to nursery trees are measured by the depreciation in their market value.⁶⁰ The tortious act in these cases is one of destruction merely. On the other hand, if timber trees are cut after they have reached maturity and the plaintiff, by getting their present market value, will realize all he could ever obtain from them, the conversion of the timber is the principal injury. If that constitutes the whole injury the value of the timber will meas-

destroyed the trees growing upon the land. We cannot see a sound distinction between the destruction of a house and the destruction of a fruit tree. The question in both cases is the same: What is the fair value of the thing destroyed?"

Under a contract providing that if fruit trees on land should be destroyed the owner should be paid their reasonable value there cannot be a recovery based on the difference between the value of the land with and without the trees, but only of the value of the trees as such. *Cooley v. Kansas City, etc. R. Co.*, 149 Mo. 487.

⁵¹ *Dwight v. Elmira, etc. R. Co.*, 132 N. Y. 199, 28 Am. St. 563, 15 L.R.A. 612; *Haskell v. Northern Adirondack Co.*, 74 Hun 380; *Carter v. Pitcher*, 87 Hun 580.

The text is quoted in *Shearer v. Park N. Co.*, 103 Cal. 415, 42 Am. St. 125, and the rule stated applied in an action for the breach of warranty as to the quality of fruit trees.

⁵² *Louisville, etc. R. Co. v. Spen-*

cer, 149 Ill. 97, aff'g 47 Ill. App. 503; *Chicago & A. R. Co. v. Davis*, 74 Ill. App. 595; *Cleveland, etc. R. Co. v. Stephens*, id. 586; *Collins v. Illinois Cent. R. Co.*, 161 id. 95.

⁵³ *Chicago & E. R. Co. v. Kern*, 9 Ind. App. 505.

⁵⁴ *Rowe v. Chicago & N. R. Co.*, 102 Iowa 286, 3 Am. Neg. Rep. 647; *Doty v. Quiney, etc. R. Co.*, 136 Mo. App. 254 (matured fruit on trees is personal property).

⁵⁵ *Ozark O. Co. v. Kansas City S. R. Co.*, 173 Mo. App. 450.

⁵⁶ *Texas, etc. R. Co. v. Smith*, 35 Tex. Civ. App. 351.

⁵⁷ *Missouri, etc. R. Co. v. Phillips*, 97 Ark. 54.

⁵⁸ *Bradley v. Iowa Cent. R. Co.*, 111 Iowa 562, 8 Am. Neg. Rep. 629; *Texas & P. R. Co. v. Graffeo*, 53 Tex. Civ. App. 569.

⁵⁹ *Bullock v. Porter*, 2 Boyce (Del.) 180. See note to § 1017.

⁶⁰ *Birket v. Williams*, 30 Ill. App. 451, 1 Am. Neg. Cas. 411; *Dwight v. Elmira, etc. R. Co.*, 132 N. Y. 199, 28 Am. St. 563, 15 L.R.A. 612.

ure the damages.⁶¹ If ores are mined and removed a like injury is done; and the same considerations apply in the determination of damages. The value of timber cut may be recovered, although the plaintiff by mistake led the defendant to believe he was cutting it on his own land.⁶² But if there has been a recovery for the injury done to the freehold by cutting trees there cannot also be a recovery for the value of the timber cut.⁶³ A trespasser, though he has acted in good faith, cannot, after the recapture of some of the logs cut by him, set up as against their owner a claim for the increase in their value by reason of their having been transported to a better market, nor can he, in an action by such owner for damages for cutting other logs, recoup for the additional value imparted by him to the logs so recaptured.⁶⁴ Where a tract of timber was partially destroyed by means of a fire, some being injured so that the cost of cutting it was increased, the damages were determinable by the value of the standing timber destroyed and the increased cost of cutting that injured. The plaintiff was not bound to cut the latter immediately after the fire, but might recover the cost of cutting it any time before the action was brought.⁶⁵ As bearing on the extent of the depreciation in the

⁶¹ *Disbrow v. Westchester H. Co.*, 164 N. Y. 415; *Kentucky S. Co. v. Page* (Ky.), 125 S. W. 170, citing the text.

⁶² *Pearson v. Inlow*, 20 Mo. 322, 64 Am. Dec. 189. But see *Kramer v. Goodlander*, 98 Pa. 353. See *Hines v. Imperial N. S. Co.*, *infra*.

⁶³ *Disbrow v. Westchester Co.*, *supra*.

But the right to recover for fallen timber as it lay on the ground, as well as for the lessened value of the land, has been upheld. *Reynolds v. Great Northern R. Co.*, 119 Minn. 251, 52 L.R.A.(N.S.) 91.

Where there has been a conveyance of timber without a stipulation as to the time of its removal and it has not been removed after

the lapse of a reasonable time, the title to it does not revert to the grantor and its removal is not an element of damage to him though the right to enter had ceased to exist. *Goodson v. Stewart*, 154 Ala. 660.

⁶⁴ *Gaskins v. Davis*, 115 N. C. 85, 25 L.R.A. 813.

⁶⁵ *Gordon v. Grand Rapids & I. R. Co.*, 103 Mich. 379.

The extraction of turpentine from trees gives the landowner the option to recover the damage done in either of two ways: that necessarily or unnecessarily done to the trees, or the recovery of the turpentine or its value together with the damage unnecessarily done to the trees; the election of the latter precludes the

value of land because of the destruction of forest trees the cost of planting nursery trees in lieu thereof and the time required for them to reach the size and give the shade given by the former may be shown.⁶⁶ The value of the products manufactured from timber may be shown, in connection with the reasonable cost of producing them, and putting them upon the market, as bearing upon the extent of the lessened value of the land by the removal of the timber.⁶⁷ The value of the timber, apart from the value of the land, may be shown, as may the value of similar land.⁶⁸

§ 1020. Same subject; value as affected by defendant's acts.

On the strict theory of trespass *quare clausum* the breaking of the close is the cause of action, and the removal of timber or other property merely enhances the damages.⁶⁹ This is especially so if the severance from the land and the carrying away are by a continuous act. In any case where the severance is not the principal injury, where the conversion into a chattel and the carrying away are together complained of as the cause or causes of action and the damages are ascertained on the value of the timber or ore, the actual injury is that the defendant has taken the plaintiff's property in the condition in which it existed prior to the trespass. How should compensation be computed for this injury? The law is not settled on this point; a great diversity of decision exists. We exclude now the consideration of any special acts detrimental to the land, not necessarily involved in taking the timber or ore, and also all elements of bad faith or wilfulness.

In this particular action this conflict is confined to narrower limits than in trover and trespass *de bonis*; the conflict, when the wrong is not wilful, is between charging the defendant with the value of the trees standing, or stumpage, and ore in

recovery of the damage necessarily done to the trees by extracting the turpentine. *Hines v. Imperial N. S. Co.*, 101 Miss. 802.

⁶⁶ *Diggs v. Wabash R. Co.*, 131 Mo. App. 457.

⁶⁷ *Nelson v. Churchill*, 117 Wis. 10.

⁶⁸ *Kentucky S. Co. v. Page* (Ky.), 125 S. W. 170.

⁶⁹ *Woll v. Voigt*, 105 Minn. 371, 23 L.R.A.(N.S.) 270, citing the text.

place, on one hand, and, on the other, its value immediately after severance from the land. The tendency of decision is toward the former rule; but as the trespasser cannot divest the owner of his title to the property when it becomes a chattel it is recognized as belonging to the owner of the land so that he may retake it, replevy it, or recover for it in actions for taking or conversion of personal property. It has been deemed the right of the owner to recover the value at the time it becomes a chattel; otherwise it is said the trespasser receives remuneration for services not requested by the owner, and for which he is not bound to make compensation. It is supposed that the right to retake the property and recover its value are correlative rights. Ruggles, J., said: "It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages."⁷⁰ The right of the owner to retake his property is maintainable on the principle that he cannot be divested of it without his consent by the tortious act of a wrong-doer; but his rate of damages or the measure of his compensation is governed by another principle, which is that he is entitled to compensation commensurate, and only commensurate, with the injury suffered. When he sues to recover damages for the taking or conversion he sues for a wrong which precedes and does not include the defendant's acts which enhance the value. The cases which support the rule of damages confined to the value of the property before the trespass was committed are given in a note, with some of the reasons advanced in their support.⁷¹ In many of these cases, notably

⁷⁰ *Silbury v. McCoon*, 3 N. Y. 384.

If the purchaser from a trespasser pays the money due the latter into court and an issue is awarded to determine whether the trespasser or landowner is entitled thereto, the latter will prevail though the value of the timber was enhanced by the trespasser's acts.

Faulkner v. Greer, 17 Ont. L. R. 123 (Court of Appeal).

⁷¹ *Foote v. Merrill*, 54 N. H. 490, 20 Am. Rep. 151, was trespass *quare clausum fregit* for cutting down and carrying away trees. It was held that the measure of damages is the amount of injury which the plaintiff suffered from the whole trespass, taken as a continuous act; the in-

those of Wisconsin, an exception is recognized where the owner would have been able to dispose of the removed property to greater

creased value of the trees occasioned by the labor of the defendant in converting them into timber is not to be included. Hibbard, J., says: "The defendant having wrongfully cut and trimmed the plaintiff's trees and it being impossible to separate the original property in them from the value subsequently added, it is unnecessary to cite authorities to show that the plaintiff, after they were cut and trimmed, remained the owner of the timber made from them, free from any lien or claim of the defendant for his labor, and that he might, therefore, have lawfully taken it peaceably into his possession. It is only where the identity of the original material has been destroyed, or where its value is insignificant compared with the value of the article manufactured from it or to which it has been annexed, that the law is otherwise. *Weatherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653. The plaintiff might also have maintained replevin for the timber. *Davis v. Easley*, 13 Ill. 192; *Wingate v. Smith*, 20 Me. 287. Or he might, according to numerous authorities, have recovered its full value at the time it was carried away by bringing trover. *Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505; *Rice v. Hollenbeck*, 19 Barb. 664; *Grant v. Smith*, 26 Mich. 201; *Ellis v. Wire*, 33 Ind. 127, 5 Am. Rep. 189. According to the doctrine of *Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569, he might have elected any day prior to the date of his writ as the time of the conversion; perhaps the same result might as well have been reached in trespass *de bonis asportatis*, but the difficulty of allowing the original taking to be abandoned,

and a later one adopted, has probably been thought greater in that form of action than in trover, although judges have sometimes taken a different view. * * * If the owner of timber cut upon his land by a trespasser gets possession of it increased in value, he has the benefit of the increased value; the law neither divests him of his property, nor requires him to pay for improvements made without his authority; perhaps in trover, and possibly in trespass *de bonis asportatis*, he may be entitled to the same benefit; but we see no occasion for giving it to him where he brings his suit for the whole trespass of breaking and entering his close and cutting down and carrying away his trees as a continuous act. The plaintiff is entitled to be compensated according to the magnitude of his loss, and the defendant ought only to be liable to compensate him according to the magnitude of his loss. The inquiry should be, how much was the plaintiff injured by the breaking and entering of his close and the cutting down and carrying away of his trees? The true measure of damages is the amount of injury which the plaintiff has actually suffered from the whole trespass. If the trees were worth no more to the plaintiff to stand than to the defendant to be cut into timber at that time, their value as timber, with the reasonable expense of cutting deducted, was the measure of the injury which was done to the plaintiff by cutting them. * * * His trees may have been prematurely cut; they may have been ornamental trees or fruit trees; their value after they were separated from the soil may have been

advantage at a date subsequent to the removal. Thus, where the stumpage value of the land from which timber has been cut, sub-

but a small part of the real injury from cutting and removing them. 'The trees considered as timber may, from their youth, be valueless, and so the injury done to the plaintiff by the trespass would be but imperfectly compensated unless he could receive a sum that would be equal to their value to him while standing upon the soil.' Gilchrist, J., in *Wallace v. Goodall*, 18 N. H. 456. A rule of damages which is manifestly unsound when applied to the cutting of trees which are more valuable while standing than after they are cut, cannot be usefully employed in other cases."

In *Longfellow v. Quimby*, 33 Me. 457, a like action, Shepley, C. J., said: "The plaintiff will be entitled to recover compensation for the injuries occasioned by the acts of the defendants upon his lands, to be ascertained by an estimate of the value of the trees cut and carried away, and of the injury, if any, occasioned by cutting them prematurely, and of the injury, if any, done to the land; and on the amount thus ascertained for being deprived of the use of his property may be added an amount equal to six per cent. per annum from the time of taking the property to the time of judgment." *Stanton v. Prichard*, 4 Hun 266.

Whitbeck v. New York, etc. R. Co., 36 Barb. 644, was a similar action for damages done by burning the plaintiff's clover field and destroying his apple trees. The court held that the plaintiff should recover the value of the trees standing, and approved the refusal of the trial court to charge the jury that he could recover no more than the diminished value of the orchard lot

by reason of the destruction of the trees. Johnson, J., said: "It is true that the trees in question were real estate, and in one sense part and parcel of the land itself. But so are buildings and fences, and grass, and trees of all kinds while growing upon the land. The true rule I conceive to be this: that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained without reference to the value of the soil on which it stands or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction. And it can make no difference, in this respect, whether the action is brought to recover for the destruction of a single tree, or all the trees in the orchard. There is no intrinsic difficulty, as I conceive, in estimating the value of a fruit tree growing upon land, although it has strictly no market or commercial value, as a tree, independent of the land which sustains it. In this respect, however, it does not differ materially from buildings and other fixtures. But it does differ from trees which are usually converted into timber or firewood, and which are frequently sold as they stand, for that purpose, or nursery trees which are grown for market. The difference is this: in the one case the value consists chiefly in the thing itself, as a convertible and marketable commodity, while in the other the value consists chiefly in the quality and quantity of its average annual products; and it is capable of being leased as much as a field or a dwelling. The calculation by which the

sequently increases, it is held that the owner is entitled to recover as damages the highest market value of that stumpage shown to

value would be determined in the two cases would be somewhat different, but, for aught I can see, it could be determined by the opinion of competent witnesses in the one case as well as in the other."

Stockbridge I. Co. v. Cone I. Works, 102 Mass. 80, was an action of tort for mining and carrying away coal, iron and other ores from the plaintiff's land. The court held that the plaintiff was entitled to recover on the ground that the taking of the ore and the injury done to the property were tortious; that the value of the ore was to be estimated as it lay in the bed, not as it was after the defendants had increased its value by removing it, and that to this was to be added the damage done to the real estate.

In *re United Merthyr C. Company*, L. R. 15 Eq. 46, was a case like the preceding. Sir James Bacon, V. C., said: "I have not the slightest intention of interfering with or departing from the decisions which have been mentioned to me (*Powell v. Aiken*, 4 K. & J. 343; *Wood v. Morewood*, 3 Q. B. 440, note; *Morgan v. Powell*, 3 Q. B. 278; *Jegon v. Vivian*, L. R. 6 Ch. 742; *Phillips v. Homfray*, id. 770; *Llynvi Co. v. Brogden*, L. R. 11 Eq. 188; *Martin v. Porter*, 5 M. & W. 351), especially the more recent cases, because, as I recollect, there was a want of exact agreement between some of the common-law cases and some of those which had formerly been decided in this court. I take the difference now to be entirely removed, and the rule to be clearly and plainly established, and so understanding, I made the order in this case. The words which are supposed to have been used are 'ac-

tual cost and expenses,'—the word that has been read from the short-hand notes is 'disbursements.' In my opinion there is not the slightest doubt about the meaning of either of these expressions. It is said that the trespasser must be treated as if he had been the purchaser. Now, that must be taken with a certain qualification. It is a useful illustration of what the court meant to decide in the particular case where that expression is to be found; but the principle of the decision is, that the plaintiff, although he has suffered a wrong, shall not have any more than he would have had if that wrong had not been committed. That I take to be the clear and plain principle. If he had himself severed the coal, he could only have done so by means of disbursements. If he had brought it to the pit's mouth when severed, he could only have done so by means of disbursements. If he himself had severed and brought the coal to the pit's mouth, whatever the value of it might then be would have to be deducted, because he would have borne the expenses on both these heads, which would have been actual disbursements, not profit; nor do 'just allowances' mean profit; but if I were to change the words of the order, I might leave it doubtful, or might open up some ground for argument, as to what was meant by just allowances.

* * * The trespasser is not to charge as if somebody else had employed him to sever. If he had paid a certain sum to his workmen, and by the custom of the trade was entitled to charge a certain other sum, he is not to have the larger sum. The plaintiff is to be put in the

have been available from the date of the wrongful removal of the timber to the time when the action started; he is not to be forced

same situation as he would have been in, neither better nor worse, if he himself had severed the coal and brought it to the pit's mouth. That must have been done, and could only have been done, by means of disbursements, not by any profit, not by any allowance in the trade, not by any artificial mode of guessing at it; but the books he must have kept would show how much money he spent in severing the coal, and how much money he spent in bringing it to the pit's mouth."

In *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617, the parties were owners of adjoining tracts of coal land, and the defendant had opened a mine upon his own land and worked it for years. The dividing line was not exactly known, and the plaintiff claimed the defendant had dug coal over the line and out of her land, which was denied. Lowrie, C. J., in delivering the opinion of the court, said: "The plaintiff insists that because the action is allowed for the coal as personal property, that is, after it has been mined or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done. Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are en-

deavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office. Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in its strict form, it is an action for the value of personal property lost by one and found by another and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion and of wrongful taking and conversion, and it affords compensation, not only for the value of the goods, but also for outrage and malice in the taking and detention of them. * * * Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whisky, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article. 6 Hill 425,

to sell in any less favorable market. As has been observed, this measure of damages is only applied where the trespass is the re-

41 Am. Dec. 753; 21 Barb. 92; 23 Conn. 523; 38 Me. 174, 61 Am. Dec. 239. Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been to the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for *mesne* profits." *Herdic v. Young*, 55 Pa. 176, 93 Am. Dec. 739; *Coleman's App.*, 62 Pa. 252, 278; *Yahoola, etc. Hydraulic & M. Co. v. Irby*, 40 Ga. 479; *Coxe v. England*, 65 Pa. 212; *Schlater v. Gay*, 28 La. Ann. 340; *Ensley v. Nashville*, 2 Baxter 144. See reasoning in opinion in *Single v. Schneider*, 24 Wis. 300-303, 30 id. 570; *Webster v. Moe*, 35 id. 75; *Hungerford v. Redford*, 29 id. 345; *Railway Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. Rep. 629; *Winchester v. Craig*, 33 Mich. 205.

The following cases are in harmony with the views expressed in those quoted from: *Striegel v. Moore*, 55 Iowa 88; *Hitchcock v. Libby*, 70 N. H. 399; *United States v. Homestake M. Co.*, 117 Fed. 481, 54 O. C. A. 303; *Chappell v. Puget Sound R. Co.*, 27 Wash. 63; *Chamberlain v. Collinson*, 45 Iowa 429; *Clement v. Duffy*, 54 id. 632; *Gardere v. Blanton*, 35 La. Ann. 811; *Thompson v. Moiles*, 46 Mich. 42; *Hinman v. Heyderstadt*, 32 Minn.

250, modifying *Nesbitt v. St. Paul L. Co.*, 21 Minn. 491; *King v. Merriam*, 38 id. 47; *Whitney v. Huntington*, 37 Minn. 197; *Oak Ridge C. Co. v. Rogers*, 108 Pa. 147; *State v. Pacific G. Co.*, 22 S. C. 50; *Coal Creek M. & M. Co. v. Moses*, 15 Lea 300; *Ross v. Scott*, id. 479; *Lewis v. Courtright*, 77 Iowa 199; *Viliski v. Minneapolis*, 40 Minn. 304, 3 L.R.A. 831; *Austin v. Huntsville C. & M. Co.*, 72 Mo. 534, 37 Am. Rep. 446; *Clowser v. Joplin M. Co.*, 4 Dill. 469, note; *Ayres v. Hubbard*, 57 Mich. 322, 58 Am. Rep. 361; *Quigley F. Co. v. Rhea*, 114 Va. 271; *Burke Hollow C. Co. v. Lawson*, 151 Ky. 305; *Bennett Jellico C. Co. v. East Jellico C. Co.*, 152 Ky. 838; *Kahle v. Crown Oil Co.*, 180 Ind 131; *Wall v. Halloman*, 156 N. C. 275; *Stewart v. Colfax C. C. Co.*, 147 Iowa 548 (varying the rule under the facts); *Befay v. Wheeler*, 84 Wis. 135; *Oregon & C. R. Co. v. Jackson*, 21 Ore. 360; *Bender v. Brooks (Tex. Civ. App.)*, 127 S. W. 168; *Lewis v. Virginia-C. C. Co.*, 69 S. C. 364, 104 Am. St. 806; *Messer v. Walton*, 42 Tex. Civ. App. 488; *Bailey v. Hayden*, 65 Wash. 57; *Nethery v. Nelson*, 51 Wash. 624; *Kirkpatrick v. McNamee*, 36 Can. Super. Ct. 152; *Sligo F. Co. v. Hobart-L. T. Co.*, 153 Mo. App. 442; *Little v. Greek*, 233 Pa. 534; *McIntosh v. Ropp*, 233 Pa. 497; *Darnell v. Wilmoth*, 69 W. Va. 704 (if the timber has only the ordinary commercial value); *Bond v. Griffin*, 74 Miss. 599; *Johnson v. Kathan*, 88 Hun 456; *Clark v. Holdridge*, 12 App. Div. (N. Y.) 613; *Gaskins v. Davis*, 115 N. C. 85, 91, 25 L.R.A. 813; *Lehan v. Dillon*, 19 Viet. L. R. 730; *Warrior C. & C. Co. v. Mabel M. Co.*, 112 Ala. 624; *Hosli v. Yokel*, 57

sult of inadvertence or mistake.⁷² The quality of the good faith which warrants its application is satisfied if the wrong was done without culpable negligence or wilful disregard of the rights of others, in the honest and reasonable belief that the act was rightful. Notice of the existence of an adverse claim is an important element to be considered; but it alone will not necessarily place the wrong-doer in the position of a culpably wilful trespasser and subject him to the more onerous measure of liability.⁷³ Where timber was cut on government land under permission of the secretary of the interior, who had no power to grant the license, and under the advice of counsel, such advice not being so plainly erroneous that a layman was charged with knowledge of the error, the trespasser was not chargeable with bad faith or with a wilful intent to commit a wrongful act.⁷⁴ Where timber was cut in the belief that the right to cut it was possessed its value after it was cut, where it was cut, measured the recovery.⁷⁵ In estimating the value of coal in its place in

Mo. App. 622. See *McGuire v. Boyd C. & C. Co.*, 236 Ill. 69 (the general expense of operating the mine from which the mineral was taken does not enter into the question).

Where the owner of land upon which timber had been cut consented to the removal of the same by the trespasser and made ineffectual efforts to sell it, after which it was burned, he recovered its value as if standing. If the owner had refused to consent to the removal of the timber, it is said the value of the logs upon the ground might have been deducted. *Michigan L. & I. Co. v. Deer Lake Co.*, 60 Mich. 143, 1 Am. St. 491.

⁷² "One who cuts timber on the land of another in good faith, believing it to be his own land and timber, is liable for the value of the timber at the stump, and not as manufactured into lumber." *Sibille v. Eastham*, 136 La. 557.

⁷³ *Kahle v. Crown Oil Co.*, 180 Suth. Dam. Vol. IV.—9.

Ind. 131; *Befay v. Wheeler*, 84 Wis. 135; *Warren v. Putnam*, 68 Wis. 481; *Callen v. Collins*, 56 Tex. Civ. App. 620; *DeWitz v. Saner-W. L. Co.* (Tex. Civ. App.), 155 S. W. 980; *Whitney v. Huntington*, 37 Minn. 197; *King v. Merriman*, 38 Minn. 47; *Jegon v. Vivian*, L. R. 6 Ch. 742; *State v. Clarke*, 109 Minn. 123; *Gladys City O., G. & Mfg. Co. v. Right of Way O. Co.* (Tex. Civ. App.), 137 S. W. 171; *Pettit v. Frothingham*, 48 Tex. Civ. App. 105. Compare *Netherly v. Nelson*, 51 Wash. 624.

⁷⁴ *United States v. Homestake M. Co.*, 117 Fed. 481, 54 C. C. A. 303, citing *Selden v. Cashman*, 20 Cal. 57, 81 Am. Dec. 93; *Abbott v. Land & W. Co.*, 101 Cal. 567. To the same effect is *Morgan v. United States*, 169 Fed. 242, 94 C. C. A. 518.

⁷⁵ *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. ed. 548.

the earth the effects of mining operations on the surrounding land will be regarded. If these have rendered the coal accessible for removal without additional expense for machinery or operating cost the plaintiff is entitled to the benefit of the resulting advantage.⁷⁶

The severer rule of damages is applied in several states.⁷⁷ It

⁷⁶ *Stewart v. Colfax C. C. Co.*, 147 Iowa 548.

⁷⁷ *Silver King C. M. Co. v. Silver King C. M. Co.*, 122 C. C. A. 402, 204 Fed. 166; *Perrine v. Chicago & H. O. Co.*, 173 Ill. App. 287; *Liberty Bell G. M. Co. v. Smuggler-Union M. Co.*, 122 C. C. A. 113, 203 Fed. 795; *United States v. Gentry*, 119 Fed. 70, 55 C. C. A. 658 (noncompliance with rules as to sale of timber cut on government land); *St. Paul v. Louisiana C. L. Co.*, 116 La. 595; *Warren v. Putnam*, 68 Wis. 481.

Maye v. Tappan, 23 Cal. 306. The trespass was committed by entering upon and taking away gold-bearing earth from the mining claim of the plaintiff. The court held the true measure of damages to be the value of the earth at the time it is separated from the surrounding soil and becomes a chattel. Crocker, J., delivering the opinion, after a review of the cases, said: "It will be noticed that the rule of damages in such cases depends, to some extent, upon the form of the action, whether the action is for an injury to the land itself, or for the conversion of a chattel which had been severed from the land. The complaint in this case alleges that the defendants, at divers times, wrongfully entered upon a portion of plaintiff's mining claim, and extracted the gold and gold-bearing earth from a portion thereof; which gold and gold-bearing earth they wrongfully carried

away and converted to their own use; and the value of the gold thus carried away is alleged to have been \$2,000. No demand of the possession of the gold after it was separated from the earth appears to have been made upon the defendants, and the *gravamen* of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule for damages in a case like the present is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. This seems to be a just and proper rule, and one established by the decisions upon this question. In estimating these damages the expense of extracting the gold and separating it from the earth, after it is first moved from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs." *Goller v. Fett*, 30 Cal. 481; *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239; *Firmin v. Firmin*, 9 Hun 571; *Robertson v. Jones*, 71 Ill. 405; *McLean C. Co. v. Long*, 81 Ill. 359; *Illinois, etc. R. & C. Co. v. Ogle*, 82 Ill. 627, 25 Am. Rep. 342; *Martin v. Porter*, 5 M. & W., 351; *Wood v. Morewood*, 3 Q. B. 440n.; *Morgan v. Powell*, 3 Q. B. 278; *Wild v. Holt*, 9 M. & W. 672; *Barton C. Co. v. Cox*, 39 Md. 1, 17 Am. Rep. 525; *Bennett v. Thompson*, 13 Ired. 146; *Parker v. Waycross & F. R. Co.*, 81 Ga.

is known, in the case of mining ores, as the royalty rule, being measured in point of time as is the royalty usually charged by land-owners for the privilege of mining thereon.⁷⁸ The circumstances under which these various rules apply and "the doctrine of the English courts on this subject," said Mr. Justice Miller,⁷⁹ "is probably as well stated by Lord Hatherley in the house of lords in the case of *Livingston v. Rawyards Coal Co.*⁸⁰

387; *Benson M. & S. Co. v. Alta M. & S. Co.* (Ariz.), 15 Pac. 565, 145 U. S. 428, 36 L. ed. 762; *Empire G. M. Co. v. Bonanza G. M. Co.*, 67 Cal. 406; *Franklin C. Co. v. McMillan*, 49 Md. 549; *Blaen Avon C. Co. v. McCulloch*, 59 id. 403; *Atlantic, etc. C. Co. v. Maryland C. Co.*, 62 id. 135; *Cheaney v. Nebraska & C. S. Co.*, 41 Fed. 740 (Colo.); *Omaha & G. S. & R. Co. v. Tabor*, 13 Colo. 41, 16 Am. St. 185, 5 L.R.A. 236 (in trover); *Aurora Hill M. Co. v. Eighty-five M. Co.*, 12 Sawyer 355, 34 Fed. 515; *Union Bank v. Rideau L. Co.*, 3 Ont. L. R. 269; *United States v. Homestake M. Co.*, 117 Fed. 481, 54 C. C. A. 303; *Sunnyside C. & C. Co. v. Reitz*, 14 Ind. App. 478, 485, 43 id. 46; *United States C. Co. v. Canon City C. Co.*, 24 Colo. 116; *St. Clair v. Cash G. M. & M. Co.*, 9 Colo. App. 235; *McLean County C. Co. v. Lennon*, 91 Ill. 561; *Thomas P. B. Co. v. Herter*, 60 Ill. App. 58; *Donovan v. Consolidated C. Co.*, 88 id. 589, 187 Ill. 32; *Negley v. Cowell*, 91 Iowa 256, 51 Am. St. 345, cited in § 1011; *Brown v. Pope*, 27 Tex. Civ. App. 225; *Peters v. Tilghman*, 111 Md. 227; *Ripy v. Less*, 55 Tex. Civ. App. 492; *William M. Rice Institute v. Freeman* (Tex. Civ. App.), 145 S. W. 688. See *Bull v. Griswold*, 19 Ill. 631; *American Sand & Gravel Co. v. Spencer*, 55 Ind. App. 523; *Hilty v. Saltsburg Coal Min. Co.*, 55 Pa. Super. Ct. 104.

Where the milder rule of damages governs the plaintiff may recover the value of the ore mined in his vein, less only the actual cost of digging it, trammings it to the bottom of the shaft, and hoisting it to the surface. Whatever expense the defendant may have been to in running levels, drifts and cross-cuts to reach such vein were no part of the cost of extracting the ore therefrom. *St. Clair v. Cash G. M. & M. Co.*, 9 Colo. App. 235.

In *Lyons v. Central C. & C. Co.*, 239 Mo. 626, the plaintiff had been in the habit of executing contracts for mining coal on a royalty basis; the damages were assessed by the customary royalty paid, rather than by the diminished value of the land.

⁷⁸ The royalty to be paid should be based upon that prevailing in the locality for coal of like quality in veins of approximately the same thickness as that tortiously worked. If the mining was conducted in such a manner as to cause unnecessary waste of coal compensation should be allowed for the amount which could have been removed by pursuing proper methods of mining as well as for that removed. *Bennett Jellico C. Co. v. East Jellico O. Co.*, 152 Ky. 838.

⁷⁹ *Wooden-ware Co. v. United States*, 106 U. S. 432, 27 L. ed. 230; *Benson M. & S. Co. v. Alta M. & S. Co.*, 145 U. S. 428, 27 L. ed. 237.

⁸⁰ 5 App. Cas. 25.

as anywhere else. He said: 'There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say will assert its authority, to punish the fraud by fixing the person with the value of the whole property which he has so furtively taken, and making him no allowance in respect to what he has so done, as would have been justly made to him if the parties had been working by agreement.' But 'when once we arrive at the fact that an inadvertence has been the cause of misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.' There seems to be no doubt," said Judge Miller, "that in the case of a wilful trespass the rule stated above is the law of damages both in England and in this country, though in some of the state courts the milder rule has been applied in this class of cases."⁸¹ On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition."⁸²

⁸¹ Weymouth v. Chicago & N. R. Co., 17 Wis. 550, 84 Am. Dec. 763; Single v. Schneider, 24 Wis. 299; Sligo F. Co. v. Hobart-L. T. Co., 153 Mo. App. 442.

⁸² Wooden-ware Co. v. United States, *supra*; Winchester v. Craig, 33 Mich. 205; Heard v. James, 49 Miss. 236; Baker v. Wheeler, 8 Wend. 505; Baldwin v. Porter, 12 Conn. 484; United States v. Eccles, 111 Fed. 490; Morgan v. United States, 169 id. 242, 94 C. C. A. 518; Ball & Bro. L. Co. v. Simms L. Co.,

121 La. 627, 18 L.R.A. (N.S.) 244; State v. Clarke, 109 Minn. 123; Hitchcock v. Libby, 70 N. H. 399; Lewis v. Virginia-C. C. Co., 69 S. C. 364; American Sand & Gravel Co. v. Spencer, 55 Ind. App. 523. See C. A. Smith Timber Co. v. Auld, 134 C. C. A. 512, 218 Fed. 824.

It is presumed that a party intended the natural consequences of his acts, and if he refused to avail himself of the means of ascertaining the facts and, reckless of the rights of the owner of property, ap-

A statute providing for the recovery of the highest market value of the manufactured product of timber wrongfully cut from the land of another applies where the trespasser had the right to go upon the land and cut certain timber, he having cut other timber which he had agreed not to cut;⁸³ and where the cutting was not the result of a mistake.⁸⁴ Statutory liability for treble damages with a condition that if the trespass was involuntary but single damages shall be allowed, means as against an intentional trespasser, compensatory damages, and not the punitive damages allowed at common law.⁸⁵ In Illinois the severer rule of damages is applied notwithstanding the trespassing was done by mistake or through inadvertence. "No necessity exists for one miner to trespass upon an adjoining owner. If proper maps and plans of the mine are kept and measurements and surveys of the work made, as required by common prudence and the statute, each miner will have no difficulty in confining his operations to his own estate. When, therefore, one miner, in disregard of his duty, invades the property of another, he should not be permitted to profit by his unlawful act, which would be the case if the trespasser was only required to pay the value of the coal as it existed in the mine before it was taken."⁸⁶ The milder rule of damages will not invariably be adhered to if the justice of the case demands that it be varied. Thus, it is said that if there is no market value

appropriates his property to his own use, it is presumed he did it intentionally and wilfully. *Liberty Bell G. M. Co. v. Smuggler-Union M. Co.*, 122 C. C. A. 113, 203 Fed. 795.

A trustee will not be permitted to reap any profit from his trespass; hence his liability is for an amount not less than that he realized from the timber cut. *Conn v. Rice*, 122 C. C. A. 417, 204 Fed. 181.

The severer rule of damages will not be applied in an accounting between tenants in common, though the defendant's conduct was wilful and his intention wrongful, if his cotenants can be compensated for

the value of their property and its income without doing so. *Silver King C. M. Co. v. Silver King C. M. Co.*, 122 C. C. A. 402, 204 Fed. 166.

⁸³ *Everett v. Gores*, 89 Wis. 421.

⁸⁴ *McNaughton v. Borth*, 136 Wis. 543.

⁸⁵ *Bailey v. Hayden*, 65 Wash. 57; *Oregon & C. R. Co. v. Jackson*, 21 Ore. 360.

⁸⁶ *Illinois, etc. R. & C. Co. v. Ogle*, 82 Ill. 627, 25 Am. Rep. 342, 92 Ill. 353; *Donovan v. Consolidated C. Co.*, 187 Ill. 28, 83 Ill. App. 589. See *American Sand & Gravel Co. v. Spencer*, 55 Ind. App. 523.

for the timber when it is cut, or the owners of it or some of them are infants, the deterioration in value which naturally occurs during the time reasonably necessary to obtain the aid of a court of equity in disposing of it may be regarded.⁸⁷ Both the foregoing rules of damages were pronounced inadequate to do justice to the parties in a Tennessee case though the defendant acted in good faith. This view seems to have been taken because of the nature of a contract between the parties. The damages were measured by the value of marble taken and sold, as it lay in the quarry, prepared for the market, less the actual and reasonable expense of preparing it for the market.⁸⁸

§ 1021. *Liability for additional injury to land.* Accompanying trespasses of this nature there is frequently injury done to the land beyond taking away timber or minerals. Where such is the case additional damages are recoverable; and these will be assessed upon the particular facts.⁸⁹ If the land is more valuable for one purpose than for another the damages will be computed upon the basis of its depreciation for the more valuable use.⁹⁰ In an action for breaking and entering the plaintiff's coal lands it was made to appear that the defendant mined coal and made excavations for that purpose, and thereby injured the coal left remaining as pillars; that, by bad mining or otherwise, he rendered it difficult or impossible for the plaintiff to get out or remove such pillars of remaining coal and thus depreciated its value. The court held the plaintiff entitled, in addition to damages for the coal actually removed, to recover for such as could not be removed what it was worth per ton in its native bed, and such damages for so much coal as could be removed with increased expense as the evidence might show such coal to be diminished in value; that if the defendant in

⁸⁷ *Virginian R. Co. v. Hurt*, 112 Va. 622.

⁸⁸ *Dougherty v. Chesnutt*, 86 Tenn. 1.

⁸⁹ *Hilty v. Saltsburg Coal Min. Co.*, 55 Pa. Super. Ct. 104; *Davis v. Wall*, 142 N. C. 450; *Chase v. Clearfield L. Co.*, 209 Pa. 422; *Johnson v. Park*, 13 Ky. L. Rep. 427; *Mays-*

ville, etc. R. Co. v. Warnock, 10 Ky. L. Rep. 937 (Ky. Super. Ct.); *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 626; *Harrison v. Adamson*, 86 Iowa 693; *Galveston, etc. R. Co. v. Chittim*, 31 Tex. Civ. App. 40.

⁹⁰ *Chase v. Hoosac Tunnel & W. R. Co.*, 85 Vt. 60.

mining and excavating under the lands thereby rendered it more difficult or expensive for the plaintiff to obtain access to the coal unmined and depreciated its value, the plaintiff was entitled to recover such damages as he sustained from such depreciation and the increased difficulty and expense of mining and removing the coal.⁹¹ In Pennsylvania it has been held that where the coal which remains in place has a market value greater than the amount of damages which its removal would cause to the surface, the plaintiff may recover for any depreciation in such market value caused by the manner in which the headings of the defendant's mine have been driven through it.⁹² The damage done by piling brush on land is met by the recovery of the cost of removing it; the added liability on account of the increased risk of fire is too speculative to be an element of damage.⁹³ This has also been held where it was sought to recover the lessened value of a farm because of the destruction of a site for a barn.⁹⁴

Where uncultivated and unfenced land was entered upon, fenced, planted and the crop removed therefrom the land-owner was held entitled to recover the value of the crop and for depreciation in the value of the land. Additional damages were not recoverable because it was the intention of the owner to allow the land to remain untilled, and because by its cultivation, if it so remained, it would suffer injury from washing and becoming weedy. The owner was bound to use the land as good husbandry required it to be used. The question on this point solely was, how much less was the land worth on account of its having been cultivated.⁹⁵ It admits of some question whether this is not making an extreme application of the doctrine of avoidable consequences. There can be no doubt that the washing of the soil and the growth of weeds would be the natural and proximate consequences of the cultivation—both

⁹¹ Barton C. Co. v. Cox, 39 Md. 1, 11 Am. Rep. 518; Wallace v. Goodall, 18 N. H. 439.

⁹² Hilty v. Saltsburg Coal Min. Co., 55 Pa. super. Ct. 104.

⁹³ Chase v. Clearfield L. Co., *supra*.

⁹⁴ Stewart v. Colfax C. Co., 147 Iowa 548.

⁹⁵ Keirnan v. Heaton, 69 Iowa 136. See § 1011.

results would follow from the act of the trespasser in the ordinary course of nature. The owner of the land had the right to hold it for an advance in the market price and sell it in its virgin state. He ought not to be compelled to mitigate the effects of the wrong done him by becoming a farmer or selling the land to some one who would have given more for it in its uncultivated condition than it was worth to him as it was left, or by selling in advance of the time he might otherwise have done. Where a structure is erected on land there may be a recovery, in addition to the rental value thereof, for loss of crops, trees, shrubbery and the like, and for injury to the residue of the land.⁹⁶

§ 1022. **Damage to unsecured ice, and for the diversion of water.** In Illinois the damages for cutting timber or mining ores are measured by their value as soon as they become chattels. The same rule has been applied where ice was cut on a stream bounded by the land of him who sued for its cutting. His right to the ice is exclusive, and the measure of damages suggested applies regardless of the situation or convenience of the parties.⁹⁷ In a Michigan case ice was destroyed when it was six inches thick by the gross negligence of a steamer in navigating in unnecessary proximity to it. The damages were measured by the value of so much of the ice as would probably have been secured and saved for the market, less the expense connected with doing so. The defendants contended that the rule was "the true value of the ice, or rather the privilege of taking it—what it would have been shown to be had the matter been settled or the case tried on the very day that the ice was broken"; or, in other words, that the damages could not be affected by the fact that the price of ice was high during the following season. This was disagreed to by the court, and the price during such time was held to have been properly considered.⁹⁸ The New York supreme court has entertained the view, in a case in which it was found that the ice cut had

. ⁹⁶ *Lyons v. Fairmont R. E. Co.*, 101 Ill. 46, 40 Am. Rep. 196; *Piper v. Connelly*, 108 Ill. 647.
71 W. Va. 754.

⁹⁸ *People's I. Co. v. Steamer Excelsior*, 44 Mich. 229.
⁹⁷ *Washington I. Co. v. Shortall*,

no market value before the cutting, that the damages for cutting and removing it, if it created any right of action against the defendant, must depend upon whether it can be regarded an injury to the real estate of the owner, and consequently the amount of recovery must be such as to compensate for that injury only.⁹⁹ In Massachusetts one who drains the waters of a pond and destroys the ice thereon is liable for the value of the right to harvest the ice upon it and make it property at the time it was destroyed. In determining the value of that right the expense of securing the ice and the risks attending thereupon are factors.¹ In Pennsylvania the measure of recovery is not enhanced by the value bestowed upon the ice by the labor of a trespasser, in the absence of any circumstances of aggravation. If there is no proof of a market value at the time and place where the injury was done the value in the nearest market, respect being had as well to time as place, less the expense of getting the ice to market, including the loss from shrinkage while stored and in handling, measures the recovery.²

The owner of hydraulic power created by a dam may use all the water secured thereby, subject only to the needs of navigation, and one who wrongfully appropriates a part of such power must answer for the diminished power, and not merely for the diversion of water. The right to recover is not dependent upon the owner's facilities for using the power. The measure of recovery is the annual rental value of the actual amount

⁹⁹ *Van Rensselaer v. Mould*, 48 Hun 396.

In a later case before a referee the damages were assessed on the basis of the value of the plaintiff's right to sell the privilege of cutting and removing the ice which the defendant had cut and removed. The case came before the court in such form that it was not required to pass upon the question of damages. *Van Rensselaer v. Mould*, 77 Hun 553.

¹ *Handforth v. Maynard*, 154

Mass. 414. See *Eidemiller I. Co. v. Guthrie*, 42 Neb. 238, 28 L.R.A. 581.

² *Stauffer v. Miller S. Co.*, 151 Pa. 330.

As to what constitutes a sufficient appropriation of ice on a great pond or on a river to enable the appropriator to maintain trover therefor, see *Barrett v. Rockport I. Co.*, 84 Me. 155, 16 L.R.A. 874; *People's I. Co. v. Davenport*, 149 Mass. 122; *Brown v. Cunningham*, 82 Iowa 512, 12 L.R.A. 583.

of horse power taken at the dam, with interest computed from the close of each year during the period not affected by the statute of limitations.³ In Utah one who causes the loss of water available for irrigating purposes is liable for its market value.⁴ In so far as the loss of crops results from the diversion of water used for irrigation the trespasser must answer therefor. It may be shown to what extent other like crops were injured by a natural drouth in order to prove the extent to which those of the plaintiff were affected by the wrong.⁵ In an action for the diversion of water by driven wells and pumps located on adjoining lands the plaintiff may show the nature, character and extent of the business interrupted thereby; though such evidence shows the profits lost it is competent on the question of the rental or usable value of the land.⁶ In addition to the recovery of the rental value of land rendered unproductive by the diversion of water, the recovery of the value of the seed sown and the labor expended in and about the crop, which made no progress whatever, has been declared proper.⁷

§ 1023. Destruction of and injury to growing crops. There is not entire accord as to the measure of recovery for destroying or injuring growing crops. According to the preponderance of authority the liability of the wrong-doer is fixed by the value of the crop in the condition it was when the trespass was committed.⁸ If such value cannot be shown the diminution in the

³ Green Bay & M. C. Co. v. Kaukauna W. P. Co., 112 Wis. 323.

⁴ North Point C. I. Co. v. Utah & Salt Lake C. Co., 23 Utah 199; Whitmore v. Utah F. Co., 26 Utah 488.

⁵ Lum Ah Lee v. Ah Soong, 16 Hawaii 163.

⁶ Reisert v. New York, 174 N. Y. 196.

⁷ Comerford v. Morrison, 145 Ill. App. 615.

⁸ Railway Co. v. Lyman, 57 Ark. 512; Thompson v. Chicago, etc. R. Co., 84 Neb. 482, 23 L.R.A. (N.S.)

310; Gulf Pipe Line Co. v. Brymer (Tex. Civ. App.), 124 S. W. 1007; Peterson v. Peterson, 42 Utah 270; Atlanta & B. A. L. R. Co. v. Brown, 158 Ala. 607, citing the text; Salstrom v. Orleans B. G. M. Co., 153 Cal. 551; Teller v. Bay & R. D. Co., 151 Cal. 209, citing the text; Blunck v. Chicago & N. R. Co., 142 Iowa 146, citing the text; Hilligoss v. Missouri, etc. R. Co., 84 Kan. 372; Missouri, etc. R. Co. v. Couch, *infra*; Deal v. St. Louis, etc. R. Co., 144 Mo. App. 691, 144 Mo. App. 384; Adam v. Chicago, etc. R. Co.,

rental value of the land by reason of the wrong has been held to be the measure of liability;⁹ such diminution to be ascertained on the basis of the use to which the land was put.¹⁰ In a case in which a tenant sued his landlord for plowing under growing wheat the court said that the plaintiff as owner of two-thirds of the wheat was entitled to recover as damages the value of his share at the time it was destroyed; not its value for immediate use in the condition it then was, but with the

139 Mo. App. 204; *Casey v. St. Louis, etc. R. Co.*, 129 Mo. App. 362; *Carter v. Wabash R. Co.*, 128 Mo. App. 57, citing the text; *Hunt v. St. Louis, etc. R. Co.*, 126 Mo. App. 261, citing the text; *Chicago, etc. R. Co. v. Johnson*, 25 Okla. 760, 27 L.R.A.(N.S.) 879, citing the text; *Missouri, O. & G. R. Co. v. Brown*, 41 Okla. 70, 50 L.R.A.(N.S.) 1124; *Pacific L Co. v. Murray*, 45 Ore. 103; *Taylor v. Canton*, 30 Pa. Super. Ct. 305; *Texas Cent. R. Co. v. Qualls* (Tex. Civ. App.), 124 S. W. 140; *Suderman v. Rodgers*, 47 Tex. Civ. App. 67; *Putnam v. St. Louis S. R. Co.*, 43 Tex. Civ. App. 448; *Lester v. Highland Boy G. M. Co.*, 27 Utah 470, 101 Am. St. 98, citing the text; *Tretter v. Chicago, etc. R. Co.*, 154 Iowa 280; *Richardson v. Northrop*, 66 Barb. 85; *Seamans v. Smith*, 46 Barb. 320; *Lommelund v. St. Paul, etc. R. Co.*, 35 Minn. 412 (overruled, see *infra*); *Houston, etc. R. Co. v. Adams*, 63 Tex. 200; *Gresham v. Taylor*, 51 Ala. 505; *Colorado Con. L. & W. Co. v. Hartman*, 5 Colo. App. 150; *Irwin v. Nolde*, 176 Pa. 594; *Lampley v. Atlantic C. L. R. Co.*, 63 S. C. 462. See *Folsom v. Apple River L. D. Co.*, 41 Wis. 608-9.

Marston, C. J., pronounced this a very unsatisfactory rule, and said that it affords a way in which parties may be avenged of their adversaries with practical impunity. He

said in a case in which it was sought to apply a corresponding rule to the destruction of ice on a navigable river, that "the owner of the growing crops would not be limited in his recovery to the value thereof at the time of their destruction, nor to the fair rental value of the lands. If the action were brought at once and a trial had the prospective yield and value of the crop when matured might be shown. The proof might be unsatisfactory and uncertain, and largely a matter of opinion. Such considerations should not, however, absolve the wrongdoer, and the dangers, if any, from such a rule he should incur. If such an action were not commenced or tried until after the time when such crops would have matured, the same elements of uncertainty would not exist. It would then be known whether the season had been a favorable or an unfavorable one; the yield per acre in that vicinity; the market price of the crop; the expense—all could be ascertained with tolerable certainty, and why should the law exclude such proofs?" *People's I. Co. v. Steamer Excelsior*, 44 Mich. 229.

⁹ *Larson v. Lammers*, 81 Minn. 239; *Burnett v. Great Northern R. Co.*, 76 Minn. 461.

¹⁰ *Missouri, etc. R. Co. v. Couch* (Tex. Civ. App.), 122 S. W. 67.

view to his right to use the land until it was matured and then harvest it. This value might be shown by evidence of the probable amount of wheat, the crop as it appeared when destroyed, would yield; the value of the same at the market season, and by deducting therefrom the necessary cost for harvesting and threshing.¹¹ The partial destruction of a crop involves liability for the difference between its value as realized and what it would have been but for the injury, less the difference between the cost of producing that obtained and that which would have been obtained but for the wrong.¹²

The plaintiff should recover compensation according to the particular facts; he is entitled to be remunerated in respect to property taken or destroyed and for any other injury. The fact that all the labor necessary to produce a crop has been performed and the state of its growth at the time of the defendant's interference will necessarily enter into the calculation.¹³ In ascertaining the value of a crop in accordance with this rule a considerable latitude of inquiry is properly open. The capacity of the land to produce crops being in question, evidence of the average yield of like crops upon the same land in previous years and similar lands in the neighborhood, under like circumstances and conditions, is admissible,¹⁴ and also the average market value of the crop injured, within reasonable limitations as to time, and the expense of harvesting and marketing a like crop.¹⁵ The Minnesota case which laid down this doctrine,

¹¹ *Scanland v. Musgrove*, 91 Ill. App. 184; *Tubbs v. Roberts*, 40 Colo. 498; *Yazoo, etc. R. Co. v. Hubbard*, 85 Miss. 480; *Deal v. St. Louis, etc. R. Co.*, 144 Mo. App. 684; *Suderman v. Rodgers*, 47 Tex. Civ. App. 67; *Biela v. Urbanczyk*, 38 Tex. Civ. App. 213.

¹² *Jonesboro, etc. R. Co. v. Cable*, 89 Ark. 518; *Texas Co. v. Lacour* (Tex. Civ. App.), 122 S. W. 424, citing local cases. But compare *Misouri, etc. R. Co. v. Couch*, *supra*.

¹³ *Watts v. Hewlett Bay Co.*, 152 App. Div. (N. Y.) 493; *Anderson v.*

St. Louis, etc. R. Co., 129 Mo. App. 384; *Behrens v. Mountz*, 37 Pa. Super. Ct. 326; *Williams v. Currie*, 1 Man. Gr. & Scott 841; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Jenkins v. McCoy*, 50 Mo. 348; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384. See *Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626.

¹⁴ *Black v. Minneapolis, etc. R. Co.*, 122 Iowa 32 (unburned portion of meadow in question).

¹⁵ *American Rio Grande L. & I. Co. v. Mercedes P. Co.* (Tex. Civ.

after being recognized as authority,¹⁶ came under review with the result that it was overruled. In the overruling case the action was to recover for growing grass. The plaintiff (in the fall of the year and within two months after the fire) was permitted to show what his prospects ought to be for a crop of grass seed and hay the next summer, what the yield should be, and what, in all probability, the value of the seed and hay would be some ten months in the future, without taking into consideration the fact that the alleged destruction was in the fall, and that a crop of some character and value could be raised on the land in question in the same growing period, and thus mitigate the injury and loss. The court said: So much of the Lommelund case as justified the court below, on the trial of this case, in holding that evidence of events which occurred subsequent to the loss, such as the average product or yield of like crops under similar conditions and within reasonable limitations as to time, and of the future average market value of a matured crop, less the expense of harvesting and marketing, may be received when estimating damages, will have to be overruled. An action to recover damages for a

App.), 155 S. W. 286; *Pace v. St. Louis S. R. Co.*, 174 Mo. App. 227; *Lommelund v. St. Paul, etc. R. Co.*, 35 Minn. 412; *International, etc. R. Co. v. Pape*, 73 Tex. 501; *Gulf, etc. R. Co. v. McGowan*, 73 Tex. 355; *Galveston, etc. R. Co. v. Borsky*, 2 Tex. Civ. App. 545; *Chicago, etc. R. Co. v. Johnson*, 25 Okla. 760, 27 L.R.A.(N.S.) 879; *Teller v. Bay & R. D. Co.*, 151 Cal. 209, 12 L.R.A.(N.S.) 267; *Sayers v. Missouri Pac. R. Co.*, 82 Kan. 123, 27 L.R.A.(N.S.) 168; *Candler v. Washoe Lake R., etc. Co.*, 28 Nev. 151, quoting the text, and applying the rule to a case in which there was a breach of contract to supply water; *Hunt v. St. Louis, etc. R. Co.*, 126 Mo. App. 261, citing the text, and saying: Knowledge of the market value of a crop when mature and

what the owner could have sold it for has much to do with its value at any stage of growth. Such facts are to be taken in connection with evidence of the cost of cultivating, gathering and marketing the crop and other items of expense an owner would incur in order to raise and sell his grain. A growing crop of corn is certainly worth more to the owner in the spring of a year when the mature crop brings a high price than in the spring of a year when it brings a low one, and such price should be considered in fixing the value of a growing crop if the action is not instituted too soon. See *Morris v. Hazel*, 1 Boyce (Del.) 324, § 1045.

¹⁶ *Byrne v. Minneapolis, etc. R. Co.*, 38 Minn. 212, 8 Am. St. 668.

partial loss or a complete destruction of growing crops, whether annual or perennial, is practically an action to recover for an injury to real property. In principle such an action cannot be distinguished from one brought to recover for an injury to growing trees, nor is the measure of damages at all different, although stated differently. The proof in an action to recover for trees destroyed is all directed to an ascertainment of the difference in the market value of the real property immediately before the injury and immediately after its infliction, this difference being the measure of damages. The proof to recover for injuries to a growing crop is, or should be, confined to estimating the value of the crop destroyed; such value being the measure of damages.¹⁷ In ascertaining the amount of the recovery evidence that another crop of some character and value may be grown on the land the same growing period, of the average yield of like crops, of the market price, the ordinary expense of harvesting and marketing such crops, the condition of that particular crop before the injury, and any other fact existing at the time of the loss tending to show how and to what extent the injury decreased the value of the farm, may be considered. But evidence of matters occurring subsequently to the injury is not competent.¹⁸ In addition to indorsing the mode of proof which generally prevails it has been suggested that the question may be solved by fixing the value of a year's rental of the land, with the cost of planting, fertilizing and bringing forward the crop until the time of its loss and what the crop would bring at that time at a sale.¹⁹

Where grass was destroyed its value and the injury caused to the land by the destruction of the turf measured the damages.²⁰ "Evidence of the value of the grass as hay, as well as for pasturage purposes, was admissible, and from a showing of all the

¹⁷ *Marron v. Great Northern R. Co.*, 46 Mont. 593.

¹⁸ *Ward v. Chicago, etc. R. Co.*, 61 Minn. 449; *Burnett v. Great Northern R. Co.*, 76 Minn. 461; *Larson v. Lammers*, 81 Minn. 239; *Deal v. St. Louis, etc. R. Co.*, 144 Mo. App. 684, § 1049, in which is cited a case holding it is immaterial that

a crop was raised on the land during the same season.

¹⁹ *Colorado C. L. & W. Co. v. Hartman*, 5 Colo. App. 150; *Lampley v. Atlantic C. L. R. Co.*, 63 S. C. 462. § 1049.

²⁰ *Warriek v. Reinhard*, 136 Iowa 27; *Terre Haute & L. R. Co. v. Walsh*, 11 Ind. App. 13; *Pacific L.*

purposes for which the plaintiff's grass was useful and valuable the jury should determine what its value was at the time at which and state in which it stood when burned. If the grass possessed a market value, that should be the criterion. But if, as is probable, there was no market value, considering it as useful for pasturage, its value when thus used should be taken."²¹ If grass is wrongfully cut and carried away the damages are measured by its value in the meadow, no allowance being made for the labor of cutting it.²² But it has been said the trespasser acquired no right to the hay by cutting and curing it; his act in carrying it away and converting it was as much a violation of the plaintiff's rights as any of previous acts; hence he was entitled to the value of the hay at a nearby market.²³

In Iowa the value of the crop when matured, less the cost of tillage, etc., from the time of the injury, may be shown,²⁴ and the plaintiff may recover reasonable compensation for the labor necessarily expended in trying to save his crop from destruction.²⁵ This is the rule in Kansas.²⁶ In Illinois if a

Co. v. Murray, 45 Ore. 103; Texas Cent. R. Co. v. Qualls (Tex. Civ. App.), 124 S. W. 140. See § 1017, note 4.

The destruction of the roots of wild grass is an injury to the land, and the damages are the difference in value before and after the wrong was done. *Mattis v. St. Louis, etc. R. Co.*, 138 Mo. App. 61. The same rule applies to the destruction of any permanent crop, as alfalfa. *Thompson v. Chicago, etc. R. Co.*, 84 Neb. 482, 23 L.R.A.(N.S.) 310.

²¹ *Gulf, etc. R. Co. v. Matthews*, 3 Tex. Civ. App. 493; *Terre Haute & L. R. Co. v. Walsh*, *supra*; *Texas & P. R. Co. v. Prude*, 39 Tex. Civ. App. 144. See *Painter v. Stahley*, 15 Wyo. 510.

²² *Hasli v. Yokel*, 57 Mo. App. 622.

The value of grass cannot be shown by proof of the value of the hay used in lieu of it. *Missouri, etc. R. Co. v. Couch* (Tex. Civ. App.), 122 S. W. 67.

Loss of alfalfa must be compensated for by the diminished value of the land. *McKee v. Chicago, etc. R. Co.*, 93 Neb. 294.

²³ *Acrea v. Brayton*, 75 Iowa 719.

²⁴ *Tretter v. Chicago, etc. R. Co.*, 154 Iowa 280.

²⁵ *Smith v. Chicago, etc. R. Co.*, 38 Iowa 518. Compare *Drake v. Chicago, etc. R. Co.*, 63 id. 302, 50 Am. Rep. 746.

In an action in case to recover for the destruction of a fence and injuries to growing trees, all caused by the direct acts of the defendant, there cannot be a recovery for the inconvenience and labor of preserving crops from damage by animals. Such elements of damage, besides being too remote, were not provable under the declaration. *Krueger v. Le Blanc*, 62 Mich. 70.

²⁶ *Missouri Pac. R. Co. v. Ricketts*, 45 Kan. 617.

trespasser cuts wheat the owner is entitled to recover as if he had himself performed the whole labor of harvesting.²⁷ But in Kansas, where the cutting and removing of wheat was done under color of authority, the expenses of converting the wheat into money are not recoverable.²⁸ In an action against trespassers the trouble of looking after them is not to be taken into consideration as an item of damage.²⁹ If a meadow is destroyed the cost of restoring it measures the damages.³⁰ A better statement of the rule is that the damages are measurable by the cost of re-seeding the meadow and its rental value during the time it will not produce a crop.³¹ "While this might result in giving plaintiff a better meadow than he lost, defendant cannot complain. It must make good the loss it has occasioned. If it cannot do this without doing something more, the plaintiff should not suffer."³² The rental value of land appropriated to a particular use may be shown by its value for such use; hence where only a portion of a meadow was destroyed it may be shown what other portions of it produced during the time in

²⁷ *Bull v. Griswold*, 19 Ill. 631; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Ellis v. Wire*, 33 Ind. 127.

²⁸ *Tuttle v. Bell*, 92 Kan. 725.

²⁹ *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525.

³⁰ *Vermilya v. Chicago, etc. R. Co.*, 66 Iowa 606, 55 Am. Rep. 279; *Hamilton v. Des Moines, etc. R. Co.*, 84 Iowa 131; *Black v. Minneapolis, etc. R. Co.*, 122 Iowa 32.

³¹ *Pittsburgh, etc. R. Co. v. Hixon*, 110 Ind. 225; *Railway Co. v. Jones*, 59 Ark. 105; *Bradley v. Iowa Cent. R. Co.*, 111 Iowa 562; *Krejei v. Chicago, etc. R. Co.*, 117 Iowa 344.

This measure has been adopted in Missouri, rather than the depreciation in the value of the land, because it admits of more certain

proof than the latter. *Couch v. Kansas City S. R. Co.*, 252 Mo. 34 46 L.R.A.(N.S.) 555, settling the difference which existed between the St. Louis and the Kansas City courts of appeals on the question, and citing their opinions.

Evidence of the injury to the roots of grass and the time it may require for the meadow to be restored is admissible. *Marron v. Great Northern R. Co.*, 46 Mont. 593.

³² *Bradley v. R. Co.*, 111 Iowa 562; *Lowe v. Yolo County C. W. Co.*, 157 Cal. 503, citing the text and applying the rule where there was a breach of duty to furnish water for irrigating land seeded to alfalfa. See § 1018.

question.³³ Double compensation is not allowed where there is a recovery for the value of unsecured hay and the cost of restoring the meadow to its former condition—that is putting the grass roots in the condition they were before the trespass.³⁴ It is otherwise unless the recovery for injury to the land caused by the loss of the turf thereon excludes the loss of produce thereon the value of which may be recovered aside from the injury to the land.³⁵

The reason for making a distinction as to the method of assessing damages for the loss of trees and the loss of grass is thus stated: The value of the use during the time lost is an important element. This can be accurately ascertained in the case of a meadow, but cannot as to trees or a hedge. How long it will take to get grass in a certain field can be foretold with substantial certainty; how long it will take trees or a hedge to attain a certain size is largely a subject of guess. In any case, it takes so long as to leave too much room for doubtful elements to enter into the calculation. The value of the grass destroyed is also an element of damages.³⁶ The right to recover on the basis of these elements of value is not affected by the fact that it might be more profitable for the plaintiff to have plowed up the meadow land and planted it to other crops. He may use his land for any purpose that pleases him.³⁷ Where cattle were herded upon uninclosed land its owner was entitled to recover the difference in the market value of the grass crop by reason thereof during the time the herding continued and what it would have been had the herding not been done,³⁸ and also the differ-

³³ *Black v. Minneapolis, etc. R. Co.*, 122 Iowa 32. See *Carter v. Wabash R. Co.*, 128 Mo. App. 57.

³⁴ *Hayden v. Missouri, etc. R. Co.*, 84 Kan. 376; *Bradley v. Iowa Cent. R. Co.*, 111 Iowa 562.

³⁵ *Gulf Pipe Line Co. v. Brymer* (Tex. Civ. App.), 124 S. W. 1007.

³⁶ *Id.*; *Chicago, etc. R. Co. v. Word* (Tex. Civ. App.), 158 S. W. 561; *Marron v. Great Northern R. Co.*, 46 Mont. 593, citing the text; *Bradley v. R. Co.*, *supra*.

Suth. Dam. Vol. IV.—10.

³⁷ *Id.*; *Toledo, etc. R. Co. v. Kingman*, 49 Ill. App. 43.

Evidence to show that the meadow in question had been burned and the turf and roots damaged by fire previous to the time the defendant caused it to burn is admissible. *Gulf, etc. R. Co. v. Saddler*, 8 Tex. Civ. App. 300.

³⁸ *Gulf, etc. R. Co. v. Jones*, 1 Tex. Civ. App. 372.

ence in the market value of the land by reason of the herding. The *onus* of showing that other cattle than the defendant's grazed on the land and the extent of damage done by them was upon him.³⁹ In the absence of evidence showing the value of grass as such, if the injury is shown to be permanent, the recovery will be measured by the depreciation in the value of the land.⁴⁰ If grass and fruit trees are merely injured the cost of restoring them is not the measure of liability, but the difference in their value before and after the injury.⁴¹ The difference between the value of a farm before and after the destruction of a hedge thereon is the measure of recovery.⁴² The seed sown to produce an annual crop is included in the value of the crop. It is otherwise as to seed which produces crops perennially; the damages resulting from their loss is to the realty and is not less than the value of the seed planted.⁴³ The value of future crops is too uncertain to be a measure of damages.⁴⁴

§ 1024. Destruction of fences. If fences are destroyed or injured the recovery should fully compensate for their restoration in as good condition as before the wrong was done.⁴⁵ It

³⁹ Harrison v. Adamson, 86 Iowa 693.

⁴⁰ Warrick v. Reinhard, 136 Iowa 27; Gulf, etc. R. Co. v. Cusenberry, 5 Tex. Civ. App. 114, citing Ft. Worth, etc. R. Co. v. Hogsett, 67 Tex. 685; Galveston, etc. R. Co. v. Horne, 69 Tex. 643.

⁴¹ Pascal v. Chicago, etc. R. Co., 160 Iowa 484; Hamilton v. Des Moines, etc. R. Co., 84 Iowa 131; Cole v. Thompson, 134 Iowa 685.

The damages for injuries to an oyster bed are not, it has been said, to be computed upon the basis of loss of profits as might be the case with a growing crop. All the facts involved may be shown for the purpose of ascertaining the diminution in the fee, rental or usable value of the premises. The value of the oysters destroyed may be recovered; the other damages must be based on

the lessened value of the premises for the use to which they were put. Watts v. Hewlett Bay Co., 152 App. Div. (N. Y.) 493.

⁴² Swanson v. Keokuk & W. R. Co., 116 Iowa 304.

⁴³ Candler v. Washoe Lake Res., etc. Co., 28 Nev. 151; Thompson v. Chicago, etc. R. Co., 84 Neb. 482.

⁴⁴ Adam v. Chicago, etc. R. Co., 139 Mo. App. 204.

⁴⁵ Norris v. Philadelphia, 49 Pa. Super. Ct. 641; McDonald v. Illinois Cent. R. Co., 179 Ill. App. 242; Ft. Worth, etc. R. Co. v. Worsham (Tex. Civ. App.), 139 S. W. 927; Central R. & B. Co. v. Murray, 93 Ga. 256; Helms v. Munro, 16 Vict. L. R. 591.

In McBride v. Cameron, 12 New Zeal. L. R. 316, it was ruled that where a tenant's fence, though it was old, was pulled down under a frivolous assertion of right he could

is immaterial to the wrong-doer that the plaintiff's lessee was bound to make repairs—the obligation to do so does not require the lessee to replace improvements destroyed solely through the fault of a stranger.⁴⁶ The actual market value of a fence is not the measure of the trespasser's liability for its destruction, but its value as an inclosure of the plaintiff's land. In arriving at that value the cost of making the fence may be regarded, including material and labor. And if a rail fence destroyed has been replaced by a wire fence the cost of the latter may be considered and from a comparison of the respective cost of the fences, and from any evidence which may be offered tending to show that rail fences are being superseded by wire fences, determine the value of that destroyed.⁴⁷ On the destruction of a hedge fence the measure of recovery is the difference between the value of the land inclosed by it, with and without the fence.⁴⁸ In an action for destroying a fence inclosing a ranch used for dairy purposes, thereby letting in other people's cattle which destroyed the grass, it was erroneous, as tending to the allowance of remote and speculative damages, to admit evidence of profits

recover damages equal to the cost of a new fence, less ten per cent.

In a decision in which the declaration was trespass *quare clausum* the court held that the fact that none of the witnesses gave an estimate of the amount of plaintiff's damages in terms of money did not limit plaintiff's recovery to merely nominal damages. Said the court: "The burden of showing the amount of his damage lies on the plaintiff. And where the character of the damages is such as to be capable of being estimated by a strict money standard, he must give evidence thereof in dollars and cents. But, where they are not susceptible of being reduced to an exact money standard, this rule does not apply. *Barngrover v. Maack*, 46 Mo. App. 407. In such cases all that is required is that the plaintiff furnish

sufficient data that the jury may estimate the proper amount with reasonable certainty. This is not to allow the jury to speculate as to the amount of the recovery, but is to submit that question to their sound judgment. The plaintiff here showed just what the defendants did. The acts complained of and the injury resulting therefrom were of just that character as to be peculiarly within the reach of that common sense and good judgment which the jury, as men of affairs, possess." *Green v. Stockwell*, 87 Vt. 459.

⁴⁶ *Gulf, etc. R. Co. v. Smith*, 3 Tex. Civ. App. 483.

⁴⁷ *Gulf, etc. R. Co. v. Wallace*, 14 Tex. Civ. App. 386.

⁴⁸ *Bradley v. Iowa Cent. R. Co.*, 111 Iowa 562, 8 Am. Neg. Rep. 629; *Hackett v. Harmon*, 255 Ill. App. 55, citing local cases.

the plaintiff might have made from animals he did not have and had made no arrangements to procure.⁴⁹ The value of crops destroyed by cattle may be recovered as a consequential damage from tortiously letting down or removing the fence around the same,⁵⁰ at least where successive trespasses are committed.⁵¹

Doubtless if a fence is broken and the owner is aware of it in time to make it whole before the crops which it inclosed are damaged he must do so if he can accomplish it at a reasonable expense and with moderate effort.⁵² Damage done to crops after the plaintiff has had a reasonable time to repair a fence broken down by trespassing animals cannot be recovered for.⁵³ But this duty does not rest upon the land-owner when a railroad company has neglected its statutory obligation to put in cattle-guards.⁵⁴

§ 1025. *Injuries to party-walls.* If a party-wall is used and holes cut in it for inserting the girders, beams, etc., of a new building which is erected the damages include not only the injury done by the cutting, but also such sum as will compensate the owner for the permanent use of the wall.⁵⁵ If an addition is made to such a wall whereby it is weakened the expense of removing the portion added and the damage caused the original wall may be recovered; but damages resulting from the loss of a sale of property of which the wall forms part are too remote.⁵⁶ If such a wall is recklessly undermined the trespasser must respond for injury to the plaintiff's goods resulting from the use of water for extinguishing a fire caused by the falling of the wall. No deduction is to be made from the value of the goods because they were insured.⁵⁷ In such a case a tenant

⁴⁹ *Giacomini v. Bulkeley*, 51 Cal. 260.

⁵⁰ *Daniel v. Obert*, 20 Ill. App. 557; *Hardin v. Kennedy*, 2 McCord 277; *Garrett v. Sewell*, 108 Ala. 521. See § 28 for a statement and illustrations of the rule of liability for consequential damages; also *Crawford v. Maxwell*, 3 Humph. 476; *Richardson v. Milburn*, 11 Md. 340.

⁵¹ *Bridgers v. Dill*, 97 N. C. 222.

⁵² § 155; *Willis v. Branch*, 94 N. C. 142.

⁵³ *Watkins v. Rist*, 67 Vt. 284.

⁵⁴ *Houston, etc. R. Co. v. Adams*, 63 Tex. 200.

⁵⁵ *Ritter v. Sieger*, 105 Pa. 400.

⁵⁶ *Brooker v. McLean*, 5 Ont. 209.

⁵⁷ *Hammond v. Schiff*, 100 N. C. 161.

who is obliged to vacate the building may recover the value of the premises for rent during the remainder of the term; and, if he has carried on an established business there, for the injury done it. In Georgia he cannot recover for the loss of profits and the value of the goodwill of his business as such, but evidence as to these may be received to throw light on the value of his leasehold estate if the extent of the damage done by their loss can be ascertained with reasonable certainty.⁵⁸ The difference between the value of the premises before and after the injury is the measure of a tenant's recovery; not the difference between the rent paid for premises to which he removed and that he would have paid if he had not removed.⁵⁹

§ 1026. **Interest on the damages.** According to the view of some courts it is discretionary with the jury to allow interest on the damages awarded.⁶⁰ But it has been allowed as matter of law against trespassers on government lands whether the trespass was wilful or inadvertent,⁶¹ and it has been so allowed in other cases. The old rule was that interest could not be allowed upon unliquidated damages. The tendency of courts has been to set this rule aside, and adopt the more reasonable one, in cases of injury to property, that the jury must first determine the actual damage sustained and allow interest upon that sum from its date.⁶² If the highest market value of the product of timber wrongfully cut is recovered, pursuant to a

⁵⁸ Bass v. West, 110 Ga. 698.

⁵⁹ Rossitti v. Valente (Misc.), 127 N. Y. Supp. 319; Herron v. Laughlin, 23 Pa. Super. Ct. 226.

⁶⁰ McConnell v. Slappey, 134 Ga. 95; Hardwood Mfg. Co. v. Wooten, 126 Ga. 55; Black v. Minneapolis, etc. R. Co., 122 Iowa 32; Lawrence, etc. R. Co. v. Cobb, 35 Ohio St. 94; Walrath v. Redfield, 18 N. Y. 457; Pittsburgh, etc. R. Co. v. Swinney, 97 Ind. 586; Gress L. Co. v. Coody, 104 Ga. 611; Chicago v. Allcock, 86 Ill. 384; Greeley, etc. R. Co. v. Yount, 7 Colo. App. 189.

⁶¹ United States v. Williams, 18 Fed. 475.

⁶² Atlanta & B. A. L. R. Co. v. Brown, 158 Ala. 607, citing the text; Boise Valley C. Co. v. Kroeger, 17 Idaho 384, 28 L.R.A.(N.S.) 968; Collins v. Gleason C. Co., 140 Iowa 114, 18 L.R.A.(N.S.) 736; Steger v. Barrett (Tex. Civ. App.), 124 S. W. 174; Taylor v. Bay City St. R. Co., 101 Mich. 140; Gates v. Comstock, 113 Mich. 127; Gulf, etc. R. Co. v. Jones, 1 Tex. Civ. App. 372. See § 355 for a discussion of the principle and authorities.

statute, interest on such value should not be allowed.⁶³ Interest should not be compounded.⁶⁴

§ 1027. **Mitigation of damages.** Beyond question, the injured party is bound to use reasonable means to mitigate the injury which has been done him,⁶⁵ and to prevent further damage.⁶⁶ The measure of such duty will be governed by circumstances, including the relation of the plaintiff to the premises trespassed upon and the amount of the outlay required to prevent additional loss.⁶⁷ In a case in which the defendant diverted a stream of water which crossed the plaintiff's land, it was competent for the former to show that by an expenditure of \$350 the latter could have removed the dam, thus returning the water into the old channel immediately after the trespass, and have filled the excavation made upon his premises, thus restoring them to their former condition. The court said: It would have been for the jury to determine whether or not such undertaking and expense would have been reasonable and within the means of the plaintiff. Of course, he would not have been called upon to embarrass himself financially or to do anything unreasonable or unlawful in the premises. The evidence should have been admitted, and the plaintiff would then have had the opportunity to show that such undertaking on his part was not reasonably within his power or means to accomplish, and if the jury believed that such was the case then they would have been warranted in finding that it was his duty to have taken these steps to restore his premises to their former condition and to

⁶³ *Everett v. Gores*, 92 Wis. 527.

⁶⁴ *Shelley v. Cody*, 187 N. Y. 166.

⁶⁵ *Murray v. Putman* (Tex. Civ. App.), 154 S. W. 245; *Hall v. Sundstrom*, 138 App. Div. (N. Y.) 548; *Scherrer v. Baltzer*, 84 Ill. App. 126.

⁶⁶ *Ludlow v. Yonkers*, 43 Barb. 493; *Hay v. Long*, 78 Wash. 616; *Falley v. Courter*, 93 Mich. 473, 8 Am. Neg. Rep. 623; *Sweeny v. Montana Cent. R. Co.*, 19 Mont. 163; *Higgins v. New York, etc. R. Co.*, 78 Hun 567; *Gulf, etc. R. Co. v.*

Simonton, 2 Tex. Civ. App. 558; *St. Louis, etc. R. Co. v. Ayres*, 67 Ark. 371; *Davis v. Poland*, 102 Me. 192, 10 L.R.A.(N.S.) 212, 120 Am. St. 480; *Stewart v. Quiney, etc. R. Co.*, 142 Mo. App. 322; *Meyer v. English*, 83 Neb. 163; *Gulf, etc. R. Co. v. McMurrough*, 41 Tex. Civ. App. 216. See note to § 1028.

⁶⁷ *Welliver v. Pennsylvania C. Co.*, 23 Pa. Super. Ct. 79; *Galveston, etc. R. Co. v. Borsky*, 2 Tex. Civ. App. 545.

prevent the increase of damages. One is not, as a rule, expected to enter or go upon a third party's premises to save his own property from increased injury, resulting from the wrongful act of another. If the dam in question was on a vacant, uninclosed and unoccupied mining location, upon and over which, by custom, people are permitted to camp, go, travel, and do other things not hurtful to the premises it would not be unreasonable to expect an injured party to go upon such open land to prevent serious damage in a great emergency.⁶⁸ A farmer is not required to forego his right to plant a crop because of his knowledge of the defective condition of the fence of an adjoining land-owner; he may recover for the loss of his crop notwithstanding.⁶⁹

If the plaintiff, in the exercise of reasonable prudence, has incurred expense in an attempt to lessen the damage which might result from the defendant's wrongful act the latter is liable therefor if the value of the property of the plaintiff was not thereby increased; in the latter event the liability would not exceed the value of the use of the property purchased for such purpose.⁷⁰ If ornamental trees in the limits of a street are removed during the process of unlawfully grading the street the incidental benefits resulting to the plaintiff's remaining premises by reason of the improvement do not lessen his recovery.⁷¹ One whose possession of business premises has been so interfered with that he cannot continue in them must secure another place in which to carry on his avocation.⁷² But benefit which may result to the injured person from the subsequent act of the wrong-doer does not always mitigate the latter's responsi-

⁶⁸ Sweeny v. Montana Cent. R. Co., 25 Mont. 543.

⁶⁹ Deal v. St. Louis, etc. R. Co., 144 Mo. App. 691.

⁷⁰ Willis v. Perry, 92 Iowa 297, 26 L.R.A. 124.

This element is sometimes overlooked, as in Knight v. Chicago, etc. R. Co., 122 Mo. App. 38, which applied the rule of loss of rental value where a meadow was destroyed, and recognized the plaintiff's duty to

mitigate his loss by re-seeding the land. The right to recover for the loss of rental value during the time the land was not usable was recognized; but nothing was allowed for the labor and expense of restoring the meadow.

⁷¹ Fisher v. Naysmith, 106 Mich. 71; Gerrish v. New Market Mfg. Co., 30 N. H. 478; Hurley v. Jones, 165 Pa. 34.

⁷² Willis v. Branch, 94 N. C. 142.

bility. Thus, an officer who unlawfully breaks into a dwelling and removes property therefrom cannot lessen his liability by proving that, pursuant to the levy, he sold the property and paid the proceeds to the execution creditor. The levy, being void, all that was done in pursuance of it was invalid.⁷³ It is otherwise if there is a subsequent valid levy independently of the trespass.⁷⁴ The mitigation of exemplary damages is elsewhere considered.⁷⁵ In an action against an officer for an alleged unlawful search of premises if special damages are asked for the humiliation and disgrace suffered by the plaintiff and his family it may be shown that two women occupants of the house searched, one of whom was the plaintiff's servant, the other, apparently, being a roomer, were prostitutes.⁷⁶ Any benefit derived by the plaintiff from the land trespassed on lessens the liability of the defendant.⁷⁷ The probable benefits which may result from the trespass are to be taken into account.⁷⁸ A parol license by the grantor of the plaintiff may be shown if he had notice of the entry, as may the nature of his title.⁷⁹ It may be shown that the right invaded was a qualified one and the extent to which the superior right might be exercised.⁸⁰ The owner of property has the right to have it remain undisturbed, and cannot have benefits forced upon him in mitigation of damages.⁸¹ The defendant may not show that his act benefited other property of the plaintiff than that trespassed

⁷³ *Welsh v. Wilson*, 34 Minn. 92.

⁷⁴ *Howard v. Manderfield*, 31 Minn. 337.

⁷⁵ § 1032.

⁷⁶ *Abrams v. Ervin*, 9 Iowa 87; *Collins v. Clark*, 30 Tex. Civ. App. 341.

A prohibition of the right to sell, remove or destroy timber on a state forest reserve prevents the allowance of any benefit to a trespasser who injured timber thereon because of the value it had thereafter. *People v. New York, etc. R. Co.*, 155 App. Div. (N. Y.) 699.

Compensatory damages are not af-

fectured by the good faith and reasonable care of the defendant. *Slatery v. Rhud*, 23 N. D. 274.

⁷⁷ *Painter v. Stahley*, 15 Wyo. 510; *Deal v. St. Louis, etc. R. Co.*, 144 Mo. App. 684.

⁷⁸ *Anderson v. Board of Supervisors*, 154 Iowa 497; *Robinson v. Moark-Nemo Consol. Min. Co.*, 178 Mo. App. 531.

⁷⁹ *Jayne v. Cortland W. Co.*, 42 N. Y. Misc. 263.

⁸⁰ *Pinkerton v. Randolph*, 200 Mass. 24.

⁸¹ *Pinney v. Winsted*, 83 Conn. 411; § 2.

on.⁸² The liability of the wrong-doer is not affected because the injury done the plaintiff's property was the result of the condition it was in;⁸³ nor by showing the extent of the plaintiff's indebtedness for the property destroyed.⁸⁴ The plaintiff is not required to accept the return of injured goods in mitigation of the liability of the defendant.⁸⁵ Advice of counsel will not mitigate liability unless it was based on a full disclosure of the facts.⁸⁶ It is within the discretion of a court of equity to refuse an allowance for permanent improvements made by a trespasser who has ousted the owner.⁸⁷ A statute providing for the mitigation of damages when a structure has been erected on surveyed land, though it is placed on the land of another by mistake, may be invoked under the plea of the general issue.⁸⁸ Under a statute providing that railroad companies liable for injury to property by fire communicated by locomotives shall have the benefit of any insurance money received by or due to the owner of the property, it is immaterial whether the insurance was obtained before or after the statute took effect. Such statute is not void because in conflict with the standard form of policy giving insurers the right to an assignment by the insured of his right to recover satisfaction from any person causing the loss or damage complained of.⁸⁹ The owner of the property damaged or destroyed may deduct from the money due from the insurer the premium paid and any expense incurred in recovering the same.⁹⁰ It may be shown that the building in question was taken down in conformity with the orders of the public authorities during a period of great public excitement and with the object of avoiding threatened violence. It is otherwise as to the recommendation of the grand jury as to the building being a public nuisance.⁹¹ The defendant may assert any right

⁸² *Frostburg v. Hitchins*, 99 Md. 617.

⁸³ *Huber v. Stark*, 124 Wis. 359, 109 Am. St. 937.

⁸⁴ *Kunkel v. Utah L. Co.*, 29 Utah 13.

⁸⁵ *Griffin v. Martel*, 77 Vt. 19.

⁸⁶ *Louisville & N. R. Co. v. Smith*, 141 Ala. 335.

⁸⁷ *Shelley v. Cody*, 187 N. Y. 166.

⁸⁸ *Marbury L. Co. v. Lamont*, 169 Ala. 33.

⁸⁹ *Lyons v. Boston & L. R. Co.*, 181 Mass. 551.

⁹⁰ *Leavitt v. Canadian Pac. R. Co.*,

90 Me. 153, 38 L.R.A. 152.

⁹¹ *Reed v. Bias*, 8 W. & S. 189.

he has in the property removed though he trespassed in entering to remove it.⁹² A trespasser's liability for cutting trees situated on the land of another is not mitigated by the effect of the shade they make on his property.⁹³ The character of the plaintiff's wife is not provable in mitigation in an action for breaking and entering his house with intent to ravish her, the latter fact being pleaded in aggravation of the damages merely.⁹⁴ An owner of crops upon which a writ has been unlawfully levied is not bound to lessen his damages by being deprived of employment for his children by seeking to obtain other employment for them away from home and with objectionable people.⁹⁵

§ 1028. **Aggravation and special damages.** Where the act complained of was done with force so as to constitute a proper ground for an action of trespass *vi et armis* all the damage of the plaintiff, of which such injurious act is the efficient cause and for which he is entitled to recover in any form may be recovered in that action, whether such damage ensues immediately or does not occur until some time after the act is done. If special or peculiar damages are claimed, such as are not the usual consequence of the act, it is necessary to set them forth specifically in the declaration by way of aggravation that the defendant may have due notice of the claim.⁹⁶ Thus, where the defendant broke and entered the plaintiff's close, lying adjacent to a river, and dug into a bank near a dam across the river and removed some gravel, in consequence of which a flood in the river which took place three weeks afterwards carried away a portion of the close and the cider mill, etc., belonging to the plaintiff, he recovered damages for the whole of such injury in

⁹² *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119. See *Farwell v. Warren*, 51 Ill. 467.

⁹³ *Bliss v. Ball*, 99 Mass. 597.

⁹⁴ *Davenport v. Russell*, 5 Day 145.

⁹⁵ *Brown v. Leath*, 17 Tex. Civ. App. 262.

⁹⁶ *Eisele v. Oddie*, 128 Fed. 941; *Eldridge v. Gorman*, 77 Conn. 699; *Hathaway v. Osborne*, 25 R. I. 249;

Lester v. Highland Boy G. M. Co., 27 Utah 470, 101 Am. St. 988; *Henderson v. Coleman*, 19 Wyo. 183; *Patchen v. Keeley*, 19 Nev. 404; *Gusdorf v. Duncan*, 94 Md. 160; *Dickinson v. Boyle*, 17 Pick. 78, 28 Am. Dec. 281; *McTavish v. Carroll*, 13 Md. 429; *Sherman v. Dutch*, 16 Ill. 283; *Freelove v. Gould*, 3 Kan. App. 750.

an action of trespass *quare clausum fregit*.⁹⁷ A defendant who had pulled down the plaintiff's fence so that his cattle escaped and were lost was liable for their value in an action for pulling down the fence.⁹⁸ A balloonist who alights in a garden, thereby attracting other people, must answer for the damage done by them therein.⁹⁹ The defendant's sheep, while trespassing upon the plaintiff's land, mingled with his sheep and communicated to them a disease of which many of them died. In an action of trespass *quare clausum fregit* evidence of this fact was properly received to affect the damages; the plaintiff was entitled to recover for the loss of his sheep as well as for the breach of his close; in order to recover it was not necessary for him to prove that the defendant had knowledge of the diseased state of his sheep at the time the disease was imparted; but it was competent for the plaintiff to prove such knowledge to enhance his damages without any allegation to that effect in the declaration.¹ Where the defendant destroyed part of a mill the plaintiff was allowed to recover for the interruption of its use and a consequent loss of profits.² Lost profits have been recovered in a considerable number of cases ruled under varying facts.³ They

⁹⁷ Dickinson v. Boyle, *supra*.

⁹⁸ Welch v. Piercy, 7 Ired. 365; Damron v. Roach, 4 Humph. 134.

⁹⁹ Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234.

¹ Lee v. Burk, 15 Ill. App. 651; Barnum v. Vandusen, 16 Conn. 201; Anderson v. Buckton, 1 Str. 192.

² White v. Moseley, 8 Pick. 356; National Fibre B. Co. v. Lewiston & A. El. L. Co., 95 Me. 318; French v. Connecticut River L. Co., 145 Mass. 261; Holden v. Lake Co., 53 N. H. 552; Simmons v. Brown, 5 R. I. 299; Hammatt v. Russ, 16 Me. 171; McTavish v. Carroll, 13 Md. 429; Whipple v. Wanskuek Co., 12 R. I. 321; Cleveland, etc. R. Co. v. Born, 49 Ind. App. 62.

³ *Id.*; Schaaf v. Pennsylvania R. Co., 77 N. J. L. 115; Johnson v. Railroad Co., 140 N. C. 574; Willis

v. Perry, 92 Iowa 297, 26 L.R.A. 124; Hueston v. Mississippi & R. R. B. Co., 76 Minn. 251; Capel v. Lyons, 3 N. Y. Misc. 73; Denison v. Ford, 10 Daly 414; Schile v. Brokhahus, 80 N. Y. 620; Oklahoma v. Hill, 6 Okla. 115; Choctaw, etc. R. Co. v. Alexander, 7 Okla. 579; Gildersleeve v. Overstolz, 90 Mo. App. 518.

One who has been deprived of the use of land he intended to plant and cultivate, but who had made no preparation to do so, cannot recover for the profits he might have made if it had been planted. *Irwin v. Nolde*, 164 Pa. 205.

A lessee whose only entrance to his place of business is wrongfully closed may recover lost profits though he knew the improvement which resulted in the injury was to

can be recovered only when it is shown that they are neither remote, speculative nor uncertain.⁴ In some cases the recovery of profits is made to depend in an undue degree upon the existence of the element of wantonness.⁵ A landlord who has lost tenants and been unable to secure others may recover the resulting loss of rents.⁶ The loss of the value of the use of property has been recovered against officers who stopped the operation of machines by the illegal execution of a writ, notwithstanding the same result would have followed if it had been legally executed. Damage done the machines because of the sudden stopping was also an element of the recovery.⁷ Where one was deprived of the profitable use of pasture for his stock by the tortious conduct of the defendant in turning in his cattle with the plaintiff's, and, in consequence of the overcrowding of the pasture, the plaintiff's cattle suffered, the damages to which he was entitled were held not to be merely the value of the pasturage in the vicinity, but the value of the growth and increase in weight which his cattle might reasonably have been expected to attain but for the overfeeding caused by the trespass;⁸ and to show this the testimony of farmers, graziers and drovers having experience with cattle and that mode of feeding was competent; it was also competent to show what would have been the market value of the cattle in the vicinity but for the act, and what was the reduced value in the same market in consequence of it; the difference in price per head and per pound in cattle of different weights and conditions. The value in a distant market could only be shown so far as it tended to control the home market, the measure of damages being what the cattle would have been worth but for the injury to the pasture by the trespass, and the reduced amount caused by the injury to be estimated up

be made and did not exercise his right to terminate his lease. He might assume that the work would be properly done, and after it was done assume that the wrong would be remedied. *International, etc. R. Co. v. Capers*, 33 Tex. Civ. App. 283.

⁴ *Bates v. Warrick*, 76 N. J. L. 108.

⁵ *McNeil v. Crucible S. Co.*, 207 Pa. 493.

⁶ *Goldschmid v. Mayor*, 14 App. Div. (N. Y.) 135, 1 Am. Neg. Rep. 508.

⁷ *Giddings v. Freedley*, 128 Fed. 355, 63 C. C. A. 85.

⁸ *Henderson v. Coleman*, 19 Wyo. 183.

to and at the time of the bringing of the action—unless the cattle have been sold prior to that day—then at the date of the sale. It was also ruled that damage to cattle resulting from loss of feed, occasioned by the tortious occupation of the plaintiff's pasture by the defendant's cattle, is not included in the damage to the pasture caused by such occupation; and the condition of the pasture, its value as such for future use at the time of the commencement of the action, were proper subjects of inquiry in estimating damages which had then been sustained.⁹ Where lands were depastured it was proper to show the expense of subsequently feeding hay to the plaintiff's sheep at his range as bearing on the value of the pasture destroyed; damage directly resulting from the trespass, though it ensued after suit begun, was also properly shown.¹⁰ In actions of tort damages which are the natural and proximate consequences of the defendant's wrongful act may be recovered though not contemplated by the wrong-doer. The injured party enters into no relation with the defendant, and assumes no voluntary risk in the matter of the wrong. Nor is any want of certainty in respect to his loss, resulting from the manner in which it is produced by the defendant, attributable to the plaintiff; therefore, in the determination of damage for compensation, so far as it is measurable upon any legal standard, the same rules will apply as in their assessment for breach of contract; but such damages will not be assumed to be a full reparation unless they appear to include compensation for the entire injury. The injured party is entitled to complete indemnity even though the amount is not ascertainable with certainty and precision. All the facts will be submitted to the jury with proper instructions that they may award such damages as in their discretion and judgment are due for the injury as thus shown.¹¹ The owner of a pasture rendered dangerous for the use of stock by partial flooding is not bound to cease using it, but may recover the damages resulting from its use if he exercises ordinary prudence to prevent their increase, including the value of

⁹ *Gilbert v. Kennedy*, 21 Mich. 117.

¹⁰ *Cosgriff v. Miller*, 10 Wyo. 190.

¹¹ *Id.*; *Hughes v. Austin*, 12 Tex. Civ. App. 178, citing the text; *Gilbert v. Kennedy*, *supra*.

animals lost and the expense of reasonable efforts to prevent damage, including the cost of guarding the stock, conveying them to a place of safety, returning them after the danger had ceased, and also the increased cost of keeping them while they were elsewhere.¹² Depreciation in the value of thoroughbred cows because of their being gotten with calves by common bulls is not too remote to be a ground of recovery.¹³

§ 1029. Same subject. If an employer is deprived of workmen because of the loss of a building, used by them for shelter he may recover the amount reasonably expended in providing other shelter, for the protraction of the labor in which they were engaged and the value of his own time in consequence of such protraction.¹⁴ Where a trespass is wilful and malicious, or of such character or committed under such circumstances as render it likely to produce injury to persons or property the trespasser is liable to any person injured. It is not necessary that he should intend to do the particular injury which ensues.¹⁵ Maliciously and wantonly pulling out and throwing away pins used in coupling together the cars of a train, whereby they were uncoupled, and the plaintiff, an employee of the company, whose duty it was to hitch and couple cars, sustained an injury to one of his hands while in the ordinary discharge of his duties in consequence of such uncoupling, entitled him to recover for

¹² Hughes v. Austin, *supra*, approving Gilbert v. Kennedy, *supra*; Atlanta & B. A. L. R. Co. v. Brown, 158 Ala. 607; St. Louis, etc. R. Co. v. Ritz, 33 Kan. 404.

The owner of cattle and of land on which they are pastured, the grass on which has been destroyed, may recover the reasonable and necessary expense of feeding them. He was bound to take action to lessen the liability of the defendant, and has the right to be reimbursed therefor. Chicago, etc. R. Co. v. Word (Tex. Civ. App.), 158 S. W. 561.

¹³ Baldwin v. Richardson, 39 Tex. Civ. App. 406.

¹⁴ Carlisle v. Callahan, 78 Ga. 320.

¹⁵ Mecartney v. Smith, 10 Kan. App. 580; Sloss-S. S. & I. Co. v. Salser, 158 Ala. 511; Bouillon v. Laclede G. L. Co., 148 Mo. App. 462, citing the text; Hunter v. Southern R. Co., 152 N. C. 682, 29 L.R.A. (N.S.) 851, 136 Am. St. 854; Behrens v. Mountz, 37 Pa. Super. Ct. 326; Munger v. Baker, 65 Barb. 539; Vandenberg v. Truax, 4 Denio 464, 47 Am. Dec. 268; Scott v. Shepherd, 2 W. Black. 892, 7 Am. Neg. Rep. 582.

such injury.¹⁶ Where the remains of a child were removed from a cemetery lot to which the parent held a deed the latter maintained an action of tort in the nature of trespass *quare clausum fregit*, in which the natural injury to his feelings was properly considered.¹⁷ Such injury is an element of damages where a wrongful and malicious search is made in a house for stolen property, though the standing of the plaintiff among his neighbors and friends was not affected.¹⁸ Allegations that the plaintiff and her family suffered physical pain and mental anguish and were exposed to the weather indicate the financial damage sustained, as well as the mental anguish suffered, and are relevant to show the mental anguish suffered and the extent of the injury inflicted.¹⁹

For the wrongful expulsion of a widow, before the assignment of her dower, from the family dwelling she may recover, in addition to her actual damages, for injury to her health and for such pain and suffering as naturally resulted.²⁰ One who stealthily enters a dwelling in the night time and commits a trespass on the property of the owner therein is liable to the latter's wife for the consequences resulting from her fright, there being an affection of the nervous system. "It is within the common observation of all that fright may and usually does affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently one who voluntarily causes a diseased condition of the latter must anticipate the consequence which follows it. The nerves being as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain it seems to us that the injury resulting therefrom is the direct result of the act pro-

¹⁶ *Munger v. Baker*, *supra*; *Wyant v. Crouse*, 127 Mich. 158, 53 L.R.A. 626.

¹⁷ *McDonald v. Butler*, 10 Ga. App. 845; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. 26; *Thirkfield v.*

Mountain View C. Ass'n, 12 Utah 76; *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 73 Am. St. 141.

¹⁸ *Krehbiel v. Henkle*, 152 Iowa 604.

¹⁹ *Snedecor v. Pope*, 143 Ala. 275.

²⁰ *Stevens v. Stevens*, 96 Ga. 374.

ducing the fright.”²¹ Where the plaintiff’s house was broken into and entered and it was alleged as matter of aggravation that the defendant intended to ravish the plaintiff’s wife, the court said that the pulling of the plaintiff’s children from the bed, threatening to burn the house, to ravish the wife, etc., might be proved to aggravate the damages; “were it otherwise, the amount of damages must be the same for raising a latch and entering a house without license, as for a like entrance accompanied with the most aggravating circumstances—a doctrine too extraordinary to need refutation.”²² Injury to health and pain and suffering are elements of damage where a trespass is attended with circumstances of insult and contumely.²³ Invasion of the privacy of a home and interference with the comfort of the plaintiff and his family are matters to be considered.²⁴ The liability for consequential damages results though the entry upon the premises was lawful if they are produced by the use of loud, profane and lewd language though the person of the sufferer was not touched and the defendant did not know of her condition.²⁵ An unjustifiable search of

²¹ *Axman v. Washington G. Co.*, 38 App. Cas. (D. C.) 150; *Fulton v. Spear*, 13 Ohio N. P. (N.S.) 473; *Watson v. Dilts*, 116 Iowa 249, 57 L.R.A. 559; *St. Louis S. R. Co. v. Alexander* (Tex. Civ. App.), 141 S. W. 135; *Arthur v. Henry*, 157 N. C. 438; *Engle v. Simmons*, 148 Ala. 92, 121 Am. St. 59, 7 L.R.A.(N.S.) 96; *Leach v. Great Northern R. Co.*, 97 Minn. 503, 7 L.R.A.(N.S.) 93; *Bouillon v. Lac'ede G. L. Co.*, 148 Mo. App. 462; *Shellabarger v. Morris*, 115 Mo. App. 566; *Alexander v. St. Louis S. R. Co.* (Tex. Civ. App.), 122 S. W. 572. See *Hunter v. Southern R. Co.*, 152 N. C. 682, 29 L.R.A.(N.S.) 851, 136 Am. St. 854; § 21 *et seq.*

Where it was alleged that the defendants maliciously conspired to cause the plaintiff to leave his home and they entered and trespassed upon his premises and threatened

to visit upon him and his wife bodily injury if they did not leave the home and place of their residence and by reason thereof they did leave their home and plaintiff left his work, and incurred expense, inconvenience and loss, an actionable wrong was stated though there was no physical assault or injury. *Parks v. Byrne*, 120 Minn. 519.

²² *Davenport v. Russell*, 5 Day 145.

²³ *Mattingly v. Houston*, 167 Ala. 167.

²⁴ *Reed v. New York & R. G. Co.*, 93 App. Div. (N.Y.) 453.

²⁵ *May v. Western U. Tel. Co.*, 157 N. C. 416, 37 L.R.A.(N.S.) 912.

A violent trespasser must respond for such humiliation and mental suffering as he inflicts regardless of his knowledge of the condition of one of the parties. *McClure v. Campbell*, 42 Wash. 252.

business premises for the purpose of finding intoxicating liquors thereon is cause for the recovery of damages for humiliation and mental anguish.²⁶ An officer from whose office records have been taken may show that various persons called to examine them. "The embarrassment to the plaintiff incident to this situation would be a natural consequence of the defendant's acts and must be held to have been reasonably within the contemplation of the parties. It was therefore a proper element of damages. And such embarrassment being a form of mental distress, it could be recovered for without a special allegation to cover it."²⁷ The unsightliness of structures and the dangerous use to which they are put are matters to be regarded.²⁸ In the absence of aggravating circumstances vexation, humiliation and annoyance are not grounds of damage.²⁹ Thus, in the absence of a wilful act intended to cause mental distress one whose pet animal has been wounded by a trespassing dog may not recover for his mental suffering.³⁰ Words spoken prior to the commission of the trespass are not ground for increasing damages.³¹

If in consequence of a trespass the plaintiff's business upon the premises is impaired or destroyed damages therefor may be recovered.³² Where he was engaged in the business of repairing watches, making gold pens and selling jewelry on premises which were rendered untenable by a trespass it was held that past profits in that business, though they could not be taken as the exact measure of future profits, were proper to be proved and taken into consideration by the jury and allowed such weight as they, in the exercise of good sense and sound judgment, should think them entitled to. If the plaintiff was obliged to remove to another place of business he could show that his business fell off in consequence and how much. The

²⁶ Cartwright v. Canode, *infra*.

²⁷ Moore v. Duke, 84 Vt. 401.

²⁸ Phelps v. Berkshire St. R., 210 Mass. 49.

²⁹ Ostrom v. San Antonio, 33 Tex. Civ. App. 683.

Suth. Dam. Vol. IV.—11.

³⁰ Buchanan v. Stout, 123 App. Div. (N. Y.) 648.

³¹ Dobbs v. Northern Union G. Co., 132 N. Y. Supp. 792.

³² Cartwright v. Canode (Tex. Civ. App.), 138 S. W. 792. See Botkin v. Miller, 190 Mass. 411.

court in deciding a case involving the foregoing facts announced this general rule: "When, from the nature of the case, the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, there is no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, or as may tend to prevent the allowance of such as may be merely possible, or too remote and fanciful in their character to be safely considered as the result of the injury."³³ In addition to recovering the value of his lease a tenant who is obliged to leave the demised premises may recover for the time necessarily occupied in removing therefrom, the expense incurred in doing so and for other loss directly resulting.³⁴ But he cannot recover for the loss of *estimated* profits, nor for the mental suffering resulting from the removal.³⁵ Such changes were made in the construction of leased premises used for business purposes as necessitated their abandonment by the tenant. The trespasser was liable for the loss of a water privilege acquired by the tenant for business purposes, for the value of the leasehold interest and any advantages constituting a part of or directly growing out of such interest, the expense of removing to another place of business, any damage resulting from the loss of the use of improvements abandoned with the leased premises, and also for loss of profits.³⁶ The time

³³ Allison v. Chandler, 11 Mich. 542; St. John v. Mayor, 13 How. Pr. 527; Sherman v. Dutch, 16 Ill. 283; Clark v. St. Clair, etc. I. Co., 24 Mich. 508; Freidenheit v. Edmundson, 36 Mo. 226; Kemper v. Louisville, 14 Bush 87; Walter v. Post, 6 Duer 363, 373; Simplex R. App. Co. v. Western R. & B. Co., 173 Ind. 1; Johnson v. Railroad Co., 140 N. C. 574, quoting the text;

Weinman v. De Palma, 232 U. S. 571, 58 L. ed. 733, aff'g 16 N. M. 302.

³⁴ Herron v. Laughlin, 23 Pa. Super. Ct. 226.

³⁵ Pennsylvania R. Co. v. Eby, 107 Pa. 166. See Simplex R. App. Co. v. Western, etc., Co., *supra*.

³⁶ Hawthorne v. Siegel, 88 Cal. 159, 22 Am. St. 291.

required to establish the business of a destroyed manufacturing plant in a distant place may not be regarded as an element of the recoverable damages for the interruption of the business.³⁷ Because of the remoteness and speculative nature of the demand a recovery for time lost in endeavoring to secure the removal of a telegraph pole and the anticipated danger because of it has been denied.³⁸

§ 1030. **Same subject.** Properly speaking, special damages are those which are stated under a *per quod* as the consequence of the breaking and entry; and where the defendant is guilty of some outrage connected with a particular trespass, and it is a part of the trespass by being done at the same time, it is matter of aggravation or a substantive ground of action and damage. The taking and carrying away of personal property at the time of breaking and entering the close or a personal injury may be alleged as matter of aggravation, either in the count for breaking the close or in a distinct count as a substantive cause of action; the latter is the more orderly method of pleading.³⁹ If alleged either as aggravation or as a distinct ground of damages in the count for breaking the close it is a dependent claim, and will not, if proved, support the action if the case for breaking the close be not established.⁴⁰ But when established, the specific claim for taking and converting property or for the personal injury is a part of the *gravamen* of the action, and the plaintiff will be entitled to recover the value of the property taken and converted or for the personal injury, as well as for breaking and entering the close.⁴¹ But for the

³⁷ Simplex, etc., Co. v. Western, etc. Co., 173 Ind. 1.

³⁸ Southwestern Tel. & T. Co. v. Whiteman, 36 Tex. Civ. App. 163.

³⁹ Bishop v. Baker, 19 Pick. 517; Wright v. Chandler, 4 Bibb 422; Bahr v. Boley, 85 Hun 448; O'Horo v. Kelsey, 60 App. Div. (N.Y.) 604. See Lamb v. Harbaugh, 105 Cal. 680.

⁴⁰ Eames v. Prentice, 8 Cush. 337; Warner v. Abbey, 112 Mass. 355;

Brown v. Lake, 29 Ohio St. 64; Oklahoma v. Hill, 6 Okla. 114.

⁴¹ Acrea v. Brayton, 75 Iowa 719; Cate v. Schaum, 51 Md. 299, 34 Am. Rep. 311; Doty v. Quincy, etc. R. Co., 136 Mo. App. 254; Adams v. Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Curlew v. Laurie, 12 Q. B. 640; Woolley v. Carter, 7 N. J. L. 85; Sampson v. Henry, 13 Pick. 36; Warner v. Abbey, 112 Mass. 355; Razzo v. Varni,

purpose of such recovery the trespass to personal property or to person should be stated with the same particularity as when

81 Cal. 289; *Moore v. Baylis*, 56 Hun 647; *United States v. Ute C. & C. Co.*, 158 Fed. 20, 85 C. C. A. 302; *Griffin v. Martel*, 77 Vt. 19. Compare *Sanders v. Cline*, 22 Okla. 154.

In *O'Horo v. Kelsey*, *supra*, it was alleged that the plaintiff was lawfully in possession of a hotel; that the defendant, for the purpose of ousting him, forcibly trespassed upon the premises; committed an assault upon the plaintiff; by false statements induced another to remove the hotel furniture; without process attempted to remove the plaintiff and his family from the hotel by force, and, failing in that, attempted to obtain a process of the court by which to accomplish the same purpose, knowing that he was not legally entitled thereto. The court said: If those allegations were established by proof we think the plaintiff would be entitled to recover in this action all the damages sustained in consequence of those several acts, viz., the damages sustained on account of the trespass committed by the defendant or by his agent, including the damage occasioned thereby to the business of the plaintiff; the damage sustained by the plaintiff on account of being assaulted by the defendant or by his agents, if authorized by him; the damages sustained on account of the removal of the furniture under the chattel mortgage in question, if wrongful and it was procured to be done by the defendant, and the fair value of such furniture, less what was due and owing upon said chattel mortgage, if it was wrongfully removed or caused to be taken and

removed by the defendant; the expense incurred by the plaintiff in defending the proceedings instituted by the defendant to oust him of the possession of the premises, if such proceedings were illegal and not instituted in good faith. Also the value of the property not included in the chattel mortgage which was taken or destroyed by the defendant while engaged in attempting to dispossess the plaintiff, and taken or removed for the purpose of compelling the plaintiff to vacate the premises. This measure of liability was not improper because the defendant acted in good faith, or as a reasonably prudent and cautious man would have acted under the circumstances. *Lamb v. Harbaugh*, 105 Cal. 680, is in accord on the last point, but in opposition as to the right to recover for a personal injury.

Where the trespass is not laid with a *continuando* the plaintiff may properly elect any day, prior to the date of the writ as the time when the defendant entered upon the land and carried away and converted to his use the bark complained of, and he cannot find fault if he be called upon to pay the highest market value of the bark at such time. *Adams v. Blodgett*, *supra*.

Though damages are not recoverable for being disturbed in possession only, as where an eviction is rightful but contrary to the forcible entry and detainer act, liability exists, according to some authorities, for injuries to persons or chattels *McIntyre v. Murphy*, 153 Mich. 342, citing *Newton v. Horland*, 1 Man. & G. 644; *Beddall v. Maitland*, 17

it is the sole ground of action; otherwise such wrongs will be mere matter of aggravation, not traversable, not a distinct ground of damage, but only a circumstance tending to give character to the principal charge and to enhance the damages assessable thereon.⁴² Where a daughter, either of or under age, is seduced in her father's house he may allege it and the consequential loss of services as matter of aggravation in an action of trespass *quare clausum*.⁴³ The fact that the continuation of a trespass is an obstruction to the plaintiff's obtaining a lease of the mining property trespassed on is not a ground for recovery in an action for the trespass.⁴⁴

The wrong-doer must answer for all loss caused by the destruction of chattels; if money has been lost it is immaterial to him that it was kept in an unusual place and he was not aware of its presence.⁴⁵ If he breaks into a house for the purpose of removing goods therefrom and leaves it unfastened he must respond for the loss of any goods taken therefrom by others.⁴⁶ Injury done to chattels exposed to threatening weather in consequence of a storm is a ground of damage.⁴⁷ It is not cause for refusing a recovery for the deterioration in the value of property that it was used in an unlawful business; it is otherwise as to the compensation paid employees for conducting the business.⁴⁸ The expense of litigation is not recoverable if the defendant has not acted in bad faith or caused the

Ch. Div. 174; *Edwick v. Hawkes*, 18 id. 199. The opposing authorities are collected in *Souter v. Codman*, 14 R. I. 119.

⁴² *Thayer v. Sherlock*, 4 Mich. 173; *Chamberlain v. Greenfield*, 3 Wils. 292; *Rucker v. McNeely*, 4 Blackf. 179; *Keenan v. Cavanaugh*, 44 Vt. 268, 1 Am. Neg. Cas. 434; *Allred v. Bray*, 41 Mo. 484, 97 Am. Dec. 283; *North Point Con. I. Co. v. Utah & Salt Lake C. Co.*, 23 Utah 199, citing the text; *Ream v. Rank*, 3 S. & R. 215; *Bracegirdle v. Orford*, 2 M. & S. 77; *Bateman v. Goodyear*, 12 Conn. 575; *Johnson v.*

Hannahan, 3 Strobb. 425; *Brown v. Lake*, 29 Ohio St. 64; *Plumb v. Ives*, 39 Conn. 120.

⁴³ *Bennett v. Allcott*, 2 T. R. 166; *Mercer v. Walmsley*, 5 Har. & J. 27, 9 Am. Dec. 486; *Woodward v. Walton*, 2 B. & P. N. R. 476.

⁴⁴ *Vallancourt v. O'Rourke*, 1 Vict. (Ct. of Mines) 43.

⁴⁵ *Eisele v. Oddie*, 128 Fed. 941.

⁴⁶ *French P. & O. Co. v. Phelps*, 47 Tex. Civ. App. 385.

⁴⁷ *Behrens v. Mountz*, 37 Pa. Super. Ct. 326.

⁴⁸ *Young v. Stevenson*, 75 Ark. 181.

plaintiff unnecessary trouble.⁴⁹ Theoretic and speculative damages are not recoverable.⁵⁰

§ 1031. **Exemplary and statutory damages.** Such damages may be given in this action, and these are in the discretion of the jury where the facts are such as to warrant them. If the trespass is wilfully or maliciously done, or if there is connected with it, otherwise not the subject of punitive damages, circumstances of outrage, insult, or wanton destruction of personal property the proof of these facts may be submitted as grounds for damages by way of punishment; and the amount to be allowed is left to the sound discretion of the jury.⁵¹ Such damages are

⁴⁹ *Georgia R. & B. Co. v. Gardner*, 118 Ga. 723; *Bendich v. Seobel*, 107 La. 242.

Expenses incurred by the plaintiff in a suit to determine his rights to the property trespassed upon are not involved, at least until it has been determined. *Murray v. Pannaci*, 130 Fed. 529, 65 C. C. A. 153.

⁵⁰ *Chase v. Cochran*, 102 Me. 431.

⁵¹ *Kentucky S. Co. v. Page* (Ky.), 125 S. W. 170; *Jordan v. Delaware & A. Tel. & T. Co.*, 1 Boyce (Del.) 107; *Kingsley v. United R. Co.*, 66 Ore. 50; *Kittrell v. Irwin* (Tex. Civ. App.), 149 S. W. 199; *Blalock v. Atwood*, 154 Ky. 394, 46 L.R.A. (N.S.) 3; *Carlberg v. Spiegls H. F. Co.*, 178 Ill. App. 424; *McDonald v. Butler*, 10 Ga. App. 845; *Giddings v. Freedley*, 128 Fed. 355, 65 L.R.A. 327, 63 C. C. A. 85; *Mattingly v. Houston*, 167 Ala. 167; *Brown v. Floyd*, 163 Ala. 317; *Western U. Tel. Co. v. Dickens*, 148 Ala. 480; *Louisville & N. R. Co. v. Smith*, 141 Ala. 335, citing the text; *Jones v. Sanders*, 138 Cal. 405; *Daniel v. Perkins L. Co.*, 9 Ga. App. 842; *Wilcox v. Alley*, 140 Ky. 187; *Nickerson v. Allen*, 110 La. 194; *Frostburg v. Hitchins*, 99 Md. 617; *Schult v. Strother*, 117 Mo. App.

64; *Miller v. Rambo*, 73 N. J. L. 726; *Hagerman I. Co. v. McMurray*, 16 N. M. 172, citing the text; *Steenburgh v. McRorie*, 60 N. Y. Misc. 510; *May v. Western U. Tel. Co.*, 157 N. C. 416, 37 L.R.A. (N.S.) 912; *Brown v. Electric Co.*, 138 N. C. 533, 107 Am. St. 554, 60 L.R.A. 631; *Sperry v. Seidel*, 218 Pa. 16; *Gerwig v. Johnston*, 207 Pa. 585; *Johns G. Co. v. San Juan*, 1 Porto Rico Fed. 160; *Faris v. American Tel. & T. Co.*, 84 S. C. 102; *Beaudrot v. Southern R.*, 69 S. C. 160; *Moore v. Duke*, 84 Vt. 401; *Winterscheid v. Reichle*, 45 Mont. 238; *Brame v. Clark*, 148 N. C. 364, 19 L.R.A. (N.S.) 1033 (attempt to seduce and carnally know the wife of the plaintiff); *Southern R. Co. v. McEntire*, 169 Ala. 42 (construction of railroad on land with knowledge that the consent of the owner had not been obtained); *West Chicago St. R. Co. v. Morrison*, 160 Ill. 288; *Thirkfield v. Mountain View C. Ass'n*, 12 Utah 76.

In *Fulton v. Spear*, 13 Ohio N. P. (N.S.) 473, the award of punitive damages was reduced; an allowance for counsel fees was made in addition to such damages.

given as punishment, and their allowance and amount are submitted only when there is evidence tending to show conduct culpable in point of intention. The act in question, or some act accompanying or connected with it, must be recklessly violent, oppressive, wanton or malicious.⁵² The defendant is

⁵² *Murray v. Pannaci*, 130 Fed. 529, 65 C. C. A. 153; *Coleman v. Pepper*, 159 Ala. 310; *Snedecor v. Pope*, 143 Ala. 275; *Sheftall v. Zipperer*, 133 Ga. 488, 27 L.R.A.(N.S.) 442; *Dunham v. Miller*, 154 Mo. App. 314; *Adams v. Loraine Mfg. Co.*, 29 R. I. 333; *Moore v. Cummings*, 87 S. C. 166; *Gilman v. Brown*, 115 Wis. 1; *Cosgriff v. Miller*, 10 Wyo. 190; *Avera v. Williams*, 81 Miss. 714; *Gusdorff v. Duncan*, 94 Md. 160; *Hicks v. Swift Creek M. Co.*, 133 Ala. 411; *Merest v. Harvey*, 5 Taunt. 442; *Sears v. Lyons*, 2 Stark. 317; *Tullidge v. Wade*, 3 Wils. 18; *Doe v. Filliter*, 13 M. & W. 47; *Moore v. Crose*, 43 Ind. 30; *Ames v. Hilton*, 70 Me. 36; *Cutler v. Smith*, 57 Ill. 252; *Smalley v. Smalley*, 81 Ill. 70; *Brown v. Allen*, 35 Iowa 306; *Kolb v. Bankhead*, 18 Tex. 228; *Gordon v. Jones*, 27 Tex. 620; *Jasper v. Purnell*, 67 Ill. 358; *Huftalin v. Misner*, 70 Ill. 55; *Owings v. Ulroy*, 3 A. K. Marsh. 454; *Bateman v. Goodyear*, 12 Conn. 580; *Major v. Pulliam*, 3 Dana 582; *Perkins v. Towle*, 43 N. H. 220, 80 Am. Dec. 149; *Bradshaw v. Buchannan*, 50 Tex. 492; *Stillwell v. Barnett*, 60 Ill. 210; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Boardman v. Goldsmith*, 48 Vt. 403; *Parker v. Shackelford*, 61 Mo. 68; *Dearlove v. Herrington*, 70 Ill. 251; *Devaughn v. Heath*, 37 Ala. 595; *Elsworth v. Potter*, 41 Vt. 685; *Rosser v. Bunn*, 66 Ala. 89; *Smith v. Thompson*, 55 Md. 5, 39 Am. Rep. 409; *Atlantic, etc. C. Co. v. Mary-*

land C. Co., 62 Md. 135; *Baltimore & O. R. Co. v. Boyd*, 63 Md. 325; *Craig v. Cook*, 28 Minn. 232; *Kemmitt v. Adamson*, 44 Minn. 121; *Weyer v. Wegner*, 58 Tex. 539; *Koenigs v. Jung*, 73 Wis. 178; *Reynolds v. Braithwaite*, 131 Pa. 416; *Trauerman v. Lippincott*, 39 Mo. App. 478; *Diamond, etc. S. Co. v. Smith*, 27 Tex. Civ. App. 558; *Wright v. Hollywood C. Co.*, 112 Ga. 884; *Stevens v. Stevens*, 96 Ga. 374; *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 73 Am. St. 141; *Thompson v. Evans*, 49 Ill. App. 289; *Donovan v. Consolidated C. Co.*, 88 Ill. App. 589; *Maysville, etc. R. v. Warnock*, 10 Ky. L. Rep. 937; *Patterson v. Waldman*, 20 Ky. L. Rep. 514; *Ohio Valley Tel. Co. v. Meyer*, 22 Ky. L. Rep. 36 ("malicious" means the intentional doing of a wrongful act without legal right); *Trainer v. Wolff*, 58 N. J. L. 381; *Sheldon v. Baumann*, 19 App. Div. (N. Y.) 61; *Waters v. Greenleaf-J. L. Co.*, 115 N. C. 648; *Remington v. Kirby*, 120 N. C. 320; *Studebaker v. New Castle G. Co.*, 7 Pa. Super Ct. 641; *Kennedy v. Erdman*, 150 Pa. 427; *Huling v. Henderson*, 161 Pa. 553; *Telephone & T. Co. v. Shaw*, 102 Tenn. 313; *Connor v. Sewell*, 90 Tex. 275; *Nolan v. Mendere*, 6 Tex. Civ. App. 203; *Thirkfield v. Mountain View C. Ass'n*, 12 Utah 76; *Scheer v. Kriesel*, 109 Wis. 125; *Leary v. United Hercules H. S. Co.*, 10 New Zeal. L. R. 420; *Cumberland Telephone & T. Co. v.*

presumed to know the law and to have acted with general malice when he violates it.⁵³ In England mere wilfulness and persistence in continuing a trespass do not justify the infliction of a penalty beyond the loss sustained by the plaintiff.⁵⁴ The act of the president of a corporation, whose employees have committed a trespass, in ordering the removal of the structures erected by them cannot be considered in mitigation of punitive damages.⁵⁵ A plaintiff in execution who, with full knowledge of the unlawful acts done by an officer, ratifies them, will be liable for reasonable exemplary damages.⁵⁶ But a later case, without noticing that which lays down the doctrine stated, declares that one

Cassedy, 78 Miss. 666; Garrett v. Sewell, 108 Ala. 521.

Interference with the right of privacy and the seclusion of a dwelling are grounds for imposing punitive damages. Bell v. Steele, 16 Pa. Dist. 197.

The government is entitled to exemplary damages for trespass upon its lands. United States v. Taylor, 35 Fed. 484.

In O'Connor v. Parrott, 22 Ill. App. 429, plaintiff's premises were broken and entered and property alleged to be worth \$1,000 was carried away under a pretense of serving a distress for \$50. A verdict for \$6,500 did not show passion or prejudice.

In Trauerman v. Lippincott, 39 Mo. App. 478, a verdict for \$50 actual and \$1,450 exemplary damages was sustained.

In Ireland the jury may award punitive damages if the defendant enters premises in a mode which he knows is illegal. Reeves v. Penrose, 26 L. R. Ir. 141.

Plaintiff, suing for injury resulting to his property from the construction and operation of a railroad, is not entitled to punitive damages where the defendant has

not been guilty of any wrongful act evincing malice, fraud, oppression or wilfulness. Mississippi Cent. R. Co. v. McClendon, — Miss. —, 64 So. 460.

Malice is not to be inferred against a street railway company from the placing of its tracks on a street against the protest of an abutting owner if its right so to do has not been judicially passed upon, the question being one of doubt. Becker v. Lebanon & M. St. R. Co. 30 Pa. Super. Ct. 546.

An entry upon land in opposition to a warning justifies an award of exemplary damages though only nominal damages were sustained. Goodson v. Stewart, 154 Ala. 660.

⁵³ Farwell v. Warren, 51 Ill. 467; Raynor v. Nims, 37 Mich. 34, 26 Am. Rep. 493; Prussner v. Brady, 136 Ill. App. 395.

⁵⁴ McArthur v. Cornwall, [1892] App. Cas. 75. Compare Cosgriff v. Miller, *infra*; and see Hollister v. Ruddy, 66 N. J. L. 68. *Contra*, Greeney v. Pennsylvania W. Co., 29 Pa. Super. Ct. 136.

⁵⁵ Kentucky M. R. Co. v. Stump, 12 Ky. L. Rep. 316.

⁵⁶ People's B. & L. Ass'n v. McElroy, 79 Ill. App. 266.

who is not liable for a trespass by reason of participation in the actual force, or by any connection with it through direction or advice, but merely because of a subsequent ratification, is not liable for such damages.⁵⁷ It is said in a recent case that malice is not to be inferred from the fact that the defendant intended to commit a trespass upon unimproved and uninclosed land, in the absence of a purpose to put its owner in a worse condition than he would otherwise have been.⁵⁸ But a later case is less favorable to the defendant.⁵⁹ In Alabama the extent of the actual damages is immaterial to the right of the jury to award punitive damages.⁶⁰ The pecuniary ability of the defendant may be shown when punitive damages are recoverable.⁶¹ The allowance of double or treble damages for a trespass is not predicated on the theory of compensating the plaintiff for his loss, but as a punishment to the defendant, the plaintiff, alleging negligence, must show the facts which support his claim to such damages.⁶² But where liability depends upon active misconduct a trespasser upon the land of another must show that the trespass was casual and involuntary.⁶³ Where such damages are sought all the facts and circumstances which give character to the transaction are to be regarded; the defendant may show title to the premises in question.⁶⁴ Some statutes imposing liability for treble damages are very strictly construed; they are said to be highly penal in character, and apply only where there was willfulness, wantonness or maliciousness on the part of the defend-

⁵⁷ Goldstein v. Miller, 93 Ill. App. 103, citing Grund v. Van Vleck, 69 Ill. 478; Rosenkrans v. Barker, 115 Ill. 331, 56 Am. Rep. 169; Partridge v. Brady, 7 Ill. App. 639; Leiter v. Day, 35 id. 248; Douglas v. Hoffman, 72 id. 110.

⁵⁸ Kiernan v. Heaton, 69 Iowa 136. See Lamb v. Harbaugh, 105 Cal. 680.

⁵⁹ Cosgriff v. Miller, 10 Wyo. 190. See Henderson v. Coleman, 19 Wyo. 183.

⁶⁰ Louisville & N. R. Co. v. Smith, 141 Ala. 335. See § 406.

⁶¹ Arthur v. Henry, 157 N. C.

393; Telephone & Tel. Co. v. Shaw, 102 Tenn. 313; Cosgriff v. Miller, *supra*; Gilman v. Brown, 115 Wis. 1. See §§ 404, 405, 744.

The character and intent of the defendant is relevant on the question of punitive damages only. Southern R. Co. v. Hayes, 183 Ala. 465.

⁶² Galvin v. Gualala M. Co., 98 Cal. 268.

⁶³ Michigan L. & I. Co. v. Deer Lake Co., 60 Mich. 143, 1 Am. St. 491.

⁶⁴ Bateman v. Goodyear, 12 Conn. 575.

ant.⁶⁵ In Minnesota when a servant, acting within the scope of his employment, wilfully cuts trees on the land of another, the master will be liable to treble damages (§ 8090, Gen. St. 1913) even though the cutting was without his knowledge or consent.⁶⁶ If the statute is not mandatory the discretion of the trial court in acting on an application to have the damages increased will not be interfered with on review if it was not abused.⁶⁷ In reviewing the action of such court the scope of the recovery by the plaintiff and the extent of the defendant's losses in connection with the transaction will be regarded.⁶⁸ Such statutes have been held inapplicable to a municipality.⁶⁹ In Vermont the statute giving treble damages to the party injured by the unauthorized cutting of trees on his land is not of a penal nature; it is rather remedial.⁷⁰ Under the Oregon statute a trespasser's belief that the owner of the land on which he cut timber authorized him to cut it does not exempt him from liability for the treble damages it imposes, it being practicable for him to ascertain whether that was true.⁷¹ The owner of land, ignorant of the boundaries of it, may not recover such damages if his acts have misled the trespasser though the statute imposes liability regardless of the latter's knowledge that the land was not his own.⁷² Under the New York statute (Code Civ. Proc. §§ 1667, 1668) ownership of the land is essential to the recovery of treble damages against one

⁶⁵ Cohn v. Neeves, 40 Wis. 393; McDonald v. Montana W. Co., 14 Mont. 88, 43 Am. St. 616; Gardner v. Lovegren, 27 Wash. 356.

The word "plants," as used in a statute which makes a person who unlawfully cuts down, injures, destroys or carries away any roots, fruits or plants liable for treble damages, has been held to include ornamental hedges. Fezler v. Gibson, 183 Mo. App. 385.

⁶⁶ Helppie v. Northwestern Drainage Co., 127 Minn. 360, distinguishing Potulni v. Saunders, 37 Minn. 517.

In Kansas, treble damages for the

cutting and removal of wheat cannot be recovered when the trespass was committed under color of authority. Tuttle v. Bell, 92 Kan. 725.

⁶⁷ Isom v. Rex Crude Oil Co., 140 Cal. 678.

⁶⁸ Isom v. Book, 142 Cal. 666.

⁶⁹ Hunt v. Boonville, 65 Mo. 620, 27 Am. Rep. 299.

⁷⁰ Guild v. Prentiss, 82 Vt. 212, and local cases cited.

⁷¹ Loewenberg v. Rosenthal, 18 Ore. 178.

⁷² Kramer v. Goodlander, 98 Pa. 353.

cutting trees and hence such damages cannot be recovered when the trees cut were within a public highway upon which plaintiff's property abutted.⁷³ Treble damages are only recoverable by the person who was entitled to sue for the trespass.⁷⁴ A trespasser acts wilfully by cutting timber on a large tract of land not described in his evidence of title.⁷⁵ A trespass is not casual and involuntary if the trespasser knows the boundary of the land on which he may cut timber and does not confine his cutting thereto.⁷⁶ If the jury allows interest on the damages found to have been sustained the whole amount may be trebled.⁷⁷ The damages to be trebled are those which are compensatory merely; not those which give the plaintiff the right to recover against a wilful trespasser the value of the article into which the converted timber has been manufactured.⁷⁸ Punitive damages are not allowable where the actual damages are doubled.⁷⁹

§ 1032. **Same subject; mitigation.** Though an entry is made upon real estate under the conviction that the right to do so exists if it is in fact wrongful and wilful injury is done to the plaintiff's property the defendant will subject himself to liability for exemplary damages.⁸⁰ So if, in making such entry where he is entitled to possession, he uses force to overcome opposition, commits an assault and battery upon the occupant, injures his personal property in removing it from the premises to obtain possession, he may, by reason of such force in the assertion of his rights and for such injury to person and property, subject himself to such damages.⁸¹ The circumstance, however, that the defendant was entitled to possession of the real estate should be taken into consideration in determining the amount of such

⁷³ *Pfohl v. Rupp*, 166 App. Div. (N. Y.) 630.

⁷⁴ *Chicago, etc. R. Co. v. Watkins*, 43 Kan. 50.

⁷⁵ *Longyear v. Gregory*, 110 Mich. 277.

⁷⁶ *Gates v. Comstock*, 113 Mich. 127.

⁷⁷ *Gates v. Comstock*, 113 Mich. 127.

⁷⁸ *Oregon & C. R. Co. v. Jackson*, 21 Ore. 360.

⁷⁹ *Stovall v. Smith*, 4 B. Mon. 378.

⁸⁰ *Shores v. Brooks*, 81 Ga. 468, 12 Am. St. 332; *Best v. Allen*, 30 Ill. 30, 81 Am. Dec. 338.

⁸¹ *Reeder v. Purdy*, 41 Ill. 279; *Bonsall v. McKay*, 1 Houst. 520; *Hedgepeth v. Robertson*, 18 Tex. 858; *Champion v. Vincent*, 20 id. 811; *Greenville, etc. R. Co. v. Partlow*, 14 Rich. 237.

damages, for it is less culpable for a person to attempt to recover his own property by force than to attempt to rob another of property to which the actor has no claim.⁸² Where an assault in such case was committed upon the occupant's wife and personal property belonging to the husband was injured, and two suits were brought against the trespasser—one by the husband and wife for the personal injury to her, and the other by the husband alone for the assault on his wife, injury to his furniture, and for breaking his close, the former of which was first tried and exemplary damages given therein,—it was held that on the trial of the second action instructions in favor of exemplary damages, correct in themselves, would be misleading and erroneous if the jury were not reminded that the same transaction had been the subject of such damages on a preceding trial; though the jury had a right to give punitive damages in both suits yet, on the question of amount, the former verdict should be considered.⁸³ A persistent and predetermined effort to prevent the owner from enjoying the use and benefit of property conceded to be his is cause for imposing punitive damages.⁸⁴ The fact that a trespass in removing a fence was committed in pursuance of the vote of the town has been allowed to be proved in mitigation of exemplary damages.⁸⁵ Such damages may be mitigated by proof of the mischievous language or conduct of the defendant if it was connected with the plaintiff's act, although it does not legally justify the injury done.⁸⁶ It is no excuse for committing a trespass upon a house that it had a bad reputation.⁸⁷

The principle of permitting damages in certain cases to go beyond naked compensation is for example and the punishment of the guilty party for the wicked, corrupt and malignant motive and design which prompted him to the wrongful act. A trespass may be committed from a mistaken notion of power,

⁸² *Reeder v. Purdy*, 41 Ill. 279.

⁸⁶ *Wilson v. Young*, 31 Wis. 574.

⁸³ *Id.*

⁸⁷ *Weston v. Graylin*, 49 Vt. 507;

⁸⁴ *Waggoner v. Wyatt*, 43 Tex. Civ. App. 75.

Love v. Moynahan, 16 Ill. 277; *Per-*

⁸⁵ *Gray v. Waterman*, 40 Ill. 522; *Jackel v. Reiman*, 78 Tex. 588.

kins v. Towle, 43 N. H. 220, 80 Am. Dec. 149.

and from an honest motive to accomplish some good end. But the law tolerates no abuse of power, nor excuses such act; yet in morals and the eye of the law there is a vast difference between the criminality of a person acting mistakenly from a worthy motive and one committing the same act in a wanton and malignant spirit and with a corrupt and wicked design. Hence, where the jury are called upon to give smart money to punish the party guilty of the wrongful act any evidence which would show this difference or, rather, all the facts and circumstances which tend to explain or disclose the motives and design of such party, should go to the jury for consideration.⁸⁸ Where the tort survives and the action is brought against the representative of the deceased tort-feasor vindictive damages should never be allowed, no matter how aggravated the trespass.⁸⁹ The liability for such damages is restricted to the individual who does the acts which give the right to claim them. While the party who institutes proceedings and the attorney who directs the service of a void writ are liable for compensatory damages resulting from a proper observance of its mandate they are not answerable for exemplary damages because the officer who served such writ acted in excess of its requirements.⁹⁰

SECTION 2.

INJURY TO INHERITANCE.

§ 1033. Injury to the rights of parties not in possession.

As has been stated, the same act may be injurious to several persons having different interests: to the person having a limited estate in possession, and the person or persons having the fee subject to that possessory title. The owner of the reversionary or expectant estate has no claim for damages where

⁸⁸ McClurg v. Brenton, 123 Iowa 368, 65 L.R.A. 519; Simpson v. McCaffrey, 13 Ohio 508, approved in Western U. Tel. Co. v. Smith. 64 Ohio St. 106; Marchand v. Haber, 16 N. Y. Misc. 319; Camp v. Camp,

59 Vt. 667; Barrett v. Mobile, 129 Ala. 179.

⁸⁹ Ripsey v. Miller, 11 Ired. 247. See § 412.

⁹⁰ Marks v. Culmer, 6 Utah 419; Cooley's Torts, 131. See § 412.

the wrong affects only its present enjoyment; and when it affects the value of the whole estate in possession and in expectancy he has no claim for damages except for the injury to the inheritance.^{90a} This injury may arise from the wrongful acts of the owner of the intermediate estate or a stranger; when done by the former it is waste. Trespass will not lie against either, because the wrong is not to the possession of the injured party. In the appropriate action, however, compensation is meted out to him on the same principles and in proportion to the injury sustained.⁹¹ An exception to the rule that the owner of leased premises cannot recover for an injury to the possession is made where such injury affects the rental value of the premises under a lease which was in effect before the trespass was committed. In the case in which this exception was declared the rental to be paid for the term was not fixed for the whole term but was made to depend for certain future periods of the term upon the agreement of the parties, or, they failing to agree, upon the decision of arbitrators. It was considered that the latter, in fixing the rental value for a term of years, would do so with reference to the conditions existing when they acted; those conditions, being permanent, resulted in such damage to the lessor that he was entitled to recover for the damage to the rental value. Fee damages, in

^{90a} *Nashville, etc. R. Co. v. Heikens*, 112 Tenn. 378, 65 L.R.A. 298, quoting the text; *Missouri, etc. R. Co. v. Couch*, — Tex. Civ. App. —, 122 S. W. 67; *Elizabethtown, etc. R. Co. v. Price*, 11 Ky. L. Rep. 367; *Jordan v. Benwood*, 42 W. Va. 312, 57 Am. St. 859, 36 L.R.A. 519, citing the text.

⁹¹ *Alexander v. United States*, 39 Ct. of Cls. 383 (extraordinary use of land as a military camp not within the area of war); *Thurmond v. Ash Grove W. L. Ass'n*, 125 Mo. App. 73; *Cherry v. Canal & W. Co.*, 140 N. C. 422, 111 Am. St. 850; *Van Deusen v. Young*, 29 N. Y. 9; *Randall v. Cleveland*, 6 Conn. 328;

Shadwell v. Hutchinson, 2 B. & Ad. 97; *Dutro v. Wilson*, 4 Ohio St. 101; *California D. D. Co. v. Armstrong*, 17 Fed. 216; *Elizabethtown, etc. R. Co. v. Price*, *supra*.

If it is uncertain whether a devisee has absolute power to sell land when he sees fit and to receive the proceeds for his own use, or is so restricted that he can sell it only to meet his necessities, and it cannot be known whether any part of the land or its proceeds will ever come to the residuary devisee, the holder of the life estate may recover full damages. *Rockwood v. Robinson*, 159 Mass. 406.

lieu of an injunction, were allowed as of the time the action was begun rather than as of the date of the expiration of the term.⁹² A remainderman may maintain trespass against a tenant of the owner of the life estate who continues to take oil after the death of such owner. The damages are measurable by the profits realized.⁹³

If a house demised to a tenant has been set on fire or thrown down from the negligence of a neighbor the damages are apportionable between the landlord and tenant. The latter is entitled to recover in respect to the value of his possessory interest and unexpired term, and the landlord in respect to the injury to his reversion.⁹⁴ But if the tenant is bound by covenant to keep the house in repair a substantial injury would accrue to him, and he would be entitled to recover the cost of rebuilding the house, deducting the difference in value between old materials and new.⁹⁵ The tenant must, however, first pay or satisfy the claim of the landlord. The amount he expends for this purpose measures his recovery against the wrong-doer.⁹⁶

The declaration in an action brought by a reversioner must either expressly allege the act to have been done to the injury of the reversion or must state an injury of such a permanent nature as to be necessarily prejudicial thereto, which allegation must be proved.⁹⁷ Waste is the abuse or destructive use of property by him who has not the absolute, unqualified title, and differs from trespass in this: that the latter is an injury by the unauthorized use of another's property by one who has no right whatever.⁹⁸ Blackstone says it is a spoil or destruction of houses, gardens, trees or other corporeal hereditaments, and the disherison of him that hath the remainder or reversion.⁹⁹ It is

⁹² *Kernoehan v. Manhattan R. Co.*, 161 N. Y. 339, 17 App. Div. (N. Y.) 634.

⁹³ *Crawford v. Forest O. Co.*, 208 Pa. 5.

⁹⁴ *Panton v. Isham*, 3 Lev. 359, 1 Salk. 19; *California D. D. Co. v. Armstrong*, 17 Fed. 216.

⁹⁵ *Lukin v. Goodsall*, 2 Peake 15, 1 Add. on Tort. 315.

⁹⁶ *California D. D. Co. v. Armstrong*, 17 Fed. 216; *Wood v. Griffin*, 46 N. H. 231.

⁹⁷ *Baxter v. Taylor*, 4 B. & Ad. 72; *Jackson v. Pesked*, 1 M. & S. 234; *Tucker v. Newman*, 11 Ad. & E. 40.

⁹⁸ *Duvall v. Waters*, 1 Bland's Ch. 569, 18 Am. Dec. 350.

⁹⁹ 2 Bl. Com. ch. 18. See Proffitt

voluntary when the tenant does some act injurious to the inheritance, and permissive when he omits some duty and thereby an injury results to the inheritance; to tear a house down is voluntary waste; to suffer it to go to decay for want of necessary repairs is permissive.¹ To be waste it must either diminish the value of the estate, increase the burdens upon it or impair the evidence of title of him who has the inheritance.² The damages for this injury and the remedy for them are generally regulated by statute. In some states only single damages are given, in others double and treble damages.³

§ 1034. *Same subject.* The damage for waste being, by definition, for injury to the inheritance, the plaintiff can recover only for such injury as affects his expectant estate. Thus, where one or more of several heirs, entitled as tenants in common to a reversionary interest in lands, sue, the recovery will be limited to the proportion of damages those suing are entitled to.⁴ If waste is committed by cutting down timber, removing buildings, carrying away gravel or other substance of the estate the owner of the inheritance will have a right to the same damages as he would have against a stranger who impaired the value of his estate by similar tortious acts. In general, this damage is the amount the estate is diminished thereby in value.⁵ In

v. Henderson, 29 Mo. 325; Delano v. Smith, 206 Mass. 365, 30 L.R.A. (N.S.) 474; Moss Point L. Co. v. Harrison County, 89 Miss. 448.

¹ 3 Dane Abr. 214, 1 Wash. Real Prop. 126.

² Huntley v. Russell, 13 Q. B. 588; Young v. Spencer, 10 B. & C. 145.

³ See 1 Wash. Real Prop. 142.

⁴ Lowery v. Rowland, 104 Ala. 420.

⁵ Evans v. Kohn, 113 Minn. 45; Martin v. Porter, 150 Ill. App. 411, citing the text; Harder v. Harder, 26 Barb. 409; Jesser v. Gifford, 4 Burr. 2141; Agate v. Lowenbein, 6 Daly 291; Dickinson v. Baltimore, 48 Md. 583, 30 Am. Rep. 492; Ayer v. Bartlett, 9 Pick. 156; White v. Stoner, 18 Mo. App. 540; Stouden-

mire v. De Bardelaben, 85 Ala. 85; Kankakee & S. R. Co. v. Horan, 131 Ill. 288; Dorsey v. Moore, 100 N. C. 41; Whorton v. Webster, 56 Wis. 356; Jordan v. Benwood, 42 W. Va. 312, 57 Am. St. 859, citing the text; Lowery v. Rowland, 104 Ala. 420; Cole v. Bickelhaupt, 64 App. Div. (N. Y.) 6. See Worrall v. Munn, 53 N. Y. 185, 38 id. 137.

The breach of a covenant by a tenant not to commit waste does not subject him to the same measure of damages as the breach of a covenant to deliver up the property at the end of the term in the same state as it came to him. The damages are measured by the diminution in the value of the reversion, less a discount for immediate pay-

determining the amount of damage for cutting and removing wood the jury are not limited to the value of that actually cut and removed; they may and should also consider the effect which the cutting has had upon the place wasted. The damages are equal to the solid and permanent injury to the inheritance.⁶ If one in possession with the right of a tenant for life of agricultural land commits waste by cutting timber necessary to be retained for the use of the farm the reversioner may recover for this damage as well as the value of the timber.⁷ An agreement entered into between the parties for the assessment of the damages upon the basis of the value of the trees cut will be enforced.⁸ The cost of restoring the premises⁹ and the loss of their use while restoration is being made may be recovered if that is less than the diminution in their value; otherwise the latter is the measure of recovery.¹⁰ Where premises were improperly leased for use as a hospital for smallpox patients the recovery was on the basis of their lessened value for every valuable use for which they were adapted, having reference to the probable effects upon their future because of the existence of the disease-producing conditions, and excluding all sentimental or fanciful notions affecting only their reputation.¹¹ If possession is fraudulently obtained and soil or trees are severed and converted the owner may recover their value as enhanced by the tenant's labor.¹²

There are two lines of authorities concerning the measure of damages a mortgagee may recover for an injury to the estate which diminishes his security. There is no denial of his right, whether he holds the first or second mortgage, to maintain an action for such wrong either against the mortgagor or a stranger.¹³ The variance as to the measure of dam-

ment. *Whitham v. Kershaw*, 16 Q. B. Div. 613.

⁶ *Harder v. Harder*, 26 Barb. 409; *Morris v. Knight*, 14 Pa. Super. Ct. 324; *McCartney v. Tittsworth*, 119 App. Div. (N. Y.) 547.

⁷ *Van Duesen v. Young*, 29 N. Y. 9.

⁸ *Lowery v. Rowland*, 104 Ala. 420.

⁹ *Prescott v. Grimes*, 143 Ky. 191, 33 L.R.A.(N.S.) 669, regardless of when the waste occurred.

¹⁰ *Ogden L. Co. v. Busse*, 92 App. Div. (N. Y.) 143.

¹¹ *Delano v. Smith*, 206 Mass. 365, 30 L.R.A.(N.S.) 474.

¹² *Evans v. Kohn*, 113 Minn. 45.

¹³ *Jones on Mort.* (4th ed.), §§ 695, 695a; *Heath v. Haile*, 45 S. C.

ages results from the difference in the nature of the mortgagee's estate. In Massachusetts the mortgage vests the legal estate in the mortgagee and carries with it the right of possession. Accordingly, it is there held that a second mortgagee may recover the full amount of damages done to the mortgaged premises, notwithstanding the security for his debt remains ample.¹⁴ But where the mortgage is not considered as a common-law conveyance on condition, but as a security for the debt, the damages to the mortgagee are measured by the diminution of his security regardless of the extent of the injury done to the land.¹⁵ If the wrong is done by a third party he is liable to the extent of the mortgagee's claim, not exceeding, in case of trespass by cutting timber, the value of that cut, including the rate of interest the mortgagor was to pay, at least where the latter is insolvent.¹⁶

As between tenants in common, one of them who has acted without fraud in leasing the land for the purpose of having wells drilled for oil must answer in equity for the value of the oil produced, less the cost of drilling the wells and of production. Money received under the lease for delay in drilling is not to be regarded unless the plaintiff ratifies the lease.¹⁷

SECTION 3.

NUISANCE.

§ 1035. What is a nuisance; parties liable for. A private nuisance has been defined to be anything wrongfully done to the hurt or annoyance of the lands, tenements or hereditaments of another.¹⁸ It may be anything which is calculated to inter-

642; *Lavenson v. Standard S. Co.*, 80 Cal. 245, 13 Am. St. 147; *Arnold v. Broad*, 15 Colo. App. 389, and cases cited; *Delano v. Smith*, 206 Mass. 365, 30 L.R.A. (N.S.) 474.

¹⁴ *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563; *Byrom v. Chapin*, 113 Mass. 308; *James v. Worcester*, 141 Mass. 361.

¹⁵ *Schalk v. Kingsley*, 42 N. J. L. 32; *Van Pelt v. McGraw*, 4 N. Y.

110; *Atkinson v. Hewett*, 63 Wis. 396; *Morgan v. Gilbert*, 2 Flap. 645, 2 Fed. 835; *Heath v. Haile*, *Arnold v. Broad*, 15 Colo. App. 289.

¹⁶ *Atkinson v. Hewett*, *supra*.

¹⁷ *McNeely v. South Penn. O. Co.*, 58 W. Va. 438.

¹⁸ 3 Black Com. 215; *Cooper v. Hall*, 5 Ohio 320; *Central Georgia Power Co. v. Pope*, 141 Ga. 186, citing the text.

fere with the comfortable enjoyment of a man's house, as smoke, noise or bad odors, even when not injurious to health.¹⁹ It may be any wrongful act which destroys or deteriorates the property of another, or interferes with the lawful use and enjoyment thereof; or any act which lawfully hinders the enjoyment of a common or public right and thereby causes a special injury.²⁰ An actionable nuisance may be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.²¹ It may be created by an affirmative act causing annoyance and damage, or by neglect of some duty

¹⁹ *Vernon v. Wedgeworth*, 148 Ala. 490 ("the use made by one of his property, whereby the unwritten but accepted law of decency is violated" may tend to show a nuisance); *Lowe v. Prospect Hill C. Ass'n*, 58 Neb. 94, 46 L.R.A. 237; *Stokes v. Pennsylvania R. Co.*, 214 Pa. 415; *Junction City L. Co. v. Sharp*, 92 Ark. 538; *Powell v. Brookfield P. B. & T. Mfg. Co.*, 104 Mo. App. 713; *Rex v. White*, 1 Burr. 333; *Tenant v. Goldwin*, 1 Salk. 360; *Rex v. Neil*, 2 C. & P. 485; *Cleveland v. Citizens' G. L. Co.*, 20 N. J. Eq. 201; *Fish v. Dodge*, 4 Denio 311, 47 Am. Dec. 254; *First Baptist Church v. Schenectady, etc. R. Co.*, 5 Barb. 79; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Whitney v. Bartholomew*, 21 Conn. 213; *Attorney General v. Stewart*, 20 N. J. Eq. 417; *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Duncan v. Hayes*, 22 N. J. Eq. 27; *Marshall v. Cohen*, 44 Ga. 489, 9 Am. Rep. 170; *Meigs v. Lister*, 23 N. J. Eq. 199; *Pottstown G. Co. v. Murphy*, 39 Pa. 257; *Bliss v. Hall*, 4 Bing. N. C. 183; *Greene v. Nunnemacher*, 36 Wis. 50; *McKeon v. See*, 4 Robert. 449; *Cropsey v. Murphy*, 1 Hilt. 126; *Whalen v. Keith*, 35 Mo. 87; *Tate v. Parrish*,

7 T. B. Mon. 325; *Smiths v. McConathy*, 11 Mo. 518; *Sparhawk v. Union, etc. R. Co.*, 54 Pa. 401; *State v. Haines*, 30 Me. 65; *Walter v. Selfe*, 4 De G. & Sm. 315; *Soltau v. De Held*, 2 Sim. (N.S.) 133, 159; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Scott v. Bay*, 3 Md. 431; *Rosenheimer v. Standard G. L. Co.*, 36 App. Div. (N. Y.) 1; *Booth v. Rome, etc. R. Co.*, 140 N. Y. 267, 37 Am. St. 552, 24 L.R.A. 105; *Herbert v. Rainey*, 162 Pa. 525.

²⁰ *Pharr v. Morgan's, etc. Co.*, 115 La. 138, 10 L.R.A.(N.S.) 710; *Viebahn v. Board of Com'rs*, 96 Minn. 276, 3 L.R.A.(N.S.) 1126; *Ackerman v. True*, 175 N. Y. 353; *Fay v. Prentice*, 1 C. B. 828; *Aiken v. Benedict*, 39 Barb. 400; *Norton v. Scholefield*, 9 M. & W. 665; *State v. Taylor*, 29 Ind. 517; *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Woodward v. Aborn*, 35 Me. 271, 58 Am. Dec. 699; *Middlestadt v. Waupaca S. & P. Co.*, 93 Wis. 4; *Whaley v. Wilson*, 112 Ala. 627.

²¹ *Towaliga Falls P. Co. v. Sims*, 6 Ga. App. 749; *Frick v. Kansas City*, 117 Mo. App. 488; *Sullivan v. Waterman*, 20 R. I. 372, 39 L.R.A. 773; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. 345; *Cooley on Torts*, 565.

of prevention.²² Where it is sought to make one accountable for the consequences of acts done by him upon his own land the question, in general, is not whether he exercised due care, but whether his acts caused the damage. If they necessarily tend to injure his neighbor in his pre-existing rights of property he is liable in damages for the natural and necessary consequences thereof, irrespective of any considerations as to the motive, care and skill with which such operations may have been conducted.²³ The only exception to this rule is where the act which causes the nuisance is done under public authority. In such a case the persons who act within the powers granted are not liable for consequential damages if they so act with care and skill.²⁴ The statutory authority which will justify an

²² *Brown S. Co. v. Chattahoochee L. Co.*, 121 Ga. 809; *Bowman v. Humphrey*, 132 Iowa 234, 6 L.R.A. (N.S.) 1111; *Yazoo, etc. R. Co. v. Sanders*, 87 Miss. 607, 3 L.R.A. (N.S.) 1119; *Glasgow v. Altoona*, 27 Pa. Super. Ct. 55; *Hawkesworth v. Thompson*, 98 Mass. 77, 93 Am. Dec. 137; *Cawkwell v. Russell*, 26 L. J. (Ex.) 35.

²³ *Exley v. Southern C. O. Co.*, 151 Fed. 101; *Vernon v. Wedgeworth*, 148 Ala. 490; *Bowman v. Humphrey*, 132 Iowa 234, 6 L.R.A. (N.S.) 1111, citing the text; *Nebo Con. C. & C. Co. v. Lynch*, 141 Ky. 711; *Wiltse v. Red Wing*, 99 Minn. 255; *Uggla v. Brokaw*, 117 App. Div. (N. Y.) 586; *Pinnix v. Canal & W. Co.*, 132 N. C. 124; *Wrightsel v. Fee*, 76 Ohio 529, 13 L.R.A. (N.S.) 233; *Vautien v. Atlantic Ref. Co.*, 231 Pa. 8; *Stokes v. Pennsylvania R. Co.*, 214 Pa. 415; *Carpenter v. Lancaster*, 212 Pa. 581; *Gossett v. Southern R. Co.*, 115 Tenn. 376, 1 L.R.A. (N.S.) 97, 112 Am. St. 846; *Coleman v. Price*, 54 Tex. Civ. App. 39; *Missouri, etc. R. Co. v. Perry*, 46 Tex. Civ. App. 374; *Barstow I. Co. v. Black*, 39 Tex. Civ. App. 80;

Terrell v. Chesapeake & O. R. Co., 110 Va. 340, 32 L.R.A. (N.S.) 371; *Chesapeake & O. R. Co. v. Greaver*, 116 Va. 350; *Gilson v. Cascade L. Co.*, 54 Wash. 289; *Ingram v. Wishkah B. Co.*, 35 Wash. 191; *Holman v. Mineral Point Z. Co.*, 135 Wis. 132, 128 Am. St. 1016; *West Bristol T. Co.*, [1908] 2 K. B. 14 (extraordinary use of land); *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Bohan v. Port Jervis G. L. Co.*, 122 N. Y. 18, 9 L.R.A. 711; *Pottstown G. Co. v. Murphy*, 39 Pa. 257; *Hauck v. Tidewater P. L. Co.*, 153 Pa. 366, 34 Am. St. 710, 20 L.R.A. 642; *Frost v. Berkeley P. Co.*, 42 S. C. 402, 46 Am. St. 736, 26 L.R.A. 693; *Susquehanna F. Co. v. Malone*, 73 Md. 268, 25 Am. St. 595, 9 L.R.A. 737; *Same v. Spangler*, 86 Md. 562, 63 Am. St. 533; *Central R. Co. v. Windham*, 126 Ala. 552; *Rosenheimer v. Standard G. L. Co.*, 36 App. Div. (N. Y.) 1; *Weston P. Co. v. Pope*, 155 Ind. 394; *Ducktown S., C. & I. Co. v. Barnes* (Tenn.), 60 S. W. 593.

²⁴ *Middlekamp v. Bessemer I. Co.*, 46 Colo. 102, 23 L.R.A. (N.S.) 795;

injury to private property and afford immunity for acts which would otherwise be a nuisance must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury.²⁵ This is the result of statutes which require that railroad companies shall receive and transport freight, provide suitable facilities for receiving the same, maintain a station at every village through which their roads pass, and carry all live-stock offered for shipment. Under these provisions the maintenance of stock yards is necessary, and no liability exists as for a nuisance if the location is a reasonable one and they are kept in reasonably good condition.²⁶ But the authority of the legislature to authorize a private nuisance and bar a remedy has been questioned.²⁷

The erector of a nuisance is liable not only for its creation,

Melendy v. Chicago, etc. R. Co., 132 Ill. App. 431; Thomason v. Railroad, 142 N. C. 300; Uvalde El. Co. v. Parsons (Tex. Civ. App.), 138 S. W. 163. See Sadlier v. New York, 40 N. Y. Misc. 78; Mayrant v. Columbia, 77 S. C. 281, 10 L.R.A. (N.S.) 1094; Townsend v. Norfolk R. & L. Co., 105 Va. 22, 115 Am. St. 842, 4 L.R.A. (N.S.) 87; Landau v. New York, 180 N. Y. 48, 105 Am. St. 709; Transportation Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Attwood v. Bangor, 83 Me. 582; Uline v. New York, etc. R. Co., 101 N. Y. 98, 54 Am. Rep. 661; Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 2 Am. St. 618; Same v. Marchant, 119 Pa. 541, 4 Am. St. 659. See Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739.

²⁵ Cogswell v. New York, etc. R. Co., 103 N. Y. 10, 57 Am. Rep. 701; Baltimore & P. R. Co. v. Baptist Church, 108 U. S. 317, 27 L. ed. 739; Pottstown G. Co. v. Murphy, 39 Pa. 257; Commonwealth v. Kidder,

107 Mass. 188; Bohan v. Port Jervis G. L. Co., 122 N. Y. 18, 9 L.R.A. 711; New York Continental J. F. Co. v. Wynkoop, 29 App. D. C. 594, 11 L.R.A. (N.S.) 542; Towaliga Falls P. Co. v. Sims, 6 Ga. App. 749. See Terrell v. R. Co., 110 Va. 340, 32 L.R.A. (N.S.) 371.

²⁶ Dolan v. Chicago, etc. R. Co., 118 Wis. 362. See Anderson v. Same, 85 Minn. 337; King v. Vicksburg R. & L. Co., 88 Miss. 456, 117 Am. St. 749, 6 L.R.A. (N.S.) 1036.

²⁷ "That which is authorized by the legislature, within the strict scope of the power given, cannot be a public nuisance; but it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom." Jones v. Sanitary Dist., 252 Ill. 591. See Blanc v. Murray, 36 La. Ann. 165, 51 Am. Rep. 9; Alabama & V. R. Co. v. King, 93 Miss. 379, 22 L.R.A. (N.S.) 603; Choctaw, etc. R. Co. v. Drew, 37 Okla. 396, 44 L.R.A. (N.S.) 38 and cases cited.

but also for its continuance.²⁸ When he who creates a nuisance conveys the land he does not transfer the liability therefor to the grantee; the latter is not generally liable until, upon request, he refuses to remove the nuisance;²⁹ if a tenant or grantee, however, continues a nuisance after request to abate it he is liable, if he has the power to abate it.³⁰ A grantee may not escape liability though no request was made to abate the nuisance if he had knowledge of it.³¹ And if the nuisance is of such a character that its continuance from day to day gives a new cause of action notice of its existence is not necessary to establish lia-

²⁸ *Smith v. Preston*, 104 Me. 156; *Conhocton, etc. Co. v. Buffalo, etc. R. Co.*, 52 Barb. 390; *Waggoner v. Jermaine*, 3 Denio 306, 45 Am. Dec. 481; *Fish v. Dodge*, 4 Denio 311, 47 Am. Dec. 254; *Smith v. Elliott*, 9 Pa. 345; *Pickard v. Collins*, 3 Barb. 444.

²⁹ *Philadelphia R. & R. Co. v. Smith*, 27 L.R.A. 131, 64 Fed. 679; *Central T. Co. v. Wabash, etc. R. Co.*, 57 Fed. 441; *Groff v. Ankenbrandt*, 124 Ill. 51, 7 Am. St. 342; *Ahern v. Steele*, 115 N. Y. 203, 5 L.R.A. 449, 12 Am. St. 778; *Hill v. Hayes*, 199 Mass. 411, 18 L.R.A. (N.S.) 375; *Wabash R. Co. v. Sanders*, 47 Ill. App. 436; *Penruddock's Case*, 5 Coke 100*b*; *Pierson v. Glenn*, 14 N. J. L. 37, 25 Am. Dec. 497; *Plumer v. Harper*, 3 N. H. 88; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201.

³⁰ *King v. Vicksburg R. & L. Co.*, 88 Miss. 456, 117 Am. St. 849, 6 L.R.A. (N.S.) 1036; *Woodman v. Tufts*, 9 N. H. 88; *Johnson v. Lewis*, 12 Conn. 307; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Morris C. & B. Co. v. Ryerson*, 27 N. J. L. 457; *Beavers v. Trimmer*, 25 id. 97; *McDonough v. Gilman*, 3 Allen 264, 80 Am. Dec. 72; *Thornton v. Smith*, 11 Minn. 15; *Waggoner v. Jermaine*, 3

Denio 306, 45 Am. Dec. 481; *Hubbard v. Russell*, 24 Barb. 404; *Townes v. Augusta*, 52 S. C. 396; *De Laney v. Georgia, etc. R. Co.*, 53 S. C. 357.

An action lies against one who continues a nuisance erected by another and who actively maintains it without notice or request to abate it. *Whitenack v. Philadelphia & R. R. Co.*, 57 Fed. 901, following *Morris C. & B. Co. v. Ryerson*, 27 N. J. L. 457.

In an Iowa case it is said, the question of the grantee being requested to abate a nuisance having been urged, "without deciding this question, we may say the evidence shows that defendant had sufficient notice, and took no steps to prevent the damage until after this action was commenced." *Hunt v. Iowa Cent. R. Co.*, 86 Iowa 15, 41 Am. St. 473.

It is implied at least in *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. 778, 5 L.R.A. 449, that notice to the owner of demised premises of the existence of a nuisance may be sufficient to make him responsible for the consequences of it.

³¹ *Martin v. Chicago, etc. R. Co.*, 81 Kan. 344, 27 L.R.A. (N.S.) 164; *Caldwell v. Gale*, 11 Mich. 77.

bility.³² One in possession of premises under a lease for nine hundred and ninety-nine years is the owner thereof so far as responsibility for maintaining the keeping in repair a structure upon the premises held by him, which is a nuisance to a third person, is concerned. But as to a tenant the rule is otherwise.³³ The doctrine that a purchaser is not liable for a nuisance until he is requested to remove it has no application where it will benefit one who was instrumental in creating the nuisance.³⁴ Where the nuisance was caused by jetties in a river which were not upon the property of the company which built them a company which afterwards bought the railroad without assuming any liability to keep the jetties in repair was not liable for the injury they produced merely because it did not remove or repair them.³⁵

According to the American cases a landlord is not relieved of liability for an existing nuisance on premises which he demises by a condition in the lease thereof that the tenant shall keep them in repair.³⁶ There are, however, English adjudications to the contrary.³⁷ If a nuisance is the result of the joint acts of a lessor and lessee they are jointly liable for both permanent and temporary injury sustained after the lease was made.³⁸ In New York a majority of the court of appeals has decided, in a carefully considered case, that, generally and *prima facie*, where lands are in the occupation of a tenant he

³² Kelsay v. Chicago, etc. R. Co., 41 Ind. App. 128.

³³ Meyer v. Harris, 61 N. J. L. 83.

³⁴ Steinke v. Bentley, 6 Ind. App. 663.

³⁵ Fordyce v. Russell, 59 Ark. 312, citing Wayland v. St. Louis, etc. R. Co., 75 Mo. 548; Walter v. Wicomico County, 35 Md. 385; Morris C & B. Co. v. Ryerson, 27 N. J. L. 457.

³⁶ Isham v. Broderick, 89 Minn. 397; Ingwersen v. Rankin, 47 N. J. L. 18, 54 Am. Rep. 109; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295.

³⁷ Pretty v. Bickmore, L. R. 8 C. P. 401; Gwinnell v. Eamer, L. R. 10 C. P. 658.

³⁸ Railroad Co. v. Hambleton, 40 Ohio St. 496.

A landlord is liable to the owner of adjoining land occupied by tenants though they cause the nuisance, if the premises or some part of them are so constructed that their constant use will necessarily result in the creation of a nuisance, or if he permits them to remain in an unsanitary condition and has the power to remedy the grievance. Park v. White, 23 Ont. 611.

alone is responsible for any nuisance thereon arising from their being out of repair; that the landlord is only liable where he demised the premises with the nuisance thereon or covenanted to repair, and that a grantee or devisee of premises upon which there is a nuisance at the time the title passes is not responsible therefor until he has had notice thereof.³⁹ A landlord who has neither possession nor control of leased premises and who has not advised or consented to the doing of an act which has caused a nuisance is not liable therefor.⁴⁰ The rule that any person injured by a continuing nuisance can maintain an action against the land-owner who created it or against a grantee who continues it is subject to the provision that the grantee, if he merely suffers it to remain, must first be asked to abate it, implies that he has the power to do so.⁴¹ A lessee is a grantee within this rule.⁴² If the nuisance is created by a tenant or a former owner who has let the premises to a tenant a grantee subject to the tenancy in consequence of the purchase and the subsequent receipt of rent is not made liable to third persons for the use which the tenant continues to make of the premises, even if it constitutes a nuisance. When a landlord lets premises with a nuisance upon them, the case is somewhat different. If the condition of the premises of itself is such as to constitute a nuisance it has been held that by the letting the landlord authorizes the continuance of the nuisance. If the premises are a nuisance not in themselves, but in consequence of the use made of them by the tenant, then the question is whether this use is authorized by the landlord. If the premises can be used by the tenant in the manner intended by the landlord, either as shown by the construction of the premises, or by the terms of the lease, or by other evidence, without becoming a nuisance, the landlord is not liable for the acts or neglect of the tenant which creates the nuisance. If the tenant creates the nuisance without authority of the landlord, and after he has entered

³⁹ *Ahern v. Steele*, 115 N. Y. 203,
12 Am. St. 778, 5 L.R.A. 449.

⁴⁰ *Baker v. Allen*, 66 Ark. 271, 74
Am. St. 93.

⁴¹ *Prentiss v. Wood*, 132 Mass.
486.

⁴² *McDonough v. Gilman*, 3 Allen
264, 80 Am. Dec. 72.

into occupation as tenant, the landlord is not liable.⁴³ On the other hand, an increase by the tenant of the injury a nuisance may do, does not affect the liability of the landlord if the nuisance existed when the lease was made.⁴⁴

§ 1036. **General principles of the law of nuisance.** For the purpose of discussing the subject of damages it is not necessary to state the technical difference between nuisance and the wrong called trespass, for the same rules of damage apply in both cases. Trespass is susceptible of very precise definition, but such a variety of wrongs come under the denomination of nuisance that all definitions of it must, in the nature of things, be very general. The remedy against a nuisance by action for damages merely would be, in many instances, imperfect and inadequate because full redress cannot be obtained in a single action. For this reason resort may be had to equity for prevention by injunction; and provision is very generally made by statute for judicial abatement at law, in addition to the award of damages.⁴⁵ A nuisance is generally of a continuing nature by the continuous fault of the person creating it; though it may be so by the fault of some other person who has become so connected with it as to be also answerable for it. This continuous fault may consist in a repetition of affirmative acts, keeping alive and perpetuating the nuisance, or in neglect to remove one which otherwise would, of itself, continue. The wrong in the latter case is in omitting to perform the necessary act to cause the nuisance to cease, when the doing of such act is a legal duty.⁴⁶ Every man has a right to use his own property as to him seems proper, subject to the important qualification that he so use it as not

⁴³ *Lufkin v. Zane*, 151 Mass. 117, 34 Am. St. 262, 17 L.R.A. 251, approving *Dalay v. Savage*, 145 Mass. 38, 1 Am. St. 429.

⁴⁴ *Pickens v. Boom Co.*, 58 W. Va. 11.

⁴⁵ *Astill v. South Yuba W. Co.*, 46 Cal. 55; *Farmer v. Behmer*, 9 Cal. App. 773; *Seifert v. Dillon*, 83 Neb. 322, 131 Am. St. 642, 19 L.R.A. (N.S.) 1018; *Remington v. Foster*,

42 Wis. 608; *Davis v. Lambertson*, 56 Barb. 480.

⁴⁶ *Fish v. Dodge*, 4 Denio 317, 47 Am. Dec. 254; *Smith v. Elliott*, 9 Pa. 345; *Holmes v. Wilson*, 10 Ad. & E. 503; *Bowyer v. Cook*, 4 M., G. & S. 236; *Loweth v. Smith*, 12 M. & W. 582; *Thompson v. Gibson*, 7 id. 456; *Staple v. Spring*, 10 Mass. 74; *Cumberland & O. C. Co. v. Hitchings*, 65 Me. 140; *Esty v. Baker*, 48

to injure another. Nuisances may be, and generally are, created and continued on the pretext of the wrong-doer using his own property to make the same conducive to his profit and enjoyment, and by neglecting the legal restriction of that use to avoid injury to others. If he carry on a lawful trade or business in such a manner that it becomes a nuisance to his neighbor he must answer in damages.⁴⁷

§ 1037. Wrong-doer liable for at least nominal damages.

The creation or continuance of a nuisance in any form which involves the physical invasion of or interference with the plaintiff's property is a wrong for which an action will lie, and at least nominal damages may be recovered.⁴⁸ Actual present damage need not be shown. "It is enough if it appears that an

id. 495; *Russell v. Brown*, 63 *id.* 203.

⁴⁷ *Alabama* *Con. C. & I. Co. v. Vines*, 151 *Ala.* 398; *Rockford & I. R. Co. v. Keyt*, 117 *Ill. App.* 32; *Over v. Dehne*, 38 *Ind. App.* 427; *Bowman v. Humphrey*, 124 *Iowa.* 744; *Powell v. Brookfield P. B. & T. Mfg. Co.*, 104 *Mo. App.* 713; *Green v. Sun Co.*, 32 *Pa. Super. Ct.* 521; *Bowling C. Co. v. Ruffner*, 117 *Tenn.* 180, 9 *L.R.A.(N.S.)* 923; *Louisville & N. T. Co. v. Lelylett*, 114 *Tenn.* 368, 1 *L.R.A.(N.S.)* 49; *Cohen v. Rittimann* (*Tex. Civ. App.*), 139 *S. W.* 59; *Campbell v. Seaman*, 63 *N. Y.* 568, 20 *Am. Rep.* 567; *Columbus G., etc. Co. v. Freeland*, 12 *Ohio St.* 392; *Keiser v. Mahanoy City G. Co.*, 143 *Pa.* 276; *Susquehanna F. Co. v. Spangler*, 86 *Md.* 562, 63 *Am. St.* 533; *St. Helen's S. Co. v. Tipping*, 11 *H. of L. Cas.* 642.

The test as to whether a noisy trade is a nuisance in a particular locality and to a particular person is, will it be likely to be physically injurious to a person of ordinary sensibilities, or is it carried on at such unreasonable hours as to disturb the repose of people dwelling

within its sphere? *McCann v. Strang*, 97 *Wis.* 551.

⁴⁸ *Willson v. New York Cent. & H. River R. Co.*, 146 *N. Y. Supp.* 208; *Gibbons v. New York Cent. & H. River R. Co.*, 161 *App. Div. (N. Y.)* 201; *Houston W.-W. Co. v. Kennedy*, 70 *Tex.* 233; *Hodges v. Pine Product Co.*, 135 *Ga.* 134, 33 *L.R.A.(N.S.)* 74; *Harvey v. Mason City, etc. R. Co.*, 129 *Iowa* 465, 3 *L.R.A.(N.S.)* 973, 113 *Am St.* 483; *Stein v. C. & O. R. Co.*, 132 *Ky.* 322; *Smith v. Sedalia*, 182 *Mo.* 1; *Stokes v. Pennsylvania R. Co.*, 214 *Pa.* 415; *Clark v. Pennsylvania R. Co.*, 145 *Pa.* 438, 27 *Am. St.* 710; *Alexander v. Kerr*, 2 *Rawle* 83, 19 *Am. Dec.* 616; *Foote v. Clifton*, 22 *Ohio St.* 247, 10 *Am. Rep.* 732; *Jones v. Han-novan*, 55 *Mo.* 462; *Phillips v. Phillips*, 34 *N. J. L.* 208; *Butman v. Hussey*, 12 *Me.* 407; *Freudenstein v. Heine*, 6 *Mo. App.* 267; *Chatfield v. Wilson*, 27 *Vt.* 670; *Hilliard on Torts*, 608; *Casebeer v. Mowry*, 55 *Pa.* 419, 93 *Am. Dec.* 766; *Farley v. Gates City G. L. Co.*, 105 *Ga.* 323.

"No one has a right to compel another to have his property improved in a particular manner. It is as

injurious effect is produced upon plaintiff's property by the maintenance of the dam, such as to diminish its value if the defendant by lapse of time should acquire a right to maintain the dam."⁴⁹ But when the act complained of is lawful in itself a different rule prevails. It is then only when some actual injury is done that a right of action ensues,⁵⁰ unless the nuisance is of a permanent character and its construction and continuance are necessarily an injury, in which case the right of action accrues upon its construction.⁵¹ Every man has a right to use his own as to himself seems proper; but he must be careful to so use it that no injury is done to another. If the thing complained of as a nuisance causes neither hurt, inconvenience, annoyance nor damage, it is not a nuisance; but if it causes either in a material degree the person creating it must be liable for the consequences, no matter how small the damage. The person sustaining it will have a right of action, but there must have been some damage in fact, not merely in imagination.⁵²

illegal to force him to receive a benefit as to submit to an injury." East Jersey W. Co. v. Bigelow, 60 N. J. L. 201, quoting from Merritt v. Packer, 1 N. J. L. 496, 533.

⁴⁹ Stimson v. Brookline, 197 Mass. 568, 16 L.R.A.(N.S.) 280, 125 Am. St. 382.

Evidence of a permanent material decrease in rentals and that similar houses in other parts of the same borough produced higher rentals is sufficient to take the question of damages to the jury. Gibbons v. New York Cent. & H. River R. Co., 161 App. Div. (N. Y.) 201.

⁵⁰ Houston v. Merkel (Tex. Civ. App.), 153 S. W. 385; Harvey v. Mason City, etc. R. Co., 129 Iowa 465, 3 L.R.A.(N.S.) 973, 113 Am. St. 483; King v. Danville, 128 Ky. 321; Shavlik v. Walla, 86 Neb. 768; McClure v. Broken Bow, 81 Neb. 384; Morse v. Chicago, etc. R. Co., 81 Neb. 745; Van Orsdel v. Burlington, C. R. & N. R. Co., 56 Iowa 470; Rid-

ley v. Seaboard & R. R. Co., 118 N. C. 996, 32 L.R.A. 708; Augusta v. Lombard, 101 Ga. 724.

⁵¹ St. Louis, etc. R. Co. v. Biggs, 52 Ark. 240, 6 L.R.A. 804; Same v. Anderson, 62 Ark. 360; Valparaiso City W. Co. v. Dickover, 17 Ind. App. 233; Missouri, etc. R. Co. v. Graham, 12 Tex. Civ. App. 54.

In some jurisdictions the right of action does not arise until damage has been done. St. Louis S. R. Co. v. Clayton, 54 Tex. Civ. App. 512; Texas & P. R. Co. v. Ford, 54 Tex. Civ. App. 312, citing local cases.

⁵² Cooper v. Hall, 5 Ohio 322; McElroy v. Goble, 6 Ohio St. 187; Elliot v. Fitchburg R. Co., 10 Cush. 191, 57 Am. Dec. 85; Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315; Stadler v. Grieben, 61 Wis. 500; Pennoyer v. Allen, 56 Wis. 511, 43 Am. Rep. 728; Sturges v. Bridgman, 11 Ch. Div. 852; Churchill v. Burlington W. Co., 94 Iowa 89; McCann v. Strang, 97 Wis. 551; Euler

"It may be stated as a general doctrine that, in order to constitute a nuisance from the use of one's property, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment especially uncomfortable and inconvenient."⁵³ In *Columbus Gas, etc. Co. v. Freeland*,⁵⁴ Gholson, J., said: "It is evident that what amount of annoyance or inconvenience will constitute a legal injury, resulting in actual damage, dependent on varying circumstances, cannot be precisely defined, and must be left to the good sense and sound discretion of the tribunal called upon to act. Any rule on the subject can only serve as a guard against an unreasonable exercise of that discretion. Thus, in the one above cited,⁵⁵ we are cautioned to regard the proper mean, the ordinary standard of comfort and convenience, and not particular or exceptional cases above, nor, it may be added, below. Regard should be had to the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities. What such persons would not regard as an inconvenience materially interfering with their physical comfort may be properly attributed, when alleged to be a nuisance, to the fancy or fastidious taste of the party. On the other hand, the charge of a nuisance, if it be of a thing offensive to persons generally, cannot be escaped by showing that to some persons it is not at all unpleasant or disagreeable."⁵⁶ In *Thompson v. Crocker*,⁵⁷ the action being brought for inconvenience to the plaintiff in working his mill caused by increasing the water below it by the defendant's dam, the judge instructed the jury

v. Sullivan, 75 Md. 616, 32 Am. St. 420; *Berlin v. Thompson*, 61 Mo. App. 234.

The least degree of hurt, inconvenience, annoyance or damage resulting from the use of property is a nuisance. *Cooper v. Hall*, 5 Ohio 322.

⁵³ *Lane v. Concord*, 70 N. H. 485, 85 Am. St. 643, and cases cited; *Alexander v. Stewart B. Co.*, 21 Pa. Super. Ct. 526.

⁵⁴ 12 Ohio St. 392.

⁵⁵ *Soltau v. De Held*, 2 Sim. (N.S.) 133.

⁵⁶ *Price v. Grautz*, 118 Pa. 402, 4 Am. St. 601; *Cooley on Torts*, 600; *First Baptist Church v. Schenectady, etc. R. Co.*, 5 Barb. 79; *St. Helen's S. Co. v. Tipping*, 11 H. of L. Cas. 642; *Sherman G. & E. Co. v. Belden (Tex.)*, 123 S. W. 119. See *Bradbury M. Co. v. Laclede G. Co.*, 128 Mo. App. 96.

⁵⁷ 9 Pick. 59.

that if the plaintiff had sustained any actual perceptible damage in consequence of the erection of the dam he was entitled to recover, but that for a theoretic injury or damage to be inferred from the obstruction of the water, and from the principle that any obstruction below would prevent the water from passing from the plaintiff's mill so rapidly as it would without such obstruction, the defendant was not answerable.⁵⁸ In such cases the cause of action depends on actual damage, and the statute of limitations begins to run from the time when such damage occurs.⁵⁹

§ 1038. Usually a continuous wrong requiring successive actions. Successive actions may be brought if the nuisance continues by the continuous fault of the defendant. In the first action the question whether the acts complained of constitute a nuisance or not is to be determined; and where there is no ground for imputing any wanton or intentional wrong the damages are confined to the actual injury from the nuisance and its continuance to the date of the writ.⁶⁰ If it continues afterwards the damages resulting therefrom can only be recovered by a new suit, and they may be so recovered, for every continuance of the nuisance is a new nuisance.⁶¹ In such

⁵⁸ See *Oakley Mills, etc. Co. v. Neese*, 54 Ga. 459.

⁵⁹ *Delaware, etc. Co. v. Wright*, 21 N. J. L. 469; *Powers v. Council Bluffs*, 45 Iowa 652, 24 Am. Rep. 792. See *Wells v. New Haven & N. Co.*, 151 Mass. 46, 21 Am. St. 423.

⁶⁰ *Central Georgia Power Co. v. Pope*, 141 Ga. 186, citing the text; *Carroll Springs D. Co. v. Schnepfe*, 111 Md. 420, citing the text; *Jones v. Kramer*, 133 N. C. 446, citing the text; *Stroth B. Co. v. Schmitt*, 1 Ohio C. C. (N.S.) 177.

Under the California code damages may be awarded for a detriment to real estate though they accrued after the action was begun; a supplemental pleading is not necessary. *Hicks v. Drew*, 117 Cal. 305.

⁶¹ *Cohen v. Bellenot (Va.)*, 32 S. E. 455; *Ginzler v. Birmingham*, 6 Ala. App. 666; *Ardmore v. Orr*, 35 Okla. 305, citing the text; *Sloss-S. S. & I. Co. v. Mitchell*, 161 Ala. 278; *St. Louis, etc. R. Co. v. Hoshall*, 82 Ark. 387; *Chicago, etc. R. Co. v. McCutchen*, 80 Ark. 235; *Platt v. Waterbury*, 80 Conn. 179, 125 Am. St. 111; *Southern R. Co. v. Cook*, 117 Ga. 286; *Ramey v. Baltimore, etc. R. Co.*, 235 Ill. 502; *Canteen H. & F. Ass'n v. Schwartz*, 128 Ill. App. 224; *Melendy v. Chicago, etc. R. Co.*, 132 id. 431; *Kerns v. Kansas City*, 79 Kan. 562; *Chesapeake & O. R. Co. v. Stein*, 142 Ky. 515; *Board of Park Com'rs v. Donahue*, 140 Ky. 502; *Stein v. C. & O. R. Co.*, 132 Ky. 322; *Mississippi Cent. R. Co. v. Magee*, 93 Miss. 196;

subsequent action all damages for such continuance since the commencement of the prior action are recoverable; and the defendant will be regarded, for such continued wrong, as wilful and contumacious, and subject to such exemplary damages as may insure the abatement of the nuisance.⁶² Under the practice in some states where the defendant has no power to condemn the injured property the owner may sue at law for damages or bring a suit in equity for an injunction and

Applegate v. Franklin, 109 Mo. App. 293; *Ahrens v. Rochester*, 97 App. Div. (N. Y.) 480; *Ganster v. Metropolitan E. Co.*, 214 Pa. 628; *Hartman v. Pittsburgh I. P. Co.*, 23 Pa. Super. Ct. 360; *Louisville & N. T. Co. v. Lellyett*, 114 Tenn. 368, 1 L.R.A.(N.S.) 49; *Godby v. Bluefield*, 61 W. Va. 604; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 34 L. ed. 784; *Stadler v. Grieben*, 61 Wis. 500; *Cole v. Sprowl*, 35 Me. 161, 56 Am. Dec. 696; *Vedder v. Vedder*, 1 Denio 257; *Blunt v. McCormick*, 3 id. 283; *Savannah & O. C. Co. v. Bourquin*, 51 Ga. 378; *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42; *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642; *Anderson, etc. R. Co. v. Kernodle*, 54 Md. 314; *Freudenstein v. Heine*, 6 Mo. App. 287; *Whitmore v. Bischoff*, 5 Hun 176; *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190; *Hartz v. St. Paul, etc. R. Co.*, 21 Minn. 358; *Sackrider v. Beers*, 10 Johns. 241; *Duncan v. Markley*, Harp. 179; *Cumberland & O. C. Co. v. Hitchings*, 65 Me. 140; *Allen v. Worthy*, L. R. 5 Q. B. 193; *Queen v. Waterhouse*, L. R. 7 Q. B. 545; *Malon v. New York, etc. R. Co.*, 24 N. Y. 658; *Thayer v. Brooks*, 17 Ohio 489; *Slight v. Gutzlaff*, 35 Wis. 675, 17 Am. Rep. 476; *Steinke v. Bentley*, 6 Ind. App. 663; *Valparaiso v. Moflitt*, 12 Ind. App. 250, 54 Am. St. 522; *Stowers v. Gilbert*, 156 N. Y. 600; *Covert v. Brooklyn,*

13 App. Div. (N.Y.) 188; *Toledo v. Lewis*, 17 Ohio C. C. 588; *Chattanooga v. Dowling*, 101 Tenn. 342; *Rogers v. Coal River B. & D. Co.*, 39 W. Va. 272; *Nanson v. Maffra*, 7 Viet. L. R. (law) 364; *Schlitz B. Co. v. Compton*, 142 Ill. 511, 34 Am. St. 92, citing the text; *Beatrice G. Co. v. Thomas*, 41 Neb. 662, 43 Am. St. 711; *Garrett v. Wood*, 57 App. Div. (N. Y.) 242; *St. Louis, etc. R. Co. v. Biggs*, 52 Ark. 240, 6 L.R.A. 804; *Valparaiso City W. Co. v. Dickover*, 17 Ind. App. 233; *Mulligan v. Augusta*, 115 Ga. 337; *Doran v. Seattle*, 24 Wash. 182; *Pickens v. Coal River B. & T. Co.*, 51 W. Va. 445; *Bennett v. Marion*, 119 Iowa 473.

The damages recoverable in a subsequent suit cannot include those which accrued before the commencement of intermediate suits though these were discontinued in reliance on the defendant's promise to abate the nuisance. *Garrett v. Wood*, 55 App. Div. (N. Y.) 281.

The damages recovered in the first suit are wholly independent of those subsequently sued for and cannot mitigate them. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 34 L. ed. 784.

⁶² *Bradley v. Amis*, 2 Hayw. 399; *Cumberland & O. C. Co. v. Hitchings*, 65 Me. 140; *Standard Oil Co. v. Kinnaird*, 13 Ky. L. Rep. 269; *Pickens v. Coal River B. & T. Co.*, *supra*.

damages. In the action at law damages cannot be recovered beyond the time of the commencement of the action; successive actions may be brought until the nuisance is abated. In the suit in equity damages are recoverable up to the entry of judgment and an injunction is issued against continuing the nuisance.⁶³

§ 1039. **What recoverable in the first action.** In the first action all damages may be recovered which have resulted from the nuisance since the plaintiff acquired title or possession to the premises⁶⁴ and which will ensue without any further fault, neglect or positively wrongful act of the defendant. If he is subject to successive actions until he removes the nuisance, then, of course, in the first action nothing can be included in the recovery which will enter into the estimate of damages in any subsequent suit. For illustration, suppose a business is conducted which causes discomfort and annoyance to others. That injury will continue so long as the offensive business is conducted; each day's business produces a day's discomfort; the business and annoyance are continuing cause and effect. In the first suit for such nuisance it cannot be proved, nor will the law assume, that the wrong and injury will continue.⁶⁵ If in fact it is continued during the pendency of the action it is a wrong not in issue; it is a new wrong and the resulting damage is a fresh cause of action. So if a person has erected a dam or embankment on his own land or elsewhere and thereby water to which another is entitled is diverted from his property; or by such means his property is flooded or otherwise injured the injury will continue so long as the dam or embankment is maintained. If it is permanent the injury will also be so unless the cause is removed, and if the law requires the defendant to remove the cause every day he neglects that duty he is guilty of continuing the nuisance and successive actions may be brought. According to the general current of decision and on principle this is a continuous wrong; for if, on such or a similar case,

⁶³ *Stowers v. Gilbert*, 156 N. Y. 600; *Kewance v. Otley*, 201 Ill. 402.

⁶⁴ *Mississippi Cent. R. Co. v. Magee*, 93 Miss. 196; *Watson v.*

Colusa-P. M. & S. Co., 31 Mont. 513.

⁶⁵ *Van Veghten v. Hudson River P. T. Co.*, 103 App. Div. (N. Y.) 130.

the plaintiff is compelled to assess his damages once for all he is precluded from bringing a second suit though the damage may turn out to be greater than the recovery.⁶⁶ The general rule is recognized by all the cases. The divergence of views arises in determining whether the particular nuisance is permanent or not. Some courts lay down as a test the right to abate the nuisance; if it may be abated by law it is not to be regarded as permanent, but as continuing, and damages may be recovered

⁶⁶ *Sloss-S. S. & I. Co. v. McCullough*, 177 Ala. 448; *Smith v. Sedalia*, 244 Mo. 107; *Illinois Cent. R. Co. v. Lockard*, 112 Ill. App. 423; *Gulf, etc. R. Co. v. Moseley*, 6 Indian T. 369; *Gebhardt v. St. Louis, etc. R. Co.*, 122 Mo. App. 503; *Gartner v. Chicago, etc. R. Co.*, 71 Neb. 444; *Johnson v. Cincinnati*, 30 Ohio C. C. 696; *Chaudiere M. & F. Co. v. Canada Atlantic R. Co.*, 33 Can. Sup. Ct. 11; *Fowle v. New Haven & N. Co.*, 112 Mass. 334, 17 Am. Rep. 106; *Wilkins v. Monson Con. S. Co.*, 96 Me. 385, 12 Am. Neg. Rep. 44; *Illinois, etc. R. Co. v. Grabill*, 50 Ill. 241; *Jeffersonville, etc. R. Co. v. Esterle*, 13 Bush 667; *Uline v. New York, etc. R. Co.*, 101 N. Y. 116; *Tallman v. Metropolitan E. R. Co.*, 121 N. Y. 119, 8 L.R.A. 173; *Cleveland, etc. R. Co. v. King*, 23 Ind. App. 573, citing the text; *New Albany v. Lines*, 21 Ind. App. 380; *Mississippi M. Co. v. Smith*, 69 Miss. 299; *Hudson v. Burk*, 48 Mo. App. 314; *Railway Co. v. Cook*, 57 Ark. 387; *Cleveland, etc. R. Co. v. Pattison*, 67 Ill. App. 351; *Bailey v. Heintz*, 71 id., 189; *Sanitary Dist. v. Ray*, 85 id., 115; *Rarey v. Lee*, 7 Ind. App. 518; *Bowers v. Mississippi & R. R. B. Co.*, 78 Minn. 398; *Pinney v. Berry*, 61 Mo. 359; *Van Hoozier v. Hannibal & St. J. R. Co.*, 70 Mo. 145; *Dickson v. Chicago, etc. R. Co.*, 71 Mo. 575; *Markt*

v. Davis, 46 Mo. App. 272; *Carson v. Springfield*, 53 Mo. App. 289; *Hole v. Chard Union*, [1894] 1 Ch. 293; *McKee v. St. Louis, etc. R. Co.*, 49 Mo. App. 174; *Ready v. Missouri Pac. R. Co.*, 90 Mo. App. 467.

If the nuisance complained of is abated before trial damages for a permanent injury cannot be recovered. *Foote v. Burlington W. Co.*, 94 Iowa 200.

It is said in an Illinois case, there is much confusion among the authorities respecting the cases in which successive actions will lie and those in which only one action may be maintained. This confusion seems to arise from the different views entertained in regard to the circumstances under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as permanent. Some cases hold it to be unreasonable to assume that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrue up to the date of bringing suit. Other cases take the ground that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury, past and prospective, if such injury be proven with reasonable certainty to be per-

from time to time;⁶⁷ and so if the defendant may abate it without interfering with the rights of others and the whole injury has not been sustained.⁶⁸ The converse of this rule is well illustrated where the nuisance is caused by a dam or other structure erected in pursuance of law, and the injury results without negligence in its operation or maintenance. In such cases all the damages must be recovered in one action.⁶⁹ And

manent in its character. We think the more correct view is presented in the former class of cases. *Schlitz B. Co. v. Compton*, 142 Ill. 511, 34 Am. St. 92. The opinion refers to the following cases as sustaining the rule favored by it: *Uline v. New York*, etc. R. Co., 101 N. Y. 98; *Duryea v. Mayor*, 26 Hun 120; *Blunt v. McCormick*, 3 Denio 283; *Reed v. State*, 108 N. Y. 407; *Hargreaves v. Kimberley*, 26 W. Va. 787; *Ottenot v. New York*, etc. R. Co., 119 N. Y. 603; *Cobb v. Smith*, 38 Wis. 81; *Delaware & R. C. Co. v. Wright*, 21 N. J. L. 469; *Wells v. New Haven & N. Co.*, 151 Mass. 46, 21 Am. St. 423; *Barrick v. Schifferdecker*, 123 N. Y. 52; *Silsby Mfg. Co. v. State*, 104 N. Y. 562; *Aldworth v. Lynn*, 153 Mass. 53, 10 L.R.A. 210, 25 Am. St. 608; *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177. The writer of the opinion added: We do not wish to be understood as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character.

⁶⁷ *Ardmore v. Orr*, 35 Okla. 305; *City of Henderson v. Robinson*, 152 Ky. 245; *Same v. Herron*, 152 Ky. 341; *St. Louis*, etc. R. Co. v. *Ram-*
Suth. Dam. Vol. IV.—13.

sey, 37 Okla. 448; *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. 133; *Baltimore*, etc. R. Co. v. *Quillen*, 34 Ind. App. 330, 107 Am. St. 183; *Railway Co. v. Higdon*, 111 Tenn 121; *Uvalde E. L. Co. v. Parsons* (Tex. Civ. App.), 138 S. W. 163; *American L. Co. v. Hoffman*, 108 Va. 363; *McHenry v. Parkersburg*, 66 W. Va. 533, 29 L.R.A.(N.S.) 860; *Baker v. Leka*, 48 Ill. App. 353; *Stein v. Lafayette*, 6 Ind. App. 414.

⁶⁸ *Vogt v. Grinnell*, 123 Iowa 332.

⁶⁹ *Choctaw*, etc. R. Co. v. *Drew*, 37 Okla. 396, 44 L.R.A.(N.S.) 38; *Philadelphia*, etc. R. Co. v. *Karr*, 38 App. Cas. (D. C.) 193; *Centralia v. Wright*, 156 Ill. 561; *Pinckneyville v. Hutchings*, 63 Ill. App. 137; *Baltimore v. Merryman*, 86 Md. 584; *McDougald v. Southern Pac. R. Co.*, 162 Cal. 1; *Middlekamp v. Bessemer I. Co.*, 46 Colo. 102, 23 L.R.A.(N.S.) 795; *Suchr v. Chicago Sanitary Dist.*, 242 Ill. 496; *Canteen H. & F. Ass'n v. Schwartz*, 128 Ill. App. 224; *Strange v. Cleveland*, etc. R. Co., 151 id. 478 (railroad embankment); *Rockford & I. R. Co. v. Keyt*, 117 id. 32; *King v. Danville*, 128 Ky. 321; *Willis v. White*, 150 N. C. 199, 134 Am. St. 906; *Carpenter v. Lancaster*, 212 Pa. 581. But see *Virginia R. Co. v. Jeffries*, 110 Va. 471; *Bowers v. Mississippi & R. R. B. Co.*, 78 Minn. 398, stated in § 1042.

so where earth is deposited on land,⁷⁰ and where soil has been lost though the cause of it was a dam which might have been abated; the abatement would not affect the damage done.⁷¹ In some cases the permanency of the structure causing the damage is not determinative of the permanent character of the nuisance unless its construction and continuance are necessarily injurious independently of circumstances.⁷² In Kentucky the cost of abatement is the test if the injury is caused by a permanent structure, as an underground sewer.⁷³

In all cases of doubt respecting the permanency of the injury courts are inclined to favor the right to bring successive actions. Otherwise the effect would be to give the defendant, because of his wrongful act, the right to continue the wrong; a right equivalent to an easement. A right to land cannot thus be acquired.⁷⁴ On the other hand, such a principle would involve the injustice of compelling the defendant to pay for a perpetual wrong which he would, perhaps, put an end to at once on the adjudication that the erection is a nuisance.⁷⁵ In a decision in Pennsylvania⁷⁶ the parties were owners of tanneries on opposite sides of the same stream, the defendant's being the lower one. The plaintiff was the owner of land on each side of the stream below both tanneries. He had a dam from which he conducted water to his tannery; the defendant made a dam below into which the surplus water from the plaintiff's dam flowed;

⁷⁰ *Baltimore, etc. R. Co. v. Quillen*, 34 Ind. App. 330, 107 Am. St. 183.

⁷¹ *Coleman v. Bennett*, 111 Tenn. 705.

⁷² *Chicago, etc. R. Co. v. McCutchen*, 80 Ark. 235.

⁷³ *Richmond v. Gentry*, 136 Ky. 319, 136 Am. St. 255.

⁷⁴ *City of Henderson v. Robinson*, 152 Ky. 245; *Same v. Herron*, 152 Ky. 341; *Atlantic, etc. R. Co. v. Robbins*, 35 Ohio St. 531; *Thompson v. Morris C. & B. Co.*, 17 N. J. L. 480; *Anderson, etc. R. Co. v. Kernodle*, 54 Ind. 314; *Sloss-S. S. & I. Co. v. Mitchell*, 161 Ala. 278,

citing this and the next section; *Birmingham v. Land*, 137 Ala. 538; *Hoover v. New Holland W. Co.*, 43 Pa. Super. Ct. 262; *Railway Co. v. Higdon*, 111 Tenn. 121. Compare *Richmond v. Gentry*, 136 Ky. 319, 136 Am. St. 255; *Charnley v. Shawano W. P., etc. Co.*, 109 Wis. 563. 53 L.R.A. 895; *Berley v. Hilton*, 55 N. H. 444; and see *Weeks-T. P. Co. v. Glenside W. Mills*, 64 N. Y. Misc. 205.

⁷⁵ *Ardmore v. Orr*, 35 Okla. 305, citing the text; *Baker v. Allen*, 66 Ark. 271, 74 Am. St. 93.

⁷⁶ *Bare v. Hoffman*, 79 Pa. 71, 21

from this dam the defendant conducted the water to his tannery by means of a pipe, by which the plaintiff lost the use of the water required to carry offal from his tannery. The court say: "A severance of the connection of the pipe with the stream would cause the water to run in its accustomed channel and remove the whole cause of complaint. It is not a case of an entry on another's land and a severance of a part of the freehold, nor the depositing a permanent nuisance thereon." The act committed was not of such a permanent character that it could be assumed to continue through all coming time and to justify the assessment of damages accordingly. It was, therefore, deemed error to permit evidence to be given of a permanent injury to the market value of the tannery and to instruct the jury that the plaintiff was entitled to recover the permanent damage done to the freehold. He was deemed entitled to the damages he had sustained prior to the commencement of the suit and to be entitled to them as of that date; and the jury were permitted to compute interest thereon down to the verdict.⁷⁷ Where the defendant filled up about two hundred yards of the plaintiff's canal bed without authority, but under color of official power, to make a street, it was held to be a nuisance erected on the plaintiff's land, which it was the duty of the defendant to remove; that successive actions could be brought until such removal; that in one action it was wrong to give as damages the diminution of the value of the property, as that would lead to an erroneous result.⁷⁸ If damages are sustained subsequently to the commencement of the action they may be considered if they are the natural and necessary result of the act complained of,⁷⁹ and are not in themselves sufficient as a ground for a

Am. Rep. 42; *Duryea v. Mayor*, 26 Hun 120.

⁷⁷ The reason for the allowance of interest was deemed the same as in the prior cases of *Railroad Co. v. Gesner*, 20 Pa. 240; *Pennsylvania R. Co. v. Cooper*, 58 id. 408; *Delaware, etc. R. Co. v. Burson*, 61 id. 369.

⁷⁸ *Cumberland & O. C. Co. v. Hitchings*, 65 Me. 140. See *Dority*

v. Dunning, 78 id. 381; *Stadler v. Grieben*, 61 Wis. 500; *Benson v. Chicago & A. R. Co.*, 78 Mo. 504.

⁷⁹ *Goodrich v. Dorset M. Co.*, 60 Vt. 280; *Central R. Co. v. Windham*, 126 Ala. 552; *Delamarre v. Bott*, 78 N. J. L. 234. Compare *Railway Co. v. Higdon*, 111 Tenn. 121; *Rowe v. Northport S. & R. Co.*, 35 Wash. 101.

separate suit.⁸⁰ But where plaintiff seeks an injunction against a continuing nuisance as well as damages for injury caused thereby, it will be prejudicial error to admit, for the purpose of determining the damages to which plaintiff is entitled, evidence as to injury sustained after the commencement of the action.⁸¹ In Wisconsin the right to recover damages since the commencement of the action is dependent on its form; they are denied in actions at law, but are allowed in suits in equity.⁸² In Ohio the damages allowed in equity are computed to the first day of the term.⁸³ In Alabama evidence of the effect of the nuisance since the action was begun is admissible though damages are limited to twelve months prior to the suit;⁸⁴ and so of damage sustained prior to that period.⁸⁵ In Kentucky if the nuisance exists when the trial is had the plaintiff may file an amended petition and recover damages up to the time of the trial; failing to do so and in the absence of instructions limiting the time for the recovery, it will be assumed that the award covers that period.⁸⁶ In Iowa facts which occur after the commencement of an action and which merely strengthen, develop or reinforce the original cause of action or enlarge the extent of or change the relief sought may be introduced by a supplemental petition although they would support an independent action.⁸⁷

§ 1040. Continuing liability of the person who causes it. The continuing liability of the erector of a nuisance which consists of a permanent structure is very strongly illustrated by an English adjudication, made in an action on the case for

⁸⁰ *Frostburg v. Dufty*, 70 Md. 47.

⁸¹ *Cauthen v. Lancaster Cotton Oil Mills*, 96 S. C. 342.

⁸² *Karns v. Allen*, 135 Wis. 48; *Fairbank Co. v. Bahre*, 213 Ill. 636, distinguishes *Chicago, etc. R. Co. v. Hoag*, 90 Ill. 339, in which damages caused by the removal of the nuisance through natural causes after the suit was begun were allowed to be proved. In the principal case the nuisance was not on the plaintiff's premises.

⁸³ *Standard B. & P. Co. v. Cleveland*, 25 Ohio C. C. 380.

⁸⁴ *Alabama Con. C. & I. Co. v. Vines*, 151 Ala. 398.

⁸⁵ *Tutwiler C., C. & I. Co. v. Nichols*, 145 Ala. 666.

⁸⁶ *Chesapeake & O. R. Co. v. Stein*, 142 Ky. 515. Damages may be recovered up to the date of the petition. *Chicago, etc. R. Co. v. Hoover*, 147 Ky. 33.

⁸⁷ *Footte v. Burlington G. Co.*, 103 Iowa 576; *Bowman v. Humphrey*, 124 Iowa 744.

continuing a nuisance to the plaintiff's market by a building which excluded the public from a part of the space on which the market was lawfully held. It appeared that the building was erected under the superintendence and direction of the defendants, though not on their own land, but on land of the corporation of K. The plaintiff became a lessee of the market after the erection of the encroaching building. It was contended on behalf of the defendants that they were not responsible for the continuing of the nuisance; that they were distinct persons from the corporation; and that, though they were guilty of erecting, they could not be considered as having continued the nuisance because they were not in possession or interested in the soil on which the building stood. Parke, B., said: "That the defendants were responsible for some consequences of the original erection of the building to the then owner of the market, though the defendants were not acting for their own benefit, but for that of the corporation, is not disputed; nor could it be. If they are considered merely as servants of the corporation they would be liable just as the servant of an individual is if he is actually concerned in erecting the nuisance; and as they would clearly have been responsible to the then owner of the market for the immediate consequences of their wrongful act, how can their liability be confined to the injury by the interruption of the first market, or what limit can be assigned to their responsibility other than the continuance of the injury itself? Is he who originally erects a wall by which ancient lights are obstructed to pay damages for the loss of the light for the first day only? Or does he not continue liable so long as the consequences of his own wrongful act continue, and bound to pay damages for the whole time? And if the then owner of the market might have maintained the action against the defendants for the injury to his franchise for the whole period during which the defendants' act continued to be injurious to him, his lessee must be in the same condition as to subsequent injuries; for it is clearly established that he has a right of action for every continuing nuisance.

* * * It was also said that the defendants could not now remove the nuisance themselves without being guilty of a tres-

pass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes by showing their inability to remove it without exposing themselves to another action.”⁸⁸ Erecting the nuisance was not deemed the entire wrong; that was done to the owner; the continuance of it was a distinct and additional wrong, and gave cause for an action to the succeeding tenant.⁸⁹ The purchaser of land on which a nuisance is maintained has the same rights as his vendor.⁹⁰

One who erects a structure or construction which creates a nuisance and then conveys to another his title and the lands and premises on which the structure or construction exists and is maintained, with a covenant in the deed of conveyance for quiet enjoyment and right to maintain such structure or construction, is liable for the continuance of the nuisance upon the ground that he affirms it and must be regarded in law as continuing it.⁹¹ This rule ceases to be operative where the new owner or lessee has been requested or required to remedy the nuisance or has materially changed the thing which caused it;⁹² or does an unauthorized act which produces the injury,⁹³

⁸⁸ *Thompson v. Gibson*, 7 M. & W. 456. See *Blunt v. Aikin*, 15 Wend. 522, 30 Am. Dec. 72; *Watson v. Colusa-P. M. & S. Co.*, 31 Mont. 513.

⁸⁹ See *Russell v. Brown*, 63 Me. 203; *Plummer v. Harper*, 3 N. H. 88; *Esty v. Baker*, 48 Me. 495; *Bowyer v. Cook*, 4 M., G. & S. 236; *Holmes v. Wilson*, 10 Ad. & E. 503; *Pickens v. Coal River B. & T. Co.*, 51 W. Va. 445.

The actual operation of a plant may be the proximate cause of the consequences though it was used for the purpose for which it was erected. *Adler v. Pruitt*, 169 Ala. 213, 32 L.R.A.(N.S.) 889.

⁹⁰ *Birmingham v. Land*, 177 Ala. 538.

⁹¹ *East Jersey W. Co. v. Bigelow*, 60 N. J. L. 201; *De Lashmutt v.*

Chicago, etc. R. Co., 148 Iowa 556; *Central C. Co. v. Pinkert*, 122 Ky. 720; *Karns v. Allen*, 135 Wis. 48. See *Uggle v. Brokaw*, 117 App. Div. (N. Y.) 586.

The creator of a nuisance which produces damage without negligence in its operation must answer therefor though the operation of the thing which produced the injury was by an independent contractor. *American C. & F. Co. v. Spears*, 146 Ky. 736.

The party who causes a nuisance and his immediate and remote lessees are liable for resulting injuries. *Atchison, etc. R. Co. v. Jones*, 110 Ill. App. 626.

⁹² *Shores v. Southern R.*, 72 S. C. 244.

⁹³ *Coman v. Alles*, 198 Mass. 99, 14 L.R.A.(N.S.) 950.

or the nuisance results from the use rather than from the erection itself.⁹⁴

In some states the continuance of a dam flooding the plaintiff's property is ground for successive actions as for a continuous wrong.⁹⁵ Where the nuisance was caused to the plaintiff's tillable land by casting water thereon, and resulted from a cause intended to be perpetually operative and of a nature to operate gradually and continuously, the rule was declared that if the effect of the nuisance was to destroy wholly and permanently the fertility of the land, so that abating the nuisance would not restore the land and render it again fertile, the right to maintain successive actions relative to subsequent years ceased and that a single action and recovery for such destruction could be maintained and would be final; but that, until such result followed, successive actions were maintainable for the annual damage.⁹⁶ The defendant was engaged in supplying water to manufacturers for business uses and for that purpose constructed a system of canals, from which races led to the establishments served; water gates controlled the flow of water in the races. The gate which supplied the plaintiff's foundry was removed and he, in times when the water was high, was injured by the discharge of large quantities of water upon his premises. The wrong done was not by the removal of the gate, but by the discharge of the water, and each discharge which caused damage gave a new cause of action.⁹⁷ The occupation of the plaintiff's land or of a street adjacent thereto for a railroad is ground for successive actions as for continuous wrong in some jurisdictions;⁹⁸ in others the contrary rule prevails.⁹⁹ A nuisance produced by a private erection or other work on land will not be regarded as permanent, no matter what the intention was when the work was done,¹ and it will

⁹⁴ *Central C. Co. v. Pinkert*, 122 Ky. 720.

⁹⁵ *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Staple v. Spring*, 10 Mass. 72. *Contra*, *Bizer v. Ottumwa H. P. Co.*, 70 Iowa 145.

⁹⁶ *Danielly v. Cheeves*, 94 Ga. 263.

⁹⁷ *Augusta v. Lombard*, 101 Ga. 724.

⁹⁸ *Mahon v. New York Cent. R. Co.*, 24 N. Y. 658; *Sherman v. Milwaukee, etc. R. Co.*, 40 Wis. 645.

⁹⁹ § 1042.

¹ *Schlitz B. Co. v. Compton*, 142

be improper to permit proof of damage sustained subsequently to the commencement of the suit.²

§ 1041. **Damages may include future expenditures.** The authorities agree that damage done at the date of the writ is to be compensated, and that only. If that damage consists in causing the party to expend money the test is not the time when the expenditures were made, for they may be paid at once or their payment delayed without in any way affecting the rights of the parties. The question is not when the money was paid, whether before or after suit; but was the liability to those expenditures occasioned by the acts complained of? Or was it by the continuance of the same acts, or of the state of things produced by those acts, after the action was brought? If they are the result and consequence of the wrongful act complained of they are to be recovered in that action; if they result from the wrongful continuance of the state of facts produced by those acts they form the basis of a new action.³

§ 1042. **When nuisance not a continuous wrong.** When a wrongful act is done which produces an injury which is not only immediate, but from its nature must necessarily continue to produce loss independently of any subsequent wrongful act, then all the damages resulting, both before and after the commencement of the suit, may be recovered in one action.⁴ Thus

Ill. 511, 48 Alb. L. J. 28, 34 Am. St. 92, citing the text; *Stowers v. Gilbert*, 156 N. Y. 600; *Ridley v. Seaboard & R. R. Co.*, 118 N. C. 996, 32 L.R.A. 708.

² *Vogler v. Chicago & Carterville Coal Co.*, 180 Ill. App. 51.

³ *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Holmes v. Wilson*, 10 Ad. & E. 593; *Staple v. Spring*, 10 Mass. 72; *O'Riley v. MeChesney*, 3 Lans. 278, aff'd 49 N. Y. 672; *Denver, etc. R. Co. v. Heckman*, 45 Colo. 470.

⁴ *Sloss-S. S. & I. Co. v. Mitchell*, 181 Ala. 576; *Alabama Con. C. & I. Co. v. Vines*, 151 Ala. 398; *Boise Valley C. Co. v. Kroeger*, 17 Idaho

384, 28 L.R.A.(N.S.) 968, quoting the text; *Harvey v. Mason City, etc. R. Co.*, 129 Iowa 465, 3 L.R.A.(N.S.) 973, 113 Am. St. 483; *Lawton v. Seaboard A. L. R.*, 75 S. C. 82; *Chicago, etc. R. Co. v. Loeb*, 118 Ill. 203; *Same v. Schaffer*, 26 Ill. App. 280; *Commings v. Stevenson*, 76 Tex. 642; *Cooper v. Randall*, 59 Ill. 321; *Hayden v. Albee*, 20 Minn. 159; *Centralia v. Wright*, 156 Ill. 561; *Ilyde Park Thomson-H. L. Co. v. Porter*, 167 Ill. 276, aff'g 64 Ill. App. 152; *Lake Erie & W. R. Co. v. Purcell*, 75 id. 573; *Powers v. St. Louis, etc. R. Co.*, 158 Mo. 87; *Paris v. Allred*, 17 Tex. Civ. App. 125;

in a Minnesota case, in which it was held that occupying land for a railroad was a continuing wrong, the court say: "If the construction of the road and track on the plaintiff's land necessarily lessened the value of the property, that is to say, if it would be worth less because of the mere existence thereon of said road-bed and track, without reference to any wrongful use which the defendant might or might not make of them, such depreciation accrued immediately upon the construction thereof, and was in its nature permanent; and being a direct and immediate result of the trespass might be recovered at once. And if such erection necessarily caused the surface water to stand upon plaintiff's land and run into his cellar and well, he could recover therefor in the same action; though such injury might not accrue for some time after the completion of the road-bed and track."⁵ Where a railroad company built a permanent approach to its track in front of the plaintiff's lot, destroying his right of egress and ingress therefrom to the street, and at the same time flooded his lot by means of an improper culvert, he recovered in the same action for all the damages. Correct pleading required that the statement

Aberdeen v. Bradford, 94 Md. 670; Coleman v. Bennett, 111 Tenn. 705. See Irvine v. City of Oelwein, 170 Iowa 653.

⁵Adams v. Hastings, etc. R. Co., 18 Minn. 265; Chicago & A. R. Co. v. Maher, 91 Ill. 312. The Minnesota case cited has been followed in several instances. Brakken v. Minneapolis, etc. R. Co., 29 Minn. 41; Byrne v. Same, 38 Minn. 212, 8 Am. St. 668; Adams v. Chicago, etc. R. Co., 39 Minn. 286, 12 Am. St. 644, 1 L.R.A. 493; Lamm v. Same, 45 Minn. 71, 10 L.R.A. 268; Bowers v. Mississippi & R. R. B. Co., 78 Minn. 398.

In the case last cited the defendant placed in the river, opposite the plaintiff's farm, but not upon it, piling to facilitate the floating of logs,

and maintained it there. The effect of the piling was to turn water, logs and ice upon the plaintiff's land and to wash it away. Previously to the bringing of the action in question the plaintiff had recovered a judgment which had been satisfied. It was contended that such judgment was a bar to the second action. This contention was overruled. It was sought to distinguish the case from the earlier ones cited on the ground that the piling was so placed in pursuance of law, and that no claim of negligence was made against the defendant. The answer was: All these facts may be conceded, and still the act of the defendant in maintaining the piling be a continuing nuisance as to the plaintiff. The obstruction was lawful as to the public, but the legislature could not

of the several items of damages be made in separate counts.⁶ If the injury to real estate is in the nature of waste, as where a building is demolished, trees destroyed or fences broken down, there is no legal obligation or duty resting upon the wrong-doer to abate the wrong or repair the mischief. He is liable only for the damages. Only one action then can be maintained, and he is liable in that for the whole damage, prospective as well as retrospective.⁷

Damages have not been invariably assessed as for a continuing wrong where deposits of soil or other substances have been made on another's land, or other encroachment made thereon of a nature to continue unless active measures are taken for their removal. If the process of deposit goes on and there is a continued accretion of foreign matter by the defendant's fault successive actions may, of course, be brought, but it is not the uniform American rule to regard the wrong of making the deposit and that of its continuance on the land as distinct or divisible wrongs. Thus, in an action by the owners of a water-power against the owner of a tannery higher up the stream for permitting tan bark to be conveyed into the plaintiff's pool to the detriment of his mill, the court, recognizing that the rule for measuring damages is that which aims at actual compensation for the injury and that whatever ascertains this is proper evidence for the jury, held that the plaintiff was entitled to permanent damages; in other words, to recover all his damages in one action, measured either by the depreciation of the value of his property or by the cost of removing

authorize the defendant to maintain it against a private party whom it injured. *Hueston v. Mississippi & R. R. B. Co.*, 76 Minn. 251. The fact that the obstruction did not physically touch the plaintiff's land is immaterial; his damages are just as great as if some part of the obstruction rested on his land.

⁶ *Wallace v. Kansas City & S. R. Co.*, 47 Mo. App. 491.

⁷ *Cumberland & O. C. Co. v. Hitchings*, 65 Me. 140.

The doctrine stated does not apply where the only physical injury to the premises is the pollution of the water in a well thereon; it is presumed that the defendant will discontinue the nuisance which produces that result. *Cleveland, etc. R. Co. v. King*, 23 Ind. App. 573. See *Chicago, I. & L. R. Co. v. Myers*, 57 Ind. App. 458, petition for rehearing overruled, 107 N. E. 296

the deposit.⁸ Agnew, J., said: "The owner of the freehold may undoubtedly recover for an injury which permanently affects or depreciates his property. * * * Being the owner of the property, and in its actual possession and use, * * * (the plaintiff) * * * had a right to all the damages flowing directly from the tort of the defendant. If, therefore, a permanent injury was created by the lodgment of the tan bark in the pool of their dam which actually depreciates the property in value as a water-power it must affect the value of the land to which it belongs; and why should not this be compensated in damages? * * * Compensation for the diminished enjoyment or use of the property for a certain number of years is not compensation for the diminished value of the estate itself. The profit of the land must not be confounded with the land itself. If the land were under lease an injury which diminished its annual profit to the tenant and also depreciated and diminished the value of the property itself would be the subject of a double action in which the tenant and the landlord would each recover the amount of his own loss. Of course, when the owner claims in both cases he cannot be allowed double compensation for the same loss. So that the damages for use must not represent in any part the damages for the permanent injury. It is the duty of the court to see that one does not overlap the other."⁹ We think the court erred in refusing to admit both methods of computing the permanent damages, to wit: that which measures the damages by the different values of the land with and without the deposit, and that which measures them by the cost of removing the deposit. It is often difficult for the court to determine the

⁸ *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642; *Coleman v. Price*, 54 Tex. Civ. App. 39. See *Tyrus v. Kansas City, etc. R. Co.*, 114 Tenn. 579.

In *Babb v. Curators of State University*, 40 Mo. App. 173, realty was damaged by the discharge of sewage upon it. It was contended that because the nuisance was discontin-

ued there could be no recovery for permanent depreciation in the value of the land. This view was disapproved and a recovery therefor was allowed as well as for loss of rents up to the time suit was brought.

⁹ *San Antonio v. Estate of Mackey*, 22 Tex. Civ. App. 145, citing the text.

true measure until the evidence is in; it may turn out that the cost of removing the deposit in a certain case would be less than the difference in the value of the land, and then the cost of removal would be the proper measure of damages; or it may be that the cost of removal would be much greater than the injury by the deposit, when the true measure would be the difference in value merely." A similar ruling has been made in New York. The owner of a flax mill upon a natural stream permitted flax shives to float down the current and collect in a mass or deposit in a mill-pond below, thereby impairing the use of the mill. The cost of removing the deposit was held to be a direct consequence of the injury, and was recoverable although it had not been removed. The removal being necessary to restore the property to its former condition, the expense of it would measure the diminution of value by the wrong done. But this was not deemed to be exclusive of other elements of damage, as, for example, the effect of the shives upon cattle in drinking and the filling in at high water of the trunks leading from the pond to the mill.¹⁰ There may be added to the cost of removing the deposits the loss of the difference in the rental value of the property as affected by the wrong.¹¹

§ 1043. **Same subject.** In New Hampshire it has been laid down that wherever the nuisance is such that its continuance is necessarily an injury, and is of a character that will continue without change from any cause but human labor, the measure of damages is an equivalent for the original and entire injury, and it may at once be fully compensated, since the injured person has no means of compelling the individual doing the wrong to apply the labor necessary to remove the cause of injury and can only accomplish that, if at all, by the expenditure of his own means.¹² This comprehensive remedy

¹⁰ O'Riley v. McChesney, 3 Lans. 278, aff'd 49 N. Y. 672.

¹¹ Bricker v. Conemaugh S. Co., 32 Pa. Super. Ct. 283.

¹² The ease and the application of the principle thereto were thus stated by the court: "The town is made by law chargeable with the

duty and expense of maintaining the road which this railroad company have in part destroyed and in part obstructed, according to the declaration; they have a qualified interest in the roadway and bridge which they have constructed and have the right to maintain, and in

for the damage from a permanent nuisance is adopted in Iowa. "In the light of it," said the court, "we can see that in a case

the materials of which they are composed, and are entitled to recover the value of that roadway and material. The railroad is in its nature and design and use a permanent structure which cannot be assumed to be liable to change; the appropriation of the roadway and materials to the use of the railroad is, therefore, a permanent appropriation; the use of the land set apart to be used as a highway by the railroad company for the use of their track is a permanent diversion of that property to that new use, and a permanent dispossession of the town of it as the place on which to maintain the highway. The injury done to the town is then a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages. Those damages are, first, the value to them of the property and rights of which they have been deprived, for the use and purpose to which they are by law bound to apply them. Assuming, then, that they were sufficient to meet the requirements of the law and the public wants for a highway, their value is to be measured by the cost of the new ground they are bound to furnish to the community for a way, if it will be less costly and more reasonable, having reference to the accommodation of the public by the highway and the railway to procure new ground, rather than to build a highway over or under the railway; by the cost of the materials which will

be requisite to make a road, which will as well meet the requirements of the legal duty of the town to the public in relation to the road as the old, and the expense of applying those materials to that use in the new road, and the fund that will be permanently required in all future time to defray the increased expense of supporting and maintaining the new road in suitable repair beyond what would have been necessary for the old road. These ingredients go to make up the present value of the old road of which the town has been deprived, and they are to be recovered, not as prospective damages, but as a compensation for the injury the town has now sustained. When these expenses shall be paid by the town, or whether they shall ever be paid, is a question with which these defendants have nothing to do. If, from change of circumstances, the town should be relieved from the burden of maintaining the road, the amount paid by the railroad will be applied, as in equity it should, to replace to the town the cost of the land for the road and the expense of making it, long since paid by them." *Troy v. Cheshire R. Co.*, 23 N. H. 102.

Referring to the test laid down by the New Hampshire court the Tennessee court pronounces it artificial and arbitrary. "There are supposable instances which, by the effect of time, might at last abate themselves, but by far the greater number of trespasses, wrongs and nuisances would continue indefinitely without the expenditure of human labor to remove or abate

of overflow from a mill-dam the injured party should be allowed to maintain successive suits. Somewhat depends on the way the dam is used. The injury, therefore, is not uniform. But what is of controlling importance, the dam if not maintained will go down, as surely as the sun will go down, and the nuisance of itself will come to an end. Its duration will be determined by freshets and other forces which are contingent, and, therefore, incalculable. It may, indeed, be so built that it should be regarded as permanent. In such case it is said that the damage should be considered and treated as original.¹³ While no infallible test can be applied to enable us to determine whether a structure is permanent or not, inasmuch as nothing is absolutely permanent, yet when a structure is practically determined to be a permanent one, its permanency, if it is a nuisance and will necessarily result in damages, will make the damages original.”¹⁴ The case was this: The defendant had constructed a ditch along a street by the plaintiff's property in such a negligent and unskilful manner that it was injured thereby; one ditch was made to empty into another by a fall, making a cavity below the fall and wearing away the land at its brink. The court held that the damage resulting from the construction of the ditch was original damage. It was said: “After the ditch was constructed and the

them. It is a rule which does not commend itself by either its reasonableness, its certainty of application or its justice.” *Nashville v. Comar*, 88 Tenn. 415, 420; *Daniel v. Ft. Worth, etc. R. Co.* (Tex. Civ. App.), 69 S. W. 198, citing the text. *Uline v. New York, etc. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, is a very interesting and important case on this subject and is in accord with the Tennessee case. See *Gartner v. Chicago, etc. R. Co.*, 71 Neb. 444; *Lyons v. Fairmont R. E. Co.*, 71 W. Va. 754.

¹³ Citing *Troy v. R. Co.*, *supra*.

¹⁴ *Powers v. Council Bluffs*, 45

Iowa 655, 24 Am. Rep. 792 (but see *Harvey v. Mason City, etc. R. Co.*, 129 Iowa 465, 3 L.R.A.(N.S.) 973, 113 Am. St. 483, throwing doubt on the authority of that case); *Central C. Co. v. Pinkert*, 122 Ky. 720, quoting the text; *Bizer v. Ottumwa H. P. Co.*, 70 Iowa 145; *Gorman v. Chicago, etc. R. Co.*, 166 Mo. App. 320; *Wichita Falls & W. R. Co. v. Wyrick*, — Tex. Civ. App. —, 147 S. W. 694.

The same rule has been applied where a railroad had insufficient culverts. *Van Orsdol v. B., C. R. & N. R. Co.*, 56 Iowa 470.

water of the creek first began to work upon the plaintiff's land its continuance was just as certain as that water would flow in the creek unless changes were made therein by human hands. Its continuance would just as certainly be an injury as that the floods of the creek would wash the soil and earth through which the ditch was dug. It follows then that the plaintiff's cause of action accrued for all injury sustained or that in the future would be suffered." Also: "We have seen no case where successive actions have been allowed for damages resulting from negligence combined with a natural cause, however gradual the operation of that cause. Successive actions are allowed only when the defendant is in continuous fault. It may be a fault of commission or omission, but if the latter, it must be something else than an omission to repair or arrest an injury resulting from negligence or unskilfulness unless the remedy is to be applied upon the wrong-doer's premises." ¹⁵

The rule stated, as applied to such a case, affords the defendant no option or opportunity to put an end to the injury by amending his work; but the permanent or "original damages" are reducible to the amount it would cost the plaintiff himself to amend it if the injurious feature of it may be corrected at a moderate expense.¹⁶ A subsequent case occurred which was unaffected by this mitigation. A railroad company and a city were the defendants. The latter had, in the exercise of its powers, granted the company the right to locate its road along a street, adjacent to which the plaintiff owned and occupied property. The complaint was that there was negligence in selecting a line for the road on that street, and it was fixed unnecessarily near the plaintiff's premises, thereby causing him great inconvenience and damage. The true measure of damages was held to be the difference in value of the plaintiff's property with the road constructed upon its present line in the street and what that value would have been if the road had been constructed upon a line therein selected with reasonable care

¹⁵ See *Finley v. Hershey*, 41 Iowa 389; *Houston v. Merkel*, — Tex. Civ. App. —, 153 S. W. 385.

¹⁶ *Simpson v. Keokuk*, 34 Iowa 568; *Van Pelt v. Davenport*, 42 id. 314.

and a proper regard for the rights of all interested.¹⁷ In another case the plaintiff was the owner of a lot abutting on a slough or arm of the Mississippi river, and occupied it with a slaughter or pork-house; the defendant owned a saw-mill on the same slough and partially filled up this slough in front of his premises and thereby impeded and cut off the flow of water from the river. The wrong was treated as an entirety, and the damages were measured and ascertained by a comparison of the value of the property affected by the filling up of the slough, prior thereto, and its value as depreciated by such filling. It was insisted that the true measure was the difference between the value of the use of the property before and after the filling. On this point the court said: "The injury sustained by plaintiffs affected the property itself and incidentally the value of its use was depreciated. It is evident that the rule contended for by defendant's counsel would, if applied to the case, fail to make full compensation to plaintiffs. The property depreciated in value because the value of its use was affected and because the property itself was injured by the acts complained of. In order to compensate the plaintiffs for the injury to their property they should recover to the extent its value was depreciated. If plaintiffs could only recover for the depreciated value of the use of the property whenever the property was used, as defendant claims, there would be a continually recurring cause of action in favor of plaintiffs and the rights of the parties would not be settled in the present suit, a thing which the law will avoid."¹⁸

§ 1044. Same subject. In a Massachusetts case¹⁹ a railroad company, for the construction of its road-bed in such a manner

¹⁷ Cadle v. Muscatine, etc. R. Co., 41 Iowa 11; O'Connor v. St. Louis, etc. R. Co., 56 id. 735.

¹⁸ Finley v. Hershey, 41 Iowa 389.

¹⁹ Fowle v. New Haven & N. Co., 112 Mass. 334, 17 Am. Rep. 106. The court say: "The permanent character of the structure, and the fact that the plaintiff accepted damages which were assessed for the

permanent injury, and necessarily involved a consideration of the probable future effect upon the plaintiff's land of the changed current of such a stream in its different stages of water, remain unaffected by the evidence. The jury may have intended to compensate the plaintiff for the injury now complained of, or to give him the means to protect

as unnecessarily to turn the current of a stream against the plaintiff's land and wash away his soil, was held liable for prospective as well as past injury. A recovery of prospective damages in a prior suit was held to bar an action for subsequent damage, though caused by an unusual freshet. The declaration in the former suit was for soil washed away and for diminution in the value of the residue. In a later case a railroad company built a culvert under its road-bed and unnecessarily brought together eight streams of water which were discharged through the culvert upon adjoining land at a place different from the original course of any of them. Thereafter these combined waters, and also an increased flow of surface water caused by the road-bed, continued to flow through the culvert. Some seven years after the road-bed was made, as the result of heavy rains, the land of the plaintiff was overflowed and his crop injured. It was determined that the railroad structure was a continuing nuisance, that the plaintiff, who bought the land shortly before the damage was done, could maintain an action for the damage occurring after his purchase, and that the statute of limitations was no bar. Referring to the case cited, it was said that in some respects it resembled that before the court; that the plaintiff had brought a former action

himself against it. As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage. There is no exception to this rule in the cases of nuisance, where damages after action brought are held not to be recoverable, because every continuance of a nuisance is a new injury and not merely a new damage. The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its con-

Suth. Dam. Vol. IV.—14.

struction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to the past and probable future injury. This is the course which appears to have been taken in this case, and to allow a recovery here might subject the defendant to double damages." See *Wells v. New Haven & N. Co.*, 151 Mass. 46, 21 Am. St. 423; *Aldworth v. Lynn*, 153 Mass. 53, 25 Am. St. 608, 10 L.R.A. 210; *North Vernon v. Voegler*, 103 Ind. 314. See *Smith v. Sedalia*, 244 Mo. 107.

in which he expressly declared for prospective damages, and he was allowed to recover them, apparently without any objection on this ground from the defendant; and if he had been allowed to hold his second verdict he would have got double damages, which clearly was not permissible. The decision of that case does not necessarily imply that an action must have been brought within six years, or, if it does, we cannot follow it; and we have no occasion to consider whether ordinarily prospective damages would be recoverable in such a case or not.²⁰ In Kentucky there may be a recovery for past and prospective injury from a permanent nuisance, as for a railroad laid and operated in a street of a city, impairing the value of the easement therein of adjacent lot-owners and subjecting such owners occupying their lots to daily annoyance from smoke, soot, noise and hazard of fire.²¹ In a subsequent case it was held that if the railway tracks have been so located as to unreasonably obstruct the abutting lot-owner's means of ingress and egress over the street to and from his lot; or if his houses have been injured by having smoke, sparks or cinders thrown or blown into or upon them; or if their walls have been cracked by the rapid movement of heavy trains of cars, he is entitled to recover for the damages directly resulting from all or any one or more of these

²⁰ Wells v. New Haven & N. Co., *supra*.

²¹ Elizabethtown, etc. R. Co. v. Combs, 10 Bush 382, 19 Am. Rep. 67. The injury and damage are thus stated by the court: "We adjudge that if appellant's road has been so located as to deprive appellee of the means of ingress and egress to and from his lot on W. street with ordinary vehicles on either side of its road when its trains are passing or standing on the street in front of his lot, he is entitled to recover such damages as he has thereby sustained; and if his houses are damaged by having smoke, soot or fire from passing engines thrown or blown into or

against them, he is entitled to recover for this also. The diminution of the value of the adjacent property occasioned by these circumstances will be the measure of his right to recover. We have heretofore held in actions for injury to real estate by trespassers that the plaintiff can only recover compensation for the injury done up to the commencement of the action; but that was in cases of injury not continuing or permanent in their character. The injury in this case, if any, is permanent and enduring, and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of."

causes; that the measure of damages which the lot-owner may recover, if entitled to recover at all, is the diminution in value of his houses and lot by the location of the railway tracks, and the uses to which they are authorized to be put by the grant under which they are built. If the location and operation of the roads in front of the houses diminish their value, say twenty per centum, then the diminution should be proportioned to their value just preceding the time at which it became generally known that the street had been selected as the line of the road. The jury should ascertain what the value of the property was just before it became generally known that the road was to be located in front of it, and then determine what proportion of that value was taken from the houses and lot by the obstruction of the street and the annoyance incident to the movement of engines and trains of cars along and over the road. Benefits arising out of or from an unauthorized act may sometimes be considered in the determination of the sum to be recovered by the injured party; but in all cases these benefits must be direct and immediate. They must be confined to the approximate consequences of the act complained of, and be of like kind with the opposite injuries for which the recovery is sought. If the railway afford the complaining lot-owner increased or additional facilities for ingress or egress to and from his houses and lot, or for the movement of articles in which he may deal, or supplies which it is necessary that he shall procure, this benefit may be taken into consideration in estimating the damages he has sustained. The same case announced the doctrine that by instituting an action for permanent damages the lot-owner in effect consents that the railroad company may continue for all future time to use the street as it is now using it, and, as consideration therefor, to accept such judgment as may be therein rendered.²²

²² *Jeffersonville, etc. R. Co. v. Esterle*, 13 Bush 667. See *Chesapeake & O. R. Co. v. Robbins*, 154 Ky. 387; *Shrout v. Chesapeake & O. R. Co.*, 157 Ky. 1.

In *Kemper v. Louisville*, 14 Bush

87, the defendant was a municipal corporation; by a street improvement it dammed a natural drain, and thus flooded the plaintiffs' lot where he lived. It was held that the plaintiffs were entitled to re-

§ 1045. *Same subject.* In Illinois the doctrine has been carried further. In an action by the owner and occupant of a lot situated near the right of way of a railroad on which the company erected cattle pens, so conducted as to become a nuisance, the court held that in estimating the damages it was proper to consider the depreciation in the value of the plaintiff's property occasioned by such nuisance, and in addition the injury and annoyance to him while occupying the premises; that one recovery for such depreciation would bar any future action for the same cause; but if the former recovery was for annoyance merely and for rendering the atmosphere unwholesome, then a similar recovery might be had at every term of court so long as the nuisance continues.²³ In a case in one of the Illinois appellate courts this test is suggested as proper for the determination of the question as to the permanence of a nuisance: Where a permanent structure is lawfully erected and thereby an injury is occasioned to adjoining property, if the structure is properly built with reference to its use and so as to produce no unnecessary damage, the cause of action arising from an injury caused by it is an entirety; but if the injury complained of results from an improper construction it is otherwise.²⁴ The supreme court, however, does not approve of this rule as applied to erections on private land, as where the wrong done consists in causing water to flow from a building on the land of the owner to the land of another.²⁵ In Arkansas

cover for the injury to their house and lot, and that while no recovery could be had for physician's bills, or loss of time to the occupants, on account of sickness caused by the stagnant water, still these facts might be proved with a view to show the extent to which the value of the property had been lessened by reason of the act complained of.

²³ Illinois, etc. R. Co. v. Grabill, 50 Ill. 241; Chicago, etc. R. Co. v. Baker, 73 Ill. 316; Cleveland, etc. R. Co. v. Pattison, 67 Ill. App. 351; Sanitary District v. Ray, 85 id. 115.

²⁴ Chicago, etc. R. Co. v. Schaffer, 26 Ill. App. 280; Melendy v. Chicago, etc. R. Co., 132 id. 431; Fincher v. Baltimore, etc. R. Co., 179 Ill. App. 622.

"Where the continuance and operation of a permanent structure are not necessarily injurious, but may or may not be so, then only the injury sustained prior to the commencement of the action may be compensated" in a single suit. Jones v. Sanitary Dist., 252 Ill. 591.

²⁵ Schlitz B. Co. v. Compton, 142 Ill. 511, 47 Alb. L. J. 28, 34 Am. St. 92.

the contrary rule is favored.²⁶ In North Carolina the damages resulting from the failure to provide a railroad with space enough between its embankments or with culverts sufficient to carry off any water that might be reasonably expected to accumulate is such a wrong that the party sustaining injury thereby may recover therefor in one action present and prospective damages.²⁷

In a case in the Ontario court of appeals a railroad company diverted a stream of water from the land of the plaintiff, which could, with slight expenditure, have been restored to its natural flow. It was contended that the damages should not be fixed as for a permanent obstruction. The opinion intimates that if the award had been extremely large that view might have been acceded to, but because it was not it was considered that there was no injustice to the defendant in allowing the verdict to stand, especially as it brought the litigation upon itself by disregarding the plaintiff's requests for a settlement. It was said: In cases of this kind, where the plaintiff is clearly entitled to relief in one form or the other, and where

²⁶ *Railway Co. v. Cook*, 57 Ark. 387.

"Whenever the nuisance is of a permanent character and its construction and continuance are necessarily an injury, the damage is original." *McAllister v. St. Louis, etc. R. Co.*, 107 Ark. 65.

²⁷ *Ridley v. Seaboard & R. R. Co.*, 118 N. C. 996, 32 L.R.A. 708.

In Texas the permanent character of the obstruction does not determine whether the nuisance is original or not; that is settled by the nature of the injury; if all the injury results from the obstruction the damage is original; but if it occurs from successive overflows, the occurrence and frequency of which cannot be foretold with certainty, nor the extent of the damages be accurately foreseen the damage done by each overflow gives a separate cause of

action. *Stephenville, etc. R. Co. v. Yates*, — Tex. Civ. App. —, 148 S. W. 836.

In some states the distinction is thus stated: Where the channel of a stream is so obstructed by a permanent dam or fill as to cause a constant overflow upon another's lands, the damages are original and must be recovered in one action; but where the dam or fill is provided with a culvert sufficient to carry off the water of the stream in its usual volume, and causes only occasionally recurrent overflows, the damage is continuing, and each overflow constitutes a separate and distinct cause of action. *Sloss-S. S. & I. Co. v. Mitchell*, 181 Ala. 576; approving *Haney v. Mason City, etc. R. Co.*, 129 Iowa 465, 3 L.R.A.(N.S.) 973, 113 Am. St. 483.

the defendant has not pointedly and conclusively shown him to be wrong in the forum of his selection, there is authority for holding that the whole damage may be assessed once for all, and that the plaintiff will not be confined merely to damages down to the trial, leaving future damages as for a continuing injury to be recovered in a subsequent proceeding.²⁸ Where the injury results from the operation of something authorized by law and located on the land of the defendant, it will be assumed a remedy will be applied, that being practicable.²⁹

§ 1046. **Same subject; result of the cases.** The apparent discrepancy in the American cases on this subject may, perhaps, be reduced by supposing that where the nuisance consists of a structure of a premanent nature and intended by the defendant to be so, or of a use or invasion of the plaintiff's property, or a deprivation of some benefit appurtenant to it for an indefinitely long period in the future, the injured party has an option to complain of it as a permanent injury and recover damages for the whole time, estimating its duration according to the defendant's purpose in creating or continuing it; or to treat it as a temporary wrong to be compensated for while it continues, that is, until the act complained of becomes rightful by grant, condemnation of property or ceases by abatement.³⁰ The recovery of damages on a declaration alleging the permanency of the nuisance, on principle, would estop the plaintiff not only from recovering future damages, but also from taking any steps to abate the nuisance during the period

²⁸ *Arthur v. Grand Trunk R. Co.*, 22 Ont. App. 89, citing *Parkdale v. West*, 12 id. 602; *North Shore R. Co. v. Pion*, 14 id. 612.

Where it was claimed that the damages caused to land by the pollution of a stream would cease at the end of five years and admitted that there had been a loss of \$800 in the value of the land, there was allowed as damages the interest on the difference between the existing value as if the pollution would be removed at the end of that time

and the price as if there were no pollution. The allowance of interest was based on the value of the land for the purpose for which it had been used though evidence of its probable value for other purposes was given. *Doremus v. Pater-son*, 81 N. J. Eq. 27.

²⁹ *Montreal St. R. Co. v. Boudreau*, 36 Can. Sup. St. 329.

³⁰ *Strange v. Cleveland, etc. R. Co.*, 245 Ill. 246, quoting the text and saying the rule is well stated.

for which damages had been recovered. This is apparently the law in Kentucky, Illinois, Indiana, Missouri, Ohio, Connecticut, Iowa, Pennsylvania, Oklahoma and Georgia. By such an action the plaintiff consents to the continuance, according to his allegations, of the duration of the injury for which he recovered judgment and accepts the recovery as a compensation therefor.³¹ In North Carolina it is said to be the right of the plaintiff in an action against a railroad company whose road was built under public authority, or of the defendant, to elect to have permanent damages assessed upon demand made in the pleadings, and that when either makes the demand the judgment may be pleaded in bar of any subsequent action. The defendant must set up this or any other equity upon which he relies. But where the plaintiff is allowed without objection to have such damages apportioned the judgment is not a bar, and either party to a subsequent suit involving the same question may demand that both present and prospective damages be assessed, and upon proof of a previous partial assessment the jury may consider that fact in diminution of the permanent damage.³² In the Massachusetts case referred to the plaintiff's second action was deemed barred on account of the scope of his first

³¹ *Fincher v. Baltimore, etc. R. Co.*, 179 Ill. App. 622; *Chesapeake & O. R. Co. v. Stein*, 142 Ky. 520; *Pinney v. Winsted*, 83 Conn. 411 (permanent trespass); *Strange v. Cleveland, etc. R. Co.*, *supra*; *Risher v. Acken C. Co.*, 147 Iowa 459; *Harvey v. Mason City, etc. R. Co.*, 129 Iowa 465, 3 L.R.A.(N.S.) 973, 113 Am. St. 483; *Chesapeake & O. R. Co. v. Stein*, 142 Ky. 515; *Board of Park Com'rs v. Donahue*, 140 Ky. 502; *Central C. Co. v. Pinkert*, 122 Ky. 720, quoting the text; *Kellogg v. Kirksville*, 149 Mo. App. 1; *Chicago, etc. R. Co. v. Davis*, 26 Okla. 434; *Carpenter v. Lancaster*, 212 Pa. 581; *Murphy v. Matthews*, 43 Pa. Super. Ct. 286; *Gaiser v. Chicago, etc. R. Co.*, 161 Ill. App. 90; *Jeffer-*

sonville, etc. R. Co. v. Esterle, 13 Bush 667; *Chicago, etc. R. Co. v. Loeb*, 118 Ill. 203; *Wenona Z. Co. v. Dunham*, 56 Ill. App. 351; *Cleveland, etc. R. Co. v. King*, 23 Ind. App. 573; *Scott v. Nevada*, 56 Mo. App. 189; *Wolf v. Cincinnati E. E. Co.*, 6 Ohio Dec. 159; *Clark v. Lanier*, 104 Ga. 184. See *Chicago, etc. R. Co. v. Hoover*, 147 Ky. 33; *Virginia R. & P. Co. v. Ferebee*, 115 Va. 289. But see the opinion by *Johnson, J.*, of the Kansas City court of appeals, published as a note to *Smith v. Sedalia*, 244 Mo. 107, criticising the rule as stated in the text.

³² *Ridley v. Seaboard & R. R. Co.*, 118 N. C. 996, 32 L.R.A. 708.

declaration and the acceptance of damages assessed for the permanent injury.³³ Thus considered, such a recovery will have the effect to give the defendant a permanent right to do the acts which constitute the nuisance as fully as though there had been a condemnation of the property by the exercise of the power of eminent domain. But the option to recover permanent damages in a common-law action, with this effect, is denied by several courts in this country and is wholly unknown in England.³⁴ We agree with the Tennessee court that "the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong when the cause of the injury is of such a nature as to be abatable either by the expenditure of labor or money; and that where the cause of the injury is one not presumed to continue that the damages recoverable from the wrong-doer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance."³⁵

³³ *Fowle v. New Haven & N. Co.*, 112 Mass. 338, 17 Am. Rep. 106. See § 1044.

In *Johnson v. Porter*, 42 Conn. 234, the plaintiff alleged in his declaration that the defendant had annoyed him by offensive odors from a barnyard, placed by the latter near the plaintiff's dwelling-house, and that thereby he was prevented from the comfortable use of his house; and his family was made sick, and he was subjected to medical expense. It was held that he could not under this declaration, for the purpose of enhancing damages, show the diminished value of his dwelling-house and lot by reason of the offensive odors. See *Illinois, etc. R. Co. v. Grabill*, 50 Ill. 241.

³⁴ *Nashville v. Comer*, 88 Tenn. 415, 7 L.R.A. 465; *Harmon v. Railroad*, 87 Tenn. 614; *Uline v. New*

York, etc. R. Co., 101 N. Y. 98, 54 Am. Rep. 661; *Adams v. Hastings, etc. R. Co.*, 18 Minn. 260; *Hartz v. St. Paul, etc. R. Co.*, 21 id. 358; *Brewster v. Sussex R. Co.*, 40 N. J. L. 57; *Ford v. Chicago, etc. R. Co.*, 14 Wis. 609; *Harrington v. St. Paul, etc. R. Co.*, 17 Minn. 215; *Blesch v. Chicago, etc. R. Co.*, 43 Wis. 183; *Ellsworth v. Central R. Co.*, 34 N. J. L. 93; *Carl v. Sheboygan, etc. R. Co.*, 46 Wis. 625; *Atlantic, etc. R. Co. v. Robbins*, 35 Ohio St. 531; *Battishill v. Reed*, 18 C. B. 696; *Devery v. Grand C. Co.*, 9 Irish C. L. 194; *Mellor v. Pilgrim*, 3 Ill. App. 476. See *Denver v. Bayer*, 7 Colo. 113.

³⁵ *Nashville v. Comer*, *supra*; *Chattanooga v. Dowling*, 101 Tenn. 342; *Kellogg v. Kirksville*, 132 Mo. App. 519. See *Southern R. Co. v. Cook*, 117 Ga. 286.

§ 1047. **Depreciation in value as damages.** If permanent damages are allowed they are measured by the depreciation of market value caused by the nuisance, or by adding to the damages allowed for past injury the amount necessary to restore the premises to their former condition, or to protect the plaintiff against future injury,³⁶ the computation to be based on the

³⁶ *Irvine v. City of Oelwein*, 170 Iowa 653; *City of Clarendon v. Betts*, — Tex. Civ. App. —, 174 S. W. 958; *Cleveland, etc. R. Co. v. Christie*, 178 Ind. 691; *Wichita Falls & W. R. Co. v. Wyrick*, — Tex. Civ. App. —, 147 S. W. 694; *Perkins v. Blauth*, 163 Cal. 782; *Miekley v. General Roofing Mfg. Co.*, 179 Ill. App. 493; *Choctaw, etc. R. Co. v. Drew*, 37 Okla. 396, 44 L.R.A.(N.S.) 38; *Louisville & N. R. Co. v. Jackson*, 139 Ga. 543; *City of Louisville v. Sauter*, 149 Ky. 721; *Smith v. Sedalia*, 244 Mo. 107; *Stephenville, etc. R. Co. v. Yates*, — Tex. Civ. App. —, 148 S. W. 836; *Sloss-S. S. & I. Co. v. McCullough*, 177 Ala. 448; *Sloss-S. S. & I. Co. v. Mitchell*, 181 Ala. 576; *St. Louis, etc. R. Co. v. Miller*, 107 Ark. 276; *Harris v. Lincoln, etc. R. Co.*, 91 Neb. 755 (distinguishing between value and market value); *St. Louis, etc. R. Co. v. Ramsey*, 37 Okla. 448; *Atlanta & B. A. L. R. v. Wood*, 160 Ala. 657; *Chicago, etc. R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. 602; *St. Louis, etc. R. Co. v. Magness*, 93 Ark. 46; *Czarnecki v. Bolen-D. C. Co.*, 91 Ark. 58; *Junction City L. Co. v. Sharp*, 92 Ark. 538; *Hodges v. Pine Product Co.*, 135 Ga. 134, 33 L.R.A.(N.S.) 74; *Davenport, etc. R. Co. v. Sinnet*, 111 Ill. App. 75; *Illinois Cent. R. Co. v. Lockard*, 112 id. 423; *Rockford & I. R. Co. v. Keyt*, 117 id. 32; *Sanitary Dist. v. Pearce*, 110 id. 592; *Perry, etc. S. Co. v. Smith*,

42 Ind. App. 413; *Baltimore, etc. R. Co. v. Quillen*, 34 Ind. App. 330, 107 Am. St. 183; *Risher v. Acken C. Co.*, 147 Iowa 459; *Louisville H. & St. L. R. Co. v. Roberts*, 144 Ky. 820; *Chesapeake & O. R. Co. v. Stein*, 142 Ky. 515; *Fidelity T. Co. v. Shelbyville W. & L. Co.*, 33 Ky. L. Rep. 202; *Board of Park Com'rs v. Donahue*, 140 Ky. 502; *Ewing v. Louisville*, 140 Ky. 726, 31 L.R.A.(N.S.) 612; *Illinois Cent. R. Co. v. Elliot*, 129 Ky. 121; *Louisville & N. R. Co. v. Whitsell*, 125 Ky. 433; *Central C. Co. v. Pinkert*, 122 Ky. 720; *Lewis v. Colorado, etc. R. Co.*, 122 La. 572; *Western Maryland R. Co. v. Martin*, 110 Md. 554; *Baltimore B. R. Co. v. Sattler*, 100 Md. 306, 105 Md. 264; *Smith v. Sedalia*, 182 Mo. 1; *South Side R. Co. v. St. Louis, etc. R. Co.*, 154 Mo. App. 364; *Krebs v. Bambrick C. Co.*, 144 Mo. App. 649; *Gebhardt v. St. Louis, etc. R. Co.*, 122 Mo. App. 503; *Watson v. Colusa-P. M. & S. Co.*, 31 Mont. 513; *McClure v. Broken Bow*, 81 Neb. 384; *Ackerman v. True*, 175 N. Y. 353; *Johnson v. Cincinnati*, 30 Ohio C. C. 696; *Upton C. & M. Co. v. Williams*, 7 Ohio C. C. (N.S.) 293, 28 Ohio C. C. 389; *Carpenter v. Lancaster*, 212 Pa. 581; *Louisville & N. T. Co. v. Lillyett*, 114 Tenn. 368, 1 L.R.A.(N.S.) 49; *Tyrus v. Kansas City, etc. R. Co.*, 114 Tenn. 579; *Coleman v. Bennett*, 111 Tenn. 705; *Sherman G. & E. Co. v. Belden*, 103 Tex. 59, 27 L.R.A.(N.S.) 237; *Denison, etc. R. Co. v. Barry*, 98 Tex.

value of the property at the time the cause of the nuisance

248; *Houston L. & L. Co. v. Texas Co.* (Tex. Civ. App.), 140 S. W. 818; *Hunt v. Johnson* (Tex. Civ. App.), 129 S. W. 879; *Gulf Pipe Line Co. v. Brymer*, 59 Tex. Civ. App. 40; *St. Louis S. R. Co. v. Clayton*, 54 Tex. Civ. App. 512; *Ingram v. Wishkah B. Co.*, 35 Wash. 191; *Weber v. Berlin*, 8 Ont. L. R. 302; *Wilson v. Areeibo*, 4 Porto Rico Fed. 293; *Hunt v. Johnson* (Tex. Civ. App.), 141 S. W. 1060; *Chicago, etc. R. Co. v. Hoover*, 147 Ky. 33; *McDougald v. Southern Pac. R. Co.*, 162 Cal. 1, citing the text; *Sacehi v. Bayside L. Co.*, 13 Cal. App. 72; *Jones v. Kramer*, 133 N. C. 446; *Finley v. Hershey*, 41 Iowa 389; *Illinois, etc. R. Co. v. Grabill*, 50 Ill. 241; *Chicago, etc. R. Co. v. Baker*, 73 Ill. 316; *Powers v. Council Bluffs*, 45 Iowa 655, 24 Am. Rep. 792; *Elizabethtown, etc. R. Co. v. Combs*, 10 Bush 382, 19 Am. Rep. 67; *Fowle v. New Haven & N. Co.*, 112 Mass. 338, 17 Am. Rep. 106; *O'Riley v. McChesney*, 3 Lans. 278; *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42; *Givens v. Van Studdiford*, 4 Mo. App. 498; *Chicago, etc. R. Co. v. Carey*, 90 Ill. 514; *Drake v. Chicago, etc. R. Co.*, 63 Iowa 302, 50 Am. Rep. 746; *Loughran v. Des Moines*, 72 Iowa 382; *Central Branch U. P. R. Co. v. Andrews*, 41 Kan. 370, 13 Am. St. 292; *Chouteau v. St. Louis*, 8 Mo. App. 48; *Autenrieth v. St. Louis, etc. R. Co.*, 36 id. 254; *Trinity & S. R. Co. v. Schofield*, 72 Tex. 496; *Plattsouth v. Boeck*, 32 Neb. 297; *Ordway v. Canisteo*, 66 Hun 569, *In re Thompson*, 85 Hun 438; *Van Sielen v. New York*, 32 N. Y. Misc. 403; *Hare v. Pittsburg, etc. R. Co.*, 10 Pa. Super. Ct. 647; *Williams v. Fulmer*, 151 Pa. 405, 31 Am. St. 767; *Harris v.*

Philadelphia, 155 Pa. 76; *Gentry v. Richmond, etc. R. Co.*, 38 S. C. 284; *Paris v. Allred*, 17 Tex. Civ. App. 125; *Hall v. Austin*, 20 Tex. Civ. App. 59, 65; *Nading v. Denison*, 22 Tex. Civ. App. 173; *Wallace v. Kansas City & S. R. Co.*, 47 Mo. App. 491; *Farley v. Gate City G. L. Co.*, 105 Ga. 323; *St. Louis, etc. R. Co. v. Anderson*, 62 Ark. 360; *Mayor v. Sikes*, 94 Ga. 30, 47 Am. St. 132; *Farkas v. Towns*, 103 Ga. 150, 3 Am. Neg. Rep. 775, 68 Am. St. 88; *Lake Erie & W. R. Co. v. Purcell*, 75 Ill. App. 573; *Louisville, etc. R. Co. v. Sparks*, 12 Ind. App. 410; *Martin v. Chicago, etc. R. Co.*, 47 Mo. App. 452; *Maysville v. Stanton*, 12 Ky. L. Rep. 586; *St. Louis T. Co. v. Bambrick*, 149 Mo. 560; *Dammann v. St. Louis*, 152 Mo. 186; *Toledo v. Grasser*, 12 Ohio C. C. 520 (disapproving the cost of repairs as the measure of damages); *Sterling H. Co. v. Galt*, 81 Ill. App. 600; *Chesapeake & O. R. Co. v. Gross*, 19 Ky. L. Rep. 1926; *Parker v. Norfolk & C. R. Co.*, 119 N. C. 677; *Daniel v. Ft. Worth, etc. R. Co.* (Tex. Civ. App.), 69 S. W. 198; *Coleman v. Bennett*, 111 Tenn. 705; *Chicago North Shore St. R. Co. v. Payne*, 192 Ill. 239; *Bungenstock v. Nishnabotna D. Dist.*, 163 Mo. 198.

This measure of damages was approved where only temporary damages were recovered. *Threatt v. Brewer M. Co.*, 49 S. C. 95.

Where water was diverted from a mill-site by means of a permanent ditch the plaintiff was entitled, at his election, to recover the difference in the value of the land without the diverted water and its value with that water, or the like difference as to the value of the mill-

began,³⁷ or at least when the first injury was done.³⁸ There is no certain rule as to the time when the comparison of the value of the affected property is to be made, the pleadings or the facts of the particular case being generally considered. If the petition alleges that the permanent injury was completed at a given time the difference in value is to be ascertained as of that time, rather than as of the time of the trial.³⁹ Where the nuisance is caused by structures erected at different times the defendant cannot object to the ascertainment of the damages by the difference in the value of the property before any of them were erected and its value after they all were erected.⁴⁰ If the structure causing the nuisance was authorized the value may be ascertained as of a time anterior to general knowledge that it would be erected and its value immediately after the erection.⁴¹ But generally as stated, the time taken is the value when the injury was done rather than at the time of the trial.⁴²

site itself. *Southern M. Co. v. Darnell*, 94 Ga. 231.

The amount a party would take for his property is not relevant to show its value. *Vernon v. Wedgeworth*, 148 Ala. 490.

³⁷ *Missouri, etc. R. Co. v. Graham*, 12 Tex. Civ. App. 54; *Meridian v. Higgins*, 81 Miss. 376; *Texas Cent. R. Co. v. Brown*, 38 Tex. Civ. App. 610.

The time of the opening of a channel for the discharge of water is not that from which the damages are to be computed, but the time of its use for the purpose for which it was constructed. *Zinser v. Sanitary Dist.*, 175 Ill. App. 9.

Where the nuisance gradually affected the property-owners' ingress and egress and there was no definite date when that began it was proper to adopt two years prior to the filing of the original petition and the date of filing the trial petition as the dates of comparison. *Hous-*

ton v. Merkel, — Tex. Civ. App. —, 153 S. W. 385.

The condition of the property and its effect upon the rental value may be shown to the date of the trial. *Philadelphia, etc. R. Co. v. Karr*, 38 App. D. C. 193. See § 113.

It is immaterial to the application of this principle that the value of the premises were enhanced by the establishment and maintenance of that which subsequently became a nuisance. *Brown v. Virginia C. C. Co.*, 162 N. C. 83, 45 L.R.A.(N.S.) 773.

³⁸ *Board of Park Com'rs v. Donahue*, 140 Ky. 502.

³⁹ *St. Louis, etc. R. Co. v. West* (Tex. Civ. App.), 131 S. W. 839.

⁴⁰ *Missouri, etc. R. Co. v. Perry*, 46 Tex. Civ. App. 374.

⁴¹ *King v. Danville*, 128 Ky. 321.

⁴² *Ft. Worth v. Scott* (Tex. Civ. App.), 145 S. W. 736, citing local cases, and disapproving *San An-*

This measure of recovery, it is erroneously said, comprehends the entire injury for which the defendant is liable.⁴³ If the cost of restoring property is less than its value there may be a recovery of the actual loss of rentals in addition to such cost,⁴⁴ and for the future.⁴⁵ Where, however, the damages are assessed for the continuance of the nuisance to the commencement of the suit only it may affect and injure the inheritance as well as the value of the possession; they may, therefore, be assessed for any permanent injury so caused and for the depreciation of the rental value of land; by the difference, in other words, between the rental value free from the effects of the nuisance and subject to it; but to the occupant the latter damages may be computed on the diminution of the value of the use to him.⁴⁶

tonio, etc. R. Co. v. Mohl (Tex. Civ. App.), 37 S. W. 22.

In Illinois the effect of the nuisance down to the time of the trial may be shown. Suehr v. Chicago Sanitary Dist., 242 Ill. 496. In Maryland testimony as to the condition of the property after the institution of the suit is not received. Baltimore B. R. Co. v. Sattler, 102 Md. 595.

⁴³ Daniel v. Ft. Worth, etc. R. Co. (Tex. Civ. App.), 69 S. W. 198; McClure v. Broken Bow, *supra*.

The owner of leased property may recover for damage to the freehold though he has not restored it to its former condition. Green v. Sun Co., 32 Pa. Super. Ct. 521.

⁴⁴ Sloss-S. S. & I. Co. v. Mitchell, 181 Ala. 576; Board of Park Com'rs v. Donahue, 140 Ky. 502; Ewing v. Louisville, 140 Ky. 726, 31 L.R.A. (N.S.) 612; Smith v. Sedalia, 182 Mo. 1; Upson C. & M. Co. v. Williams, 28 Ohio C. C. 388; Bricker v. Conemaugh S. Co., 32 Pa. Super. Ct. 283; Harvey v. Susquehanna C. Co., 201 Pa. 63, 88 Pa. 800; Helbling v. Allegheny C. Co., 201 Pa. 171.

⁴⁵ Mineral Wells v. Russell, 30 Tex. Civ. App. 232.

⁴⁶ Northcutt v. Springfield Crushed Stone Co., 178 Mo. App. 389; Ireland v. Bowman (Ky.), 114 S. W. 338; Immel v. Herb, 50 Pa. Super. Ct. 241; Jefferson F. Co. v. Rich, 182 Ala. 633; Fincher v. Baltimore, etc. R. Co., 179 Ill. App. 622; Reuter v. Same, id. 570; Atlantic C. L. R. Co. v. Knapp, 139 Ga. 422; Wilson v. Guyandotte T. Co., 70 W. Va. 602; Cumberland G. Co. v. Baugh, 151 Ky. 641, 43 L.R.A. (N.S.) 1037; City of Henderson v. Robinson, 152 Ky. 245; Same v. Herron, 152 Ky. 341; Ardmore v. Orr, 35 Okla. 305; City of Louisville v. Sauter, 149 Ky. 721; Dalton v. Moore, 141 Fed. 311, 72 C. C. A. 459; Sloss-S. S. & I. Co. v. Mitchell, 167 Ala. 226; Tutwiler C., etc. Co. v. Nichols, 146 Ala. 364, 119 Am. St. 34; St. Louis S. R. Co. v. Mackey, 95 Ark. 297; Czarnecki v. Bolen-D. C. Co., 91 Ark. 58; Sacchi v. Bayside L. Co., 13 Cal. App. 72; Gorham v. New Haven, 79 Conn. 670; Dudley v. New Britain, 77 Conn. 322; Hodges v. Pine Product Co., 135 Ga. 134, 33 L.R.A.

The rule of liability based upon permanent depreciation in

- (N.S.) 74; *Jones v. Royster G. Co.*, 6 Ga. App. 506; *Towaliga Falls P. Co. v. Sims*, 6 Ga. App. 749; *Young v. Extension D. Co.*, 13 Idaho 174; *Atchison, etc. R. Co. v. Jones*, 110 Ill. App. 626; *Muncie P. Co. v. Keesling*, 166 Ind. 479; *Same v. Martin*, 164 Ind. 30; *Merchants' Mut. Tel. Co. v. Hirschman*, 43 Ind. App. 283; *Over v. Dehne*, 38 Ind. App. 427; *Baltimore, etc. R. Co. v. Quillen*, 34 Ind. App. 330, 107 Am. St. 183; *McGill v. Pintsch C. Co.*, 140 Iowa 429, 20 L.R.A.(N.S.) 466; *Steber v. Chicago, etc. R. Co.*, 139 Iowa 153; *Harvey v. Mason City, etc. R. Co.*, 129 Iowa 465, 3 L.R.A.(N.S.) 973, 113 Am. St. 483; *Holbrook v. Griffiths*, 127 Iowa 505; *Vogt v. Grinnell*, 123 Iowa 332; *Chesapeake & O. R. Co. v. Stein*, 142 Ky. 515; *Fidelity T. Co. v. Shelbyville W. & L. Co. (Ky.)*, 110 S. W. 239; *Louisville, etc. St. R. Co. v. Roberts*, 144 Ky. 820; *Ewing v. Louisville*, 140 Ky. 726, 31 L.R.A.(N.S.) 612; *Richmond v. Gentry*, 136 Ky. 319, 136 Am. St. 255; *Probst v. Hinesley*, 133 Ky. 64; *Cincinnati, etc. R. Co. v. Gillespie*, 130 Ky. 213; *Illinois Cent. R. Co. v. Elliot*, 129 Ky. 121; *Long v. Louisville & N. R. Co.*, 128 Ky. 26, 13 L.R.A.(N.S.) 1063; *Louisville & N. R. Co. v. Whitsell*, 125 Ky. 433; *Pickerill v. Louisville*, 125 Ky. 213; *Louisville & N. R. Co. v. Seomp*, 124 Ky. 330; *Standley v. Atchison, etc. R. Co.*, 121 Mo. App. 537; *Krebs v. Bambrick C. Co.*, 144 Mo. App. 649; *Delamarre v. Bott*, 78 N. J. L. 234; *Pritchard v. Edison E. I. Co.*, 179 N. Y. 364; *Howard v. Buffalo (Misc.)*, 122 N. Y. Supp. 1095; *Senglaup v. Acker P. Co.*, 121 App. Div. (N. Y.) 49; *Bly v. Edison E. I. Co.*, 111 App. Div. (N. Y.) 170; *Van Veghten v. Hudson River P. T. Co.*, 103 App. Div. (N. Y.) 130; *Ahrens v. Rochester*, 97 App. Div. (N. Y.) 480; *Bates v. Holbrook*, 89 App. Div. (N. Y.) 548; *Dinger v. New York*, 42 N. Y. Misc. 319; *Stroth B. Co. v. Schmitt*, 1 Ohio C. C. (N.S.) 177, 25 Ohio C. C. 231; *McCartney v. Philadelphia*, 22 Pa. Super. Ct. 257; *Louisville & N. T. Co. v. Lellyett*, 114 Tenn. 368, 1 L.R.A.(N.S.) 49; *Paris v. Jenkins*, — Tex. Civ. App. —, 122 S. W. 411; *Cane Belt R. Co. v. Ridgeway*, 38 Tex. Civ. App. 108; *Karns v. Allen*, 135 Wis. 48; *Chicago, etc. R. Co. v. Hoover*, 147 Ky. 33; *Francis v. Schoellkopf*, 53 N. Y. 152; *Wiel v. Stewart*, 19 Hun 272; *Whitmore v. Bischoff*, 5 id. 176; *Emery v. Lowell*, 109 Mass. 197; *Walrath v. Redfield*, 11 Barb. 368; *Hatfield v. Central R. Co.*, 33 N. J. L. 251; *Carl v. Sheboygan, etc. R. Co.*, 46 Wis. 625; *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42; *Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626; *Schuylkill N. Co. v. Farr*, 4 W. & S. 362; *Gile v. Stevens*, 13 Gray 146; *Jutte v. Hughes*, 67 N. Y. 267; *Pinney v. Berry*, 61 Mo. 359; *Eufaula v. Simmons*, 86 Ala. 515; *Jackson v. Kiel*, 13 Colo. 378, 16 Am. St. 207; *Georgia R. & B. Co. v. Berry*, 78 Ga. 744; *Sullens v. Chicago, etc. R. Co.*, 74 Iowa 659, 7 Am. St. 501; *Shirely v. Cedar Rapids, etc. R. Co.*, 74 Iowa 169, 7 Am. St. 471; *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433, 11 Am. St. 679; *Schwab v. Cleveland*, 28 Hun 458; *Pond v. Metropolitan E. R. Co.*, 42 Hun 567; *Harmon v. Railroad*, 87 Tenn. 614; *Gulf, etc. R. v. Hellsley*, 62 Tex. 593; *Same v. Tait*, 63 id. 223; *Sabine, etc. R. Co. v. Johnson*, 65 id. 389; *Same v. Broussard*,

rental value may be applied as well where the owner occupies the affected premises as where they are rented or offered for rent,⁴⁷ or are not occupied at all, the owner being shown to

69 id. 617; *Comminge v. Stevenson*, 76 Tex. 642; *Willey v. Hunter*, 47 Vt. 479; *Langfelt v. McGrath*, 33 Ill. App. 158; *Woodin v. Wentworth*, 57 Mich. 278; *Colriek v. Swinburne*, 105 N. Y. 503; *Van Bruen v. Fishkill W. Co.*, 50 Hun 448; *Bennett v. Marion*, 119 Iowa 473; *Mitchell v. West (Iowa)*, 93 N. W. 380; *Swift v. Broyles*, 115 Ga. 885; *Hollenbeck v. Marion*, 116 Iowa 69; *Reisert v. City of New York*, 69 App. Div. (N. Y.) 302; *Keithsburg v. Simpson*, 70 Ill. App. 467; *Valparaiso City W. Co. v. Dickover*, 17 Ind. App. 233; *Podhaisky v. Cedar Rapids*, 106 Iowa 543; *Louisville v. McGill*, 21 Ky. L. Rep. 718; *Louisville v. O'Malley*, 21 Ky. L. Rep. 873; *Jungblum v. Minneapolis*, etc. R. Co., 70 Minn. 153; *Gillett v. Kinderhook*, 77 Hun 604; *Fischer v. Sandford*, 12 Pa. Super. Ct. 435; *Railway Co. v. Cook*, 57 Ark. 387, citing the text; *Ivie v. McMunigal*, 66 Mo. App. 437; *Macon v. Dannenberg*, 113 Ga. 1111; *Hoffman v. Flint*, etc. R. Co., 114 Mich. 316; *Adams v. Durham & N. R. Co.*, 110 N. C. 325.

In a recent Oregon case the true measure of damages was held to be the depreciation in the rental value plus compensation for the discomfort and annoyance or injury to health which plaintiff had suffered by the existence of the nuisance. *Porges v. Jacobs*, 75 Ore. 488.

The owner of a hotel cannot recover, in addition to the loss of rental value, for a reduction of rent made because of the nuisance, nor for rent which he voluntarily remitted in order that the tenant

might take a new lease, nor for his personal annoyance on account of the nuisance, he having chosen to board in the hotel. *Miller v. Edison E. I. Co.*, 33 N. Y. Misc. 664.

The tenant may elect the measure of damages. *Hoffman v. Edison E. I. Co.*, 87 App. Div. (N. Y.) 371.

In *Hatch v. Dwight*, 17 Mass. 239, 9 Am. Dec. 145, a mortgagee who had taken possession was held entitled to recover interest on the value of a mill privilege rendered useless for the erection of a mill by a dam built below.

⁴⁷ *Bernhardt v. Baltimore*, etc. R. Co., 165 Ill. App. 408; *Michel v. Supervisors*, 39 Hun 47; *Brown v. Woodliff*, 89 Ga. 413; *Francis v. Schoellkopf*, 53 N. Y. 152; *Rosenheimer v. Standard G. L. Co.*, 36 App. Div. (N. Y.) 1; *Harris v. Philadelphia*, 155 Pa. 76; *Swift v. Broyles*, 115 Ga. 885; *Junction City L. Co. v. Sharp*, 92 Ark. 538, citing the text; *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. 133; *Savannah*, etc. R. Co. v. *Parish*, 117 Ga. 893; *Quinn v. Chicago*, etc. R. Co., 23 S. D. 126, 22 N.R.A.(N.S.) 789; *Benjamin v. Gulf*, etc. R. Co., 49 Tex. Civ. App. 473; *Gulf*, etc. R. Co. v. *Blue*, 46 Tex. Civ. App. 239. But compare *Pickerill v. Louisville*, 125 Ky. 213. *Contra*, *Potter v. Froment*, 47 Cal. 165.

A life tenant may recover the entire rental value of premises rendered untenable notwithstanding he occupied them rather than remove from them. *Herbert v. Rainey*, 162 Pa. 525.

But in Illinois it is ruled that the damages must be measured by

have intended making another use thereof.⁴⁸ If he occupies them he is entitled to recover their lessened usable value.⁴⁹ The right to recover for temporary depreciation in the rental value of leased premises is in the tenant who took possession under a lease executed during the existence of the nuisance. The owner cannot recover because it would subject the defendant to a double liability.⁵⁰ But if the damage would extend beyond the tenant's term or the landlord is bound to restore the premises he would doubtless be entitled to a remedy. The loss of crops is not an element of damages in favor of the landlord if he was not entitled to a share of them.⁵¹ There cannot be a recovery either for the total value of land destroyed or for its lessened value and, in addition, for the loss of its rental value during the same period.⁵² It has been said of the distinction between these rules for measuring damages that so far as usable value includes something other than rental value it must necessarily refer to the net results to be obtained by the owner from the property in any legitimate use to which it could be put. Usable value must be shown by testimony from which the jury may find such value other than the conclusion of a witness.⁵³

the discomforts and the deprivation of the healthful use and comforts of the plaintiff's home, and not by depreciation in its rental value. *Fairbank Co. v. Nicolai*, 167 Ill. 242; *Cleveland, etc. R. Co. v. Pattison*, 67 Ill. App. 351; *Chicago-V. C. Co. v. Wilson*, id. 443; *Litchfield v. Whitenack*, 78 id. 364; *Vogler v. Chicago & Carterville Coal Co.*, 180 Ill. App. 51.

⁴⁸ *Pettit v. Grand Junction*, 119 Iowa 352.

⁴⁹ *Southern R. Co. v. Routh*, 161 Ky. 196; *City of Louisville v. Sauter*, 149 Ky. 721; *Tallman v. Metropolitan E. R. Co.*, 121 N. Y. 119, 8 L.R.A. 173; *Woolsey v. New York E. R. Co.*, 134 N. Y. 323, 31 id. 891; *Thomason v. Railroad*, 142 N. C. 300; *Toebbe v. Covington*, 145 Ky. 763.

⁵⁰ *Miller v. Edison E. Co.*, 184 N. Y. 17, 3 L.R.A.(N.S.) 1060. Compare *Southern R. Co. v. Routh*, 161 Ky. 196.

⁵¹ *Western Maryland R. Co. v. Martin*, 110 Md. 554.

⁵² *Texas & P. R. Co. v. Ford*, 54 Tex. Civ. App. 312.

⁵³ *Randall v. United States L. Co.*, 72 App. Div. (N. Y.) 317.

The difference between the amount of rent stipulated to be paid before and after the damage is not decisive of the diminished rental value because unrelated contingencies may have played an important part in affecting the amounts. Such evidence may go to the jury, which may find the causes responsible for the lessened value. *Sloss-S. S. & I. Co. v. Mitchell*, 181 Ala. 576.

For the general rules governing the proof of value the reader is referred to the sections which treat of that subject. It is enough here to cite a case or two which bear upon the proof of rental value. Such value may not be shown by proof of what was received before and after the nuisance came into existence; circumstances for which the defendant was not responsible may have affected the amount realized for the premises after that event.⁵⁴ Depreciation in the value of pasturage may be shown by proof that cattle therein did not grow as usual after the event complained of; but that is not an element of damage if there has been a recovery for lessened rental value.⁵⁵ There is a relation between the value and the rental value of property.⁵⁶

Where the action is brought by the owner alone there cannot be a recovery, in addition to such depreciation and the cost of repairs and protection from further injury, for depreciation in value unless permanent damages are recovered.⁵⁷ Where the action is brought to recover for past injuries and the measure of liability depends upon the rental or usable value of the property affected the estimate must be made upon the basis of the value of the property in the condition it was during the time it was affected; damages cannot be recovered upon the

The measure of relief, where the nuisance has ceased, will include loss of rental value and compensation for permanent physical injury to the property regulated by the situation when the suit is decided. *Gasse v. Development & F. Co.*, 135 N. Y. Supp. 732.

⁵⁴ *Sloss-S. S. & I. Co. v. Mitchell*, 157 Ala. 226.

⁵⁵ *Vogt v. Grinnell*, 123 Iowa 332.

⁵⁶ *Krebs v. Bambrick C. Co.*, 144 Mo. App. 649.

⁵⁷ *Barrick v. Schifferdecker*, 123 N. Y. 52.

Where houses occupied by rent-paying tenants were caused to be flooded and the tenants were driven out and did not return, and, after they were restored they remained

vacant, through no fault of the plaintiff, the loss of rent during such period of vacancy was not an element of the damages. "Something might be said in favor of the justice of its allowance; nevertheless, we think it unadvisable for courts to venture into a field so full of speculation and uncertainty, and that the rule allowing full recovery for diminished rental value will meet the requirements of substantial justice. For it is to be noted that that rule allows that measure of recovery as an injury to the land, whether there is any subsequent diminution in the actual rents or not." *Sloss-S. S. & I. Co. v. Mitchell*, 181 Ala. 576.

basis of its value for uses to which it might have been, but was not, put.⁵⁸ If the property injured is not devoted to any use the test is the value of its use when occupied for any purpose for which it is suitable in its then condition.⁵⁹ The supreme court of Texas favors a more elastic rule, one more nearly like that which generally prevails in condemnation proceedings: Where damages for a permanent injury are sought the standard is the market value, at the time of the trial, of the property for any use to which it might be appropriated, not excluding evidence showing its value for a particular purpose.⁶⁰ The use to which improved land has been put is evidence of its special value for that use, and affords a basis for assessing damages.⁶¹ The diminution of the value of the land is the measure of recovery where the plaintiff is executor and has held possession of the land affected since the death of the testator.⁶² Damages

⁵⁸ *Tallman v. Metropolitan E. R. Co.*, 121 N. Y. 119, 8 L.R.A. 173; *Hatfield v. Central R. Co.*, 33 N. J. L. 251; *Dorlan v. East Brandywine & W. R. Co.*, 46 Pa. 520; *Potter v. Indiana, etc. R. Co.*, 95 Mich. 389; *Southern M. Co. v. Darnell*, 94 Ga. 231.

The owner of a dairy farm through which a polluted stream ran has been permitted to show the extent of his milk business before the nuisance was created and the scope of it thereafter, and that numerous cases of typhoid fever prevailed on the premises from which the pollution came, without showing that the typhoid germs reached his farm or that the water of the stream was used for drinking purposes. *Gorham v. New Haven*, 79 Conn. 670.

⁵⁹ *Pettit v. Grand Junction*, 119 Iowa 352.

These cases may be distinguishable from an English case brought to recover for the obstruction of ancient lights. In such an action the damages are not to be assessed

solely with reference to the effect the diminished light has for the purposes of occupation or business to which the premises have been or were put at the time of the obstruction; the uses to which they might thereafter be put are to be considered. *Moore v. Hall*, 3 Q. B. Div. 178, disapproving *Martin v. Goble*, 1 Camp. 320.

In estimating damages caused by the obstruction of ancient lights the whole of the premises affected was considered in view of their value for the erection of buildings of a character adapted to the neighborhood, in the condition they were in then, though it was probable the buildings would soon be demolished by public authority. *Griffith v. Clay*, [1912] 1 Ch. 291, [1912] 2 Ch. 291.

⁶⁰ *Sherman G. & E. Co. v. Bel-den*, 103 Tex. 59, 27 L.R.A.(N.S.) 237.

⁶¹ *Illinois Cent. R. Co. v. Trustees of Schools*, 112 Ill. App. 488.

⁶² *Drake v. Lady Ensley C., I. & R. Co.*, 102 Ala. 501, 24 L.R.A. 64.

may be recovered in the same action for injury of a temporary character and for that which is permanent.⁶³ It is probable that if any circumstances of aggravation exist or there is great difficulty in proving the damage that the plaintiff will not be required to produce the most convincing proof as to its amounts.⁶⁴

§ 1048. *Other elements of damages.* The measure of damages thus stated compensates the ordinary or general loss from the nuisance. If there are special elements of damage, as in most cases there are, the recovery may be increased accord-

⁶³ Alabama Con. C. & I. Co. v. Vines, 151 Ala. 398, quoting the text; Illinois Cent. R. Co. v. Elliot, 129 Ky. 121; Chesapeake & O. R. Co. v. Stein, 142 Ky. 515; Lynch v. Troxell, 207 Pa. 162; Brisky v. Leavenworth L., B. & W. Co., 68 Wash. 386; Wallace v. Kansas City, etc. R. Co., 47 Mo. App. 491, citing Babb v. Curators of State University, 40 id. 173; Givens v. Van Studdiford, 4 Mo. App. 938, 86 Mo. 149, 56 Am. Rep. 421, and this section.

There may be a recovery for occasional nuisances under a declaration alleging a continuous nuisance if they were caused in the manner pleaded. Cohen v. Bellenot, 2 Va. Dec. 639; Virginia R. & P. Co. v. Ferebee, 115 Va. 289.

⁶⁴ Weber v. Berlin, 8 Ont. L. R. 302.

In Tuebner v. California St. R. Co., 66 Cal. 171, there was a verdict for \$1,000. In answer to the contention that the amount was excessive the court said: "It was not incumbent on the plaintiffs to prove their injury by value; it may have been of trivial cost to sweep up a pail of soot, and yet the soot may have caused serious injury; it may also have been quite out of the question to prove the loss in value

sustained by the jarring. It was for the jury to determine a reasonable sum to be proper compensation."

Evidence of the damage done anterior to the time for which there may be a recovery under a statute and after the action was begun is competent to show the effects of the nuisance, as is evidence of the kind and value of the crops raised on the land, and a decrease of fish caught in the polluted stream. Tutwiler C., etc. Co. v. Nichols, 146 Ala. 364, 119 Am. St. 34.

Where the injury is permanent the jury may consider what the subsequent result has been. Zinser v. Sanitary Dist., 175 Ill. App. 9.

The rule of diminished value may not be applied in cases where it includes the general damages suffered alike by all the property adjacent to the nuisance. Wilson v. Oregon-W. R. & N. Co., 71 Wash. 102.

The evidence as to damages must be limited to the effect of the nuisance upon the value of the land where that measures the recovery. Miekley v. General Roofing Mfg. Co., 179 Ill. App. 493.

The general rule of damages as stated cannot be applied unless the evidence shows the value of the

ingly.⁶⁵ If the injury done makes repairs necessary their expense may be recovered⁶⁶ as well as the rent which would have been received from the property if it was occupied during the time they were being made,⁶⁷ if they were made without unnecessary delay.⁶⁸ If the repairs made have not restored the property to its former condition the difference in its value before injury and after they were made may be recovered, in addition to the reasonable cost of repairs and the loss of rent.⁶⁹ A mill

land before and after it was affected. *Texas, etc. R. Co. v. Norman* (Tex. Civ. App.), 153 S. W. 1184.

⁶⁵ *Central Georgia Power Co. v. Pope*, 141 Ga. 186, citing the text; *Atlanta & B. A. L. R. v. Wood*, 160 Ala. 657; *St. Louis S. R. Co. v. Mackey*, 95 Ark. 297; *Brown S. Co. v. Chattahoochee L. Co.*, 121 Ga. 809; *Baltimore B. R. Co. v. Sattler*, 100 Md. 306; *Frick v. Kansas City*, 117 Mo. App. 488; *Mahoney v. Same*, 106 Mo. App. 39; *Landau v. New York*, 180 N. Y. 48, 105 Am. St. 709; *Woodstock H. & S. Mfg. Co. v. Charleston L. & W. Co.*, 84 S. C. 306. See *Harvey v. Mason City, etc. R. Co.*, 129 Iowa 465, 3 L.R.A. (N.S.) 973, 113 Am. St. 483.

Where a mining company which used the chlorinating process permitted its *detritus* and tailings to run down a stream on the lands of the lower owner the damages were made up of these elements: the injury to the land, to the right to water the stock, to the air, to the fishing privilege, to the plaintiff's ditches and to two public roads, if he sustained special damage as to the latter. *Threatt v. Brewer M. Co.*, 49 S. C. 95, 128.

⁶⁶ *Krebs v. Bambrick C. Co.*, 144 Mo. App. 649; *Grant v. St. Louis, etc. R. Co.*, 149 Mo. App. 306; *Frick v. Kansas City*, 117 Mo. App. 488;

Davelaar v. Milwaukee, 123 Wis. 413; *Lepper v. Wisconsin S. Co.*, 146 Wis. 494; *Pickerill v. Louisville*, 125 Ky. 213; *Bishop v. Readshoro C. Mfg. Co.*, 85 Vt. 141, 36 L.R.A. (N.S.) 1171.

⁶⁷ *Spradra Creek C. Co. v. Eureka A. C. Co.*, 104 Ark. 359; *Cox v. Odell*, 1 Cal. App. 682; *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. 133; *Chicago v. Rust*, 117 Ill. App. 427; *Over v. Dehne*, 38 Ind. App. 427; *Board of Park Com'rs v. Donahue*, 140 Ky. 502; *South Side R. Co. v. St. Louis, etc. R. Co.*, 154 Mo. App. 364; *Stevens v. State*, 65 N. Y. Misc. 240; *Reisert v. New York*, 42 N. Y. Misc. 275; *Cairns v. Chester City*, 34 Pa. Super. Ct. 43; *McHenry v. Parkersburg*, 66 W. Va. 533, 29 L.R.A. (N.S.) 860; *Toebe v. Covington*, 145 Ky. 763; *Rust v. Victoria G. D. Co.*, 36 Ch. Div. 113, 131; *Graves v. Kansas City, etc. R. Co.*, 69 Mo. App. 574; *Slavin v. State*, 152 N. Y. 45; *Connor v. State*, 152 N. Y. 49; *Weir v. Plymouth*, 148 Pa. 566; *Herbert v. Rainey*, 162 Pa. 525; *Nashville v. Sutherland*, 94 Tenn. 356; *San Antonio v. Estate of Mackey*, 22 Tex. Civ. App. 145.

⁶⁸ *Sloss-S. S. & I. Co. v. Mitchell*, 181 Ala. 576.

⁶⁹ *Kerns v. Kansas City*, 79 Kan. 562.

owner may show the loss of custom, expense of remedying the injury done by filling up a millstream, and the increased cost of machinery to operate his mill.⁷⁰ The added expense of navigating an obstructed stream may be recovered.⁷¹ The owner of property is not entitled to recover, in addition, for a depreciation of rental value because of a prejudice which exists against his property in consequence of the nuisance. That is not a damage which is the natural result of, or caused by, the injury.⁷² Where land temporarily injured or permanently destroyed is so connected with other land that the value of the latter is permanently impaired the extent of such impairment is an element of damage.⁷³ Where the defendant caused the nuisance by digging a ditch and by means thereof conducted water from his brewery into a clay pit on the plaintiff's premises, and such water became stagnant and offensive, and plaintiff incurred expense in filling up the pit by direction of the board of health such expense was

⁷⁰ *Atlanta & B. A. L. R. v. Wood*, 160 Ala. 657.

The cost of operating a mill by electricity may be recovered where the water by which it was operated has been diverted. *Dement v. Walla Walla*, 58 Wash. 60.

⁷¹ *Pharr v. Morgan's, etc. Co.*, 115 La. 138, 10 L.R.A. (N.S.) 710.

⁷² *Wigle v. Gosfield South*, 25 Ont. L. R. 646; *McGill v. Pintsch C. Co.*, 140 Iowa 429, 20 L.R.A. (N.S.) 466, citing the text; *Rust v. Victoria G. D. Co.*, *supra*; *Robb v. Carnegie*, 145 Pa. 324, 27 Am. St. 694, 14 L.R.A. 329; *San Antonio v. Estate of Mackey*, *supra*, citing the text.

The rights and liabilities of the parties are not affected by changes in the value of the property by reason of other causes than the nuisance. *St. Louis, etc. R. Co. v. West*, — Tex. Civ. App. —, 131 S. W. 839.

It was said in *West Leigh C. Co. v. Tunncliffe*, [1908] App. Cas. 27: To say that the surface land would sell for less because of the appre-

hension of future subsidence is no doubt true. To say that the depreciation in present value caused by that apprehension ought to be included as an element of compensation is, in my view, unsound. For that is asking compensation, not for physical damage which has in fact arisen, but for the present influence on the market of a fear that such damage may occur in the future.

A person who contemplated the erection of houses cannot recover their rental value because the building of them was delayed. As owner of the land he had the advantage of the use of his money and was not entitled to such rental. If there was an increase in the price of labor or materials during the necessary delay, it is probable there may be a recovery on account thereof. *Mahoney v. Kansas City*, 106 Mo. App. 39.

⁷³ *Trinity & S. R. Co. v. Schofield*, 72 Tex. 496.

The recovery of damages for

an item of damage.⁷⁴ The owner and occupier may recover for expenses incurred to protect the premises affected by the nuisance against a continuance of the injury as well as to repair that already done.⁷⁵ The owner of the reversion may also recover expenditures reasonably made to guard against additional injury,⁷⁶ or other expense incurred;⁷⁷ but interest on such expenditures cannot generally be recovered in New York.⁷⁸ In Missouri interest may be recovered on money expended to prevent further damage or to remedy the injury done.⁷⁹ Interest has been recovered as part of the damages from the time the injury was sustained,⁸⁰ or from the time redress was demanded.⁸¹ And in New York, where the claim was against the state and payment of it was delayed by unsuccessful litigation, interest was allowed from the time the claim was filed.⁸² Interest on the value of property from the time it was rendered useless is necessary to full compensation.⁸³

maintaining a nuisance in a highway must be limited to the land described in the complaint, notwithstanding the plaintiff owned other land in close proximity to that described. *Pittsburgh, etc. R. Co. v. Noftsgcr*, 148 Ind. 101.

⁷⁴ *Shaw v. Cummiskey*, 7 Pick. 76; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. 345; *Reichert v. Backenstross*, 71 Hun 516.

⁷⁵ *Texas Co. v. Giddings*, — Tex. Civ. App. —, 148 S. W. 1142; *Murray v. Butte*, 35 Mont. 161; *Orange L. Co. v. Thompson* (Tex. Civ. App.), 126 S. W. 604; *Benjamin v. Gulf, etc. R. Co.*, 49 Tex. Civ. App. 473; *Pritchard v. Edison E. I. Co.*, 179 N. Y. 364; *San Antonio, etc. R. Co. v. Gurley*, 37 Tex. Civ. App. 283; *Weber v. Berlin*, 8 Ont. L. R. 302; *Barriek v. Schifferdecker*, 123 N. Y. 52; *Sayre v. State*, 123 N. Y. 291; *Sherman v. Fall River I. Works*, 2 Allen 524, 79 Am. Dec. 799; *Bardeen v. Portage*, 79 Wis. 126; *Jutte v. Hughes*, 67 N. Y. 267;

Kankakee, etc. R. Co. v. Horan, 22 Ill. App. 145; *Chicago, etc. R. Co. v. Carey*, 90 Ill. 514; *Springfield v. Griffith*, 46 Ill. App. 246; *Chesapeake & O. R. Co. v. Gross*, 19 Ky. L. Rep. 1926; *Hughes v. Austin*, 12 Tex. Civ. App. 178; *Paddock v. Somes*, 51 Mo. App. 320.

⁷⁶ *Comstock v. New York, etc. R. Co.*, 48 Hun 225.

⁷⁷ *Hoffman v. Edison E. I. Co.*, 87 App. Div. (N. Y.) 371.

⁷⁸ *Sayre v. State*, 123 N. Y. 291.

⁷⁹ *Paddock v. Somes*, 51 Mo. App. 320.

⁸⁰ *Toledo v. Grasser*, 12 Ohio C. C. 520; *Young v. Extension D. Co.*, 13 Idaho 174 (on decreased rental value); *Gulf, etc. R. Co. v. Moseley*, 6 Ind. Ty. 369.

⁸¹ *Upson C. & M. Co. v. Williams*, 28 Ohio C. C. 388.

⁸² *Lakeside P. Co. v. State*, 45 App. Div. (N. Y.) 112, 55 App. Div. (N. Y.) 208.

⁸³ *Weber v. Berlin*, 8 Ont. L. R. 302.

The cost of restoring property to its previous condition is the proper measure of damages for injury thereto when it is less than the diminution in its market value by reason of the injury,⁸⁴ but if the cost of restoration would exceed the diminution in value the latter measures the damages.⁸⁵ The loss caused by inability to use property while it is being repaired is also an element of damages.⁸⁶ The cost of restoring property is not measurable by the expense of providing a substitute for that destroyed, but by putting the plaintiff in the position he was in before the wrong was done.⁸⁷ The owner of logs scattered and delayed by reason of a boom by which the defendant obstructed a floatable stream has been allowed the depreciation in the market value during the detention, for loss of logs carried away and the expense of searching for others.⁸⁸ A plaintiff who occupies a home is not limited to the recovery of the diminished rental value of it, but may be compensated for any actual inconvenience and physical discomfort which materially affected

⁸⁴ *Cincinnati v. McLaughlin*, 12 Ohio C. C. (N.S.) 220; *Davelaar v. Milwaukee*, 123 Wis. 413; *Missouri, etc. R. Co. v. Merritt*, 46 Tex. Civ. App. 130.

⁸⁵ *Covington v. Berry*, 120 Ky. 582, quoting the text; *McCook v. McAdams*, 76 Neb. 1; *Cincinnati v. Wright*, 2 Ohio N. P. (N.S.) 53; *Bachert v. Lehigh C. & N. Co.*, 208 Pa. 362; *Welliver v. Irondale E. L., etc. Co.*, 38 Pa. Super Ct. 26; *Cairns v. Chester City*, 34 id. 43; *Glasgow v. Altoona*, 27 id. 55; *Gulf, etc. R. Co. v. Felts* (Tex. Civ. App.), 135 S. W. 719; *Hartshorn v. Chad-dock*, 135 N. Y. 116, 17 L.R.A. 426; *Stevenson v. Ebervale C. Co.*, 201 Pa. 112, 88 Am. St. 805; *Mellick v. Pennsylvania R. Co.*, 203 Pa. 457; *Gift v. Reading*, 3 Pa. Super. Ct. 359; *Lentz v. Carnegie*, 145 Pa. 612, 27 Am. St. 717; *Eshleman v. Martie*, 152 Pa. 68; *Williams v. Fulmer*, 151 Pa. 405, 31 Am. St. 767. See § 1047.

Evidence of the cost of partial restoration is competent. The jury may act upon it or award damages on the basis of diminished value. *Senglaup v. Acker P. Co.*, 121 App. Div. (N. Y.) 49.

⁸⁶ *Lynch v. Troxell*, 207 Pa. 162.

⁸⁷ *Ireland v. Bowman* (Ky.), 114 S. W. 338; *Hoober v. New Holland W. Co.*, 43 Pa. Super Ct. 262.

⁸⁸ *Plummer v. Penobscot L. Ass'n*, 67 Me. 363.

The loss of personal property is an element of the damages. *Ardmore v. Orr*, 35 Okla. 305.

The loss of logs at a place where there is no market for them must be compensated for at market value at the place they were destined for, less the cost of getting them there and interest from the date when they would have reached there but for the interference with their movement. *Burr's Ferry, etc. R. Co. v. Allen* (Tex. Civ. App.), 149 S. W. 358.

the comfortable and healthful enjoyment and occupancy of his home, as well as for any actual injury to his health or property caused by the nuisance.⁸⁹ In addition to a recovery for the annoyance and trouble caused by a nuisance which endangers life the expense of the removal of the plaintiff and his family to a place of safety and the reasonable rent paid for a new residence may be recovered.⁹⁰ The damages to a lot-owner resulting from the temporary obstruction of an alley to which his lot runs back and which he uses in common with others are measurable by the diminished value of the use during the time the obstruction continued.⁹¹ This rule may be inapplicable to property owned and rented by the plaintiff, but it was not so as to property which he permitted a son to occupy free of charge.⁹² Where the water of a spring is damaged the recovery is measured by the injury sustained in being deprived of the water for domestic or farm purposes. It cannot be shown that the plaintiff had sold water from the spring, it not appearing it was entirely destroyed.⁹³ For the continuous discharge of culm into a stream whereby it constantly accumulates in a mill dam and race, the mill being equipped for both steam and water power, there may be a recovery for the increased cost of running the mill by steam, in so far as the use of steam was made necessary by the defendant's acts, and for the cost of cleaning out the dam and race. If an injunction is granted to prohibit the continuance of the nuisance there cannot be a recovery of the cost of a new arrangement of gateways and sluices intended to keep the

⁸⁹ Langley v. Augusta, 118 Ga. 590, 98 Am. St. 133; Baltimore B. R. Co. v. Sattler, 102 Md. 595; Weber v. Berlin, 8 Ont. L. R. 302; Ingram v. Wishkah B. Co., 35 Wash. 191 (value of chattels destroyed); Berger v. Minneapolis G. Co., 60 Minn. 296; Pierce v. Wagner, 29 Minn. 355; Mansfield v. Hunt, 19 Ohio C. C. 488.

In the absence of a count for negligence or an allegation that injury to health was caused by a particular event which produced a fall there

cannot be a recovery for injury to health in an action for a nuisance to land. Evans v. Finn, 4 New South Wales St. Rep. 297.

⁹⁰ Evans v. Finn, *supra*.

⁹¹ Rogers v. Flick, 144 Ky. 844; Big Sandy R. Co. v. Bays, 31 Ky. L. Rep. 288; Bannon v. Rohmeiser, 17 Ky. L. Rep. 1378.

⁹² Bannon v. Murphy, 18 Ky. L. Rep. 989.

⁹³ Kinnaird v. Standard O. Co., 89 Ky. 468, 7 L.R.A. 451.

In such a case the recovery is not

mill and race clear in the future.⁹⁴ The cost of obtaining water to take the place of that diverted from a river should not include the expense of an addition to, or improvement of, the property affected, which improvement is retained by the plaintiff; the recovery should be of the value of the use of the improvement up to the time suit was brought, including an allowance for wear and depreciation; a second recovery for these elements of damage may be had for the continuance of the nuisance. Any cost incurred in obtaining water before the diversion is to be deducted from the expense of getting the new supply.⁹⁵ The right of a proprietor whose land abuts on a stream to enjoy the same for fishing is a substantial one.⁹⁶ The unsightliness of the thing causing the nuisance is relevant to show the value of the property, and if the sufficiency of a ditch to carry away all the water which naturally came to it from either ordinary or extraordinary rainfalls has been impaired the consequences thereof are elements of damage.⁹⁷

§ 1049. **Injuries to crops, trees, etc.** For injury done to the plaintiff's crops by flowing his land he is entitled to recover their value, standing upon it, so far as destroyed and the depreciation in value of such as are only injured or partially destroyed,⁹⁸

limited to the cost of removing the nuisance. *Louisville & N. R. Co. v. Simpson*, 17 Ky. L. Rep. 989.

⁹⁴ *Keppel v. Lehigh C. & N. Co.*, 200 Pa. 649.

After a nuisance has been abated the loss sustained during its continuance may be recovered; the injury done the property, as well as the decrease in its rental value, may be shown. *Immel v. Herb*, 50 Pa. Super. Ct. 241.

⁹⁵ *Weidman S.-D. Co. v. Newark*, 83 N. J. L. 50.

⁹⁶ *West Muncie S. Co. v. Slack*, 164 Ind. 21.

The destruction of, or injury to, a fishing privilege is a ground for recovery, and an allegation that the fish in a stream on the plaintiff's land were destroyed is relevant,

though their value does not measure the damages. *Hodges v. Pine Product Co.*, 135 Ga. 134.

⁹⁷ *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. 133.

⁹⁸ *Chicago, etc. R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. 602 (not their value to the plaintiff, but their general value); *Ducktown S., C. & I. Co. v. Barnes* (Tenn.) 60 S. W. 593; *Railway Co. v. Lyman*, 57 Ark. 512; *Teller v. Bay & R. D. Co.*, 151 Cal. 209, 12 L.R.A.(N.S.) 267; *Pace v. St. Louis S. R. Co.*, 174 Mo. App. 227; *Nelson v. Omaha, etc. St. R. Co.*, 158 Iowa 81; *Alabama Con. C. & I. Co. v. Vines*, 151 Ala. 398, citing the text; *St. Louis, etc. R. Co. v. Hardie*, 87 Ark. 475; *Same v. Ho-shall*, 82 Ark. 387; *Boyd v. Lincoln*,

or their value in their matured condition less the deductions for the reasonable expense of maturing and marketing them.⁹⁹ If

etc. R. Co., 89 Neb. 840; *Smith v. Chicago*, etc. R. Co., 81 Neb. 186; *Pribbeno v. Same*, 81 Neb. 657; *Jones v. Kramer*, 133 N. C. 446; *Vautier v. Atlantic Ref. Co.*, 231 Pa. 8; *Missouri*, etc. R. Co. v. *Gilbert* (Tex. Civ. App.), 131 S. W. 1145; *Same v. Malone*, 59 Tex. Civ. App. 254; *Freeman v. Field* (Tex. Civ. App.), 135 S. W. 1073; *Gulf Pipe Line Co. v. Brymer* (Tex. Civ. App.), 124 S. W. 1007; *Missouri*, etc. R. Co. v. *Riverhead Farm*, 53 Tex. Civ. App. 643; *International*, etc. R. Co. v. *Foster*, 45 Tex. Civ. App. 334; *Little Rock*, etc. R. Co. v. *Wallis*, 82 Ark. 447; *St. Louis*, etc. R. Co. v. *Saunders*, 78 Ark. 589; *Dennis v. Crocker-H. L. & W. Co.*, 6 Cal. App. 58; *St. Louis B. T. R. Ass'n v. Schultz*, 226 Ill. 409; *Funston v. Hoffman*, 232 Ill. 360; *Cincinnati*, etc. R. Co. v. *Ward*, 120 Ill. App. 212; *De Lashmutter v. Chicago*, etc. R. Co., 148 Iowa 556, citing the text; *Jefferis v. Same*, 147 Iowa 124 (if the plaintiff is not the owner of the land); *Sayers v. Missouri Pac. R. Co.*, 82 Kan. 123, 27 L.R.A.(N.S.) 168; *Madisonville*, etc. R. Co. v. *Cates*, 138 Ky. 257, 137 Am. St. 379; *Gehhardt v. St. Louis*, etc. R. Co., 122 Mo. App. 503; *Jones v. Cooley Lake Club*, 122 Mo. App. 113; *Watson v. Colusa-P. M. & S. Co.*, 31 Mont. 513; *Colorado C. Co. v. Sims*, 42 Tex. Civ. App. 442; *St. Louis S. R. Co. v. Baer*, 39 Tex. Civ. App. 16; *West v. Bristol T. Co.* (1908) 2 K. B. 14; *United States S. Co. v. Sisam*, 191 Fed. 293, 37 L.R.A.(N.S.) 976; *Jones v. Sanitary Dist.*, 252 Ill. 591, quoting the text; *Sabine*, etc. R. Co. v. *Joachim*, 58 Tex. 456; *Chicago*, etc. R. Co. v. *Carey*, 90 Ill.

514; *Same v. Schaffer*, 26 Ill. App. 280; *Drake v. Chicago*, etc. R. Co., 63 Iowa 302, 50 Am. Rep. 746; *Byrne v. Minneapolis*, etc. R. Co., 38 Minn. 212, 8 Am. St. 668; *G. & S. F. R. Co. v. Holliday*, 65 Tex. 513; *Gulf*, etc. R. Co. v. *Pool*, 70 id. 713; *Trinity & S. R. Co. v. Schofield*, 72 Tex. 496; *Folsom v. Apple River L. D. Co.*, 41 Wis. 602; *Adams v. Stadler*, 78 Ill. App. 432; *St. Louis v. Merchants' B. T. R. Co.*, 84 id. 116; *Young v. Gentis*, 7 Ind. App. 199; *Chicago & E. R. Co. v. Barnes*, 10 Ind. App. 460. See § 1023.

In case of injury to crops the net loss is all that can be recovered—their market value over the cost of producing, harvesting and marketing. *Shotwell v. Dodge*, 8 Wash. 337, citing *Lommelund v. St. Paul*, etc. R. Co., 35 Minn. 412; *Holden v. Lake Co.*, 53 N. H. 552; *Smith v. Chicago*, etc. R. Co., 38 Iowa 518; *Sedgwick on Dam.*, §§ 191, 937; *Malmstrom v. People's D. D. Co.*, 32 Nev. 246 and *Tretter v. Chicago G. W. R. Co.*, 147 Iowa 375, are to the same effect.

In *Bigbee F. Co. v. Scott*, 3 Ala. App. 333, it is admitted that the rule of the supreme court is in harmony with the text; but because the nuisance continued from the time the crops were planted and evidence was received without objection showing what other local crops unaffected by the nuisance yielded when matured, it was held that the damages might be based on the value of the crop when it would have matured if it had not been destroyed.

⁹⁹ *Brous v. Wabash R. Co.*, 160 Iowa 701.

the seed planted is not up when destroyed its value is to be estimated upon the basis of the rental value of the land and the cost of seed and labor;¹ if the land cannot be used during the year its rental value may be recovered,² or such value and interest.³ If the crop is partially grown there may be a recovery also for the labor of cultivating it.⁴ Interest is allowed on the value of the crop destroyed or the amount of its depreciation from the date thereof.⁵ In Texas a majority of one of the courts of appeals has expressed the opinion that a recovery may be had for the loss of any number of crops, notwithstanding that in the year in which they were destroyed, and subsequent to the loss, a crop was secured on the same land, and that the measure of damages for the loss of each crop is its value at the time it was destroyed regardless of the value of the crop secured.⁶ In determining the value of a growing crop it is competent to show any fact or circumstance pertaining to its condition and prospects; and the jury may consider whatever it may be presumed would have been considered by a careful person desiring to buy the land.⁷

¹ *Young v. West*, 130 Ill. App. 216; *Baltimore, etc. R. Co. v. Stewart*, 128 id. 270; *Ohio & M. R. Co. v. Nuetzel*, 43 id. 108.

² *Jones v. Club*, 122 Mo. App. 113.

³ *St. Louis, etc. R. Co. v. Saunders*, 85 Ark. 111.

⁴ *Enright v. Toledo, etc. R. Co.*, 158 Ill. App. 323; *Baltimore, etc. R. Co. v. Stewart*, 128 id. 270; *Houston & T. Cent. R. Co. v. Darwin*, 47 Tex. Civ. App. 219; *Lampley v. Atlantic C. L. R. Co.*, 63 S. C. 462.

⁵ *Id.*; *G. C. & S. F. R. Co. v. Holli-day*, *Trinity & S. R. Co. v. Schofield*, *supra*; *St. Louis S. R. Co. v. Hoshall*, 82 Ark. 387; *Same v. Saunders*, 78 Ark. 589; *Little Rock, etc. R. Co. v. Wallis*, 82 Ark. 447.

⁶ *Galveston, etc. R. Co. v. Parr*, 8 Tex. Civ. App. 280.

⁷ *Sayers v. Missouri Pac. R. Co.*, 82 Kan. 123, 27 L.R.A.(N.S.) 168; *Missouri, etc. R. Co. v. Gilbert*, 58

Tex. Civ. App. 467; *Bigbee F. Co. v. Scott*, *supra*; *Drake v. Chicago, etc. R. Co.*, 63 Iowa 302, 50 Am. Rep. 746; *Economy L. & P. Co. v. Cutting*, 49 Ill. App. 422.

"The most satisfactory means of arriving at the value of a growing crop is to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation as well as the cost of its preparation and transportation to market. The difference between the value of the probable crop in the market and the expense of maturing, preparing and placing it there will in most cases give the value of the growing crop with as much certainty as can be obtained by any other method." *International R. Co. v. Pape*, 73 Tex. 501; *United States S. Co. v. Sisam*, 37 L.R.A.(N.S.) 967, 191 Fed. 293. See

A farmer may give his opinion as to the value of crops when they were destroyed and state as the basis of it the usual yield of the land in question in similar crop seasons. "While the damages recoverable could not exceed the actual value of the crops at the date of the injury, with legal interest from that time, it was not improper that the jury, in estimating that value, should consider the probable value at maturity if they believed from the evidence that the crops would have matured but for their loss in that manner alleged in the complaint."⁸ In South Carolina the value of immature or growing crops destroyed is ascertained by the rental value of the land, the cost of seed, labor and fertilizer and interest on these. Evidence of the net result in the yield and sale of crops of the same kind during years previous to the destruction of the crop in question and during that year is inadmissible.⁹ It may be shown what the effect of the nuisance on adjacent lands was, the kind of crops raised thereon during the time in question, and the cost of remedying the condition produced by the nuisance.¹⁰ The first proposition stated from the South Carolina case first cited has been questioned on the ground that the evidence there favored does not show value at all, but merely determines the question of cost, which, while an element of value, never furnishes its exact measure.¹¹ There is also a well grounded dissent from the view

§ 1023; Missouri, etc. R. Co. v. Riverhead Farm, *supra*.

The special value of the land for raising a particular crop may be shown though that crop was raised some years before the injury. *Dennis v. Crocker-H. L. & W. Co., supra*.

A witness who has testified to the amount of a crop produced on land may testify to the crop raised on an equal area of similar adjacent land cultivated as was that in question. *St. Louis, etc. R. Co. v. Hardie*, 87 Ark. 475.

Its value is to be ascertained from a consideration of the circumstances existing when it was destroyed, as well as at any time before the trial,

and the consideration of the hazards and expenses incident to the process of growth or appreciation, and, where the crop is damaged, the difference between the cost of producing a full average crop and that which was produced. *St. Louis, etc. R. Co. v. Hoshall*, 82 Ark. 387.

⁸ *Railway Co. v. Lyman*, 57 Ark. 512.

⁹ *Horres v. Berkeley C. Co.*, 57 S. C. 189. *Contra*, if local lands are ordinarily leased on shares. *Mugge v. Erkman*, 161 Ill. App. 180.

¹⁰ *Shores v. Southern R.*, 72 S. C. 244.

¹¹ *Teller v. Bay & R. D. Co.*, 151 Cal. 209, 12 L.R.A.(N.S.) 267.

that it is not competent to show what the land produced the previous year.¹² In Maryland testimony as to the value of the crops destroyed and those which the plaintiff was prevented from raising is inadmissible because too speculative.¹³ Where the destruction of a crop is partial only the damages are ascertainable by the difference in the value of the crop produced from that which was ordinarily produced on the land in like seasons; if there had been no similar seasons the difference may be ascertained by comparison with ordinary seasons and making the proper allowances in the estimate.¹⁴ Where a crop is but partially destroyed allowance should be made for the difference between the cost of producing and harvesting it and what would have been the cost of so doing if there had been a full crop.¹⁵ And by parity of reasoning, if such cost has been increased by the nuisance the wrong-doer should be liable accordingly. The subsequent destruction of an injured crop by a cause for which the defendant was not responsible excludes from the consideration of the jury its probable value if it had matured, but does not otherwise affect its liability.¹⁶

Where grass is submerged and its value has been recovered the owner is not entitled to recover the amount paid for other pastures nor the expense of driving his animals to them. The value of milk which cows would have given if they had not been prevented from grazing on lands owned by others than the plaintiff is too remote. But if, in consequence of an overflow of lands, animals are drowned either upon plaintiff's lands or the lands of others the wrong-doer is liable for their value.¹⁷ If the growth of grass is prevented and the owner is deprived of the use of a pasture for a considerable time his damages are measured by the value of the use of the land for pasturage in the condition it would have been but for the wrong done.

¹² *Sacchi v. Bayside L. Co.*, 13 Cal. App. 72.

¹³ *New York, etc. R. Co. v. Jones*, 94 Md. 24.

¹⁴ *Jones v. Cooley Lake Club*, 122 Mo. App. 113.

¹⁵ *St. Louis S. R. Co. v. Morris*, 76 Ark. 542.

¹⁶ *International, etc. R. Co. v. Jackson*, 47 Tex. Civ. App. 26.

¹⁷ *Sabine, etc. R. Co. v. Johnson*, 65 Tex. 389; *Broussard v. Sabine, etc. R. Co.*, 80 id. 329; *Hughes v. Austin*, 12 Tex. Civ. App. 178; *Weber v. Berlin*, 8 Ont. L. R. 302.

Starvation of animals cannot be added to that measure because the damages would be doubled, and, besides, that loss is too remote.¹⁸ For depriving a party of the use of land by a nuisance recovery can be had only of the rental value; not the supposed value of what might have been raised by cultivation, less the cost of raising and marketing crops.¹⁹ The damages for the diversion of subterranean waters are measured by the decrease in rental value of the land affected, not by the money loss in the value of crops produced thereon.²⁰

For injuries done to a house, grounds, fruit-trees and garden the damages may be ascertained in favor of the owner by the difference between the value of the premises before and their value immediately after the injury, taking into account only the damages which have resulted from the defendant's acts.²¹

¹⁸ *Broussard v. R. Co.*, *supra*.

The extent of the depreciation in the value of animals is to be ascertained by their condition as of the date pleaded as compared with their previous condition. *Benjamin v. Gulf, etc. R. Co.*, 49 Tex. Civ. App. 473.

¹⁹ *Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626; *Galveston, etc. R. Co. v. Chittim*, 31 Tex. Civ. App. 40; *St. Louis, etc. R. Co. v. Hardie*, 87 Ark. 475.

The rules deducible from the Illinois cases are thus stated by Baker, J., in *Kankakee & S. R. Co. v. Horan*, 17 Ill. App. 650: "1st. That for lands plaintiff was prevented from tilling he is entitled to recover the rental value. 2d. That for the lands where the crops were not up the damage should be estimated upon the basis of the rental value, and the cost of seed and labor in breaking up and planting or sowing. 3d. That in cases of destruction where the crops were up or more or less matured, plaintiff should recover as is last above stated, and in addition thereto the

cost of any labor bestowed after the planting or sowing; or, at his option, he may recover the value of the crop at the time of its destruction, with the right to the purchaser to mature the crop and harvest or gather it. 4th. That where the crop was injured but not destroyed, the assessment should be commensurate with the depreciation in value."

²⁰ *Reisert v. New York*, 42 N. Y. Misc. 275.

²¹ *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. 133; *Jefferis v. Chicago & N. R. Co.*, 147 Iowa 124, citing local cases; *Morse v. Chicago, etc. R. Co.*, 81 Neb. 745; *Black v. Highland S. S. Co.*, 98 App. Div. (N. Y.) 409; *Park v. Northport S. & R. Co.*, 47 Wash. 597; *Chase v. New York, etc. R. Co.*, 24 Barb. 273; *Trinity & S. R. Co. v. Schofield*, 72 Tex. 496; *Louisville, etc. R. Co. v. Sparks*, 12 Ind. App. 410; *Willitts v. Chicago, etc. R. Co.*, 88 Iowa 281, 21 L.R.A. 608; *Kansas Z. M. & S. Co. v. Brown*, 8 Kan. App. 802; *Carron v. Wood*, 10 Mont. 500; *Hopkins v. Butte & M. C. Co.*, 16 Mont. 356; *Fremont, etc. R. Co. v. Har-*

This rule has been applied where the shade trees destroyed were on the street on which the plaintiff's premises abutted and he had no title to the land.²² Under such circumstances the owner is bound to use reasonable care, skill and diligence adapted to the occasion to save his property from being injured, notwithstanding the fault and negligence of the defendant.²³ Some recent cases have made a distinction between matured and growing forest trees. "If forest trees have reached maturity it may be an advantage to remove them. In case of the destruction of such trees, there being no appreciable injury to the soil, the measure of damage is the value of the trees apart from the value of the land. But it is otherwise in the case of growing trees.

lin, 50 Neb. 698, 1 Am. Neg. Rep. 312, 61 Am. St. 578, 36 L.R.A. 417; Koch v. Sackman-P. I. Co., 9 Wash. 405.

The Arkansas court objected to this statement of the rule in a case where lands were overflowed as the result of the erection of a levee, because it ignores the fact that owing to the improvement there may have been a shrinkage in the value of the property although the work was skilfully done. "The true rule, and the one in this case easily applicable by a jury of practical men, was to take the actual value of the land at the time the work was completed, supposing the consequences to be known, compare it with what the value would have been if the overflow had remained as formerly, and fix the damages at the difference. This allows all appreciation of land to complainant and affords just compensation for want of care and skill." *Railway Co. v. Morris*, 35 Ark. 622.

In South Carolina the diminished value of the land is the measure of recovery; but in ascertaining that it is not permissible to consider the value of a crop thereon. "For, be-

sides the fact that there is no allegation in the complaint of any damage sustained by loss of crops, either present or prospective, it seems to us that damages resulting from a loss of, or injury to, crops which might have been made, are altogether too remote and speculative, depending upon too many uncertain contingencies, to be allowed in a case like this." *Gentry v. Richmond, etc. R. Co.*, 38 S. C. 284.

The damages have been shown by proof of the value of the trees destroyed, by showing the value of the land with and without them, or in both ways. *Mogollon G. & C. Co. v. Stout*, 14 N. M. 245.

If a nuisance is caused by a railroad the measure of damages and the evidence to establish it are the same as in condemnation proceedings. *Davenport, etc. R. Co. v. Sinnet*, 111 Ill. App. 75.

²² *Donahue v. Keystone G. Co.*, 90 App. Div. (N. Y.) 386.

²³ *Mogollon G. & C. Co. v. Stout*, *supra*; *Mugge v. Erkman*, 161 Ill. App. 180; *Chase v. New York, etc. R. Co.*, 24 Barb. 273; *Sabine, etc. R. Co. v. Joachimi*, 58 Tex. 456.

They have a prospective value which is yet to be gathered in part from the soil. The destruction of such trees is an injury to the freehold itself, and the measure of damage is the difference in the value of the land before and after the injury.”²⁴

Where debris was deposited upon a city residence lot and fences, walks, trees, shrubbery and outhouses were injured the damages were ascertainable by the sum which it would cost to put the premises in as good condition as they were in before the wrong was done, less such benefit as they received from the deposit.²⁵ The measure of damages for injury done to growing crops and fruit trees by sulphurous fumes from a fertilizer factory is the difference in the yield and the price of the crops with and without the presence of the fumes.²⁶ Where crops were injured by the smoke and gas produced in manufacturing coke and it was claimed that there was a permanent impairment of the productiveness of the soil by the formation of its surface of sterilizing and poisonous substances, it was held that the rule which governs the ascertainment of damages in condemnation proceedings did not apply; in other words, there could not be a recovery for the depreciation in the selling value of the farm.²⁷ The extent of the depreciation in the producing qualities of the farm was best provable by a chemical analysis of the soil, and that depreciation and the damage sustained by crops which had been secured afforded the basis for measuring the defendant's liability.²⁸ Depreciation in the value of land is the standard by which to gauge liability where alfalfa roots or the roots of other perennial crops are destroyed or where Johnson grass seed is spread on land.²⁹

There cannot be a recovery for the loss of crops if the plaintiff knew when he planted that they would be flooded and

²⁴ *Doak v. Mammoth C. M. Co.*, 192 Fed. 748; *Jones v. Sanitary Dist.*, 252 Ill. 591.

²⁵ *Koch v. Sackman-P. I. Co.*, 9 Wash. 405, 17 Am. Neg. Cas. 818.

²⁶ *International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 49 L.R.A. (N.S.) 415.

²⁷ This proposition is adhered to in a case stated in § 1053.

²⁸ *Robb v. Carnegie*, 145 Pa. 324, 27 Am. St. 694, 14 L.R.A. 329.

²⁹ *Missouri, etc. R. Co. v. Malone* (Tex. Civ. App.), 126 S. W. 936.

destroyed;³⁰ nor for the loss of successive perennial crops if the roots from which they grew have been destroyed,³¹ nor if there has been a recovery for the depreciation in the value of the land.³² But it has been held that a gardener was justified in putting in a crop after the defendant had closed a crossing which he used upon the assumption that the wrongful act would be discontinued and he would have access to a market.³³ Where the sale of products was thus prevented the wrong-doer was liable for the loss of profits.³⁴ The owner of rented land cannot recover for damage done to crops on such part thereof as was held by tenants who had paid the stipulated rent.³⁵

§ 1050. **Liability for remoter consequences.** Where the plaintiff is the owner and occupier of the land affected by the nuisance the particular circumstances of the injury may be taken into account and damages given, not only for the diminished value of his use and for any peculiar annoyance suffered or expense rendered necessary or incurred in respect thereto,³⁶ but also for any act which permanently injures the inheritance. For the unauthorized maintenance of a dam so as to overflow his land he may recover damages for loss of the use of a ford which he had habitually used in moving crops and wood from one part of his farm to another, and for the loss of growing timber killed by such overflow prior to the suit, though the timber did not die until afterwards.³⁷ A land owner deprived of access to land he is cultivating may recover fair and reasonable compensation for the resulting loss, including the value of the use of the land and the loss of crops.³⁸ The obstruction of a navigable slough which prevents the plaintiff from using it to

³⁰ *Funston v. Hoffman*, 232 Ill. 360; *Willitts v. Chicago, etc. R. Co.*, 88 Iowa 281.

³¹ *Black v. Highland S. S. Co.*, 98 App. Div. (N. Y.) 409.

³² *Tutwiler C., etc. Co. v. Nichols*, 146 Ala. 364, 119 Am. St. 34.

³³ *Galveston, etc. R. Co. v. Bau-*
dat, 21 Tex. Civ. App. 236.

³⁴ *Id.*

³⁵ *St. Louis, etc. R. Co. v. Trigg*, 63 Ark. 536.

³⁶ *Sacchi v. Bayside L. Co.*, 13 Cal. App. 72; *Central Georgia Power Co. v. Pope*, 141 Ga. 186, citing the text; § 1048.

³⁷ *Hayden v. Albee*, 20 Minn. 159. See *King L. Co. v. Bowen*, 7 Ala. App. 462.

³⁸ *Weller v. Heimbruck*, 145 Wis. 217.

market logs may be attended with liability for the loss of the use of his engine, the wages paid idle men, and the increased wages paid others subsequently to take their places.³⁹ One who is delayed in the construction of a building may recover for the increased price necessarily paid for materials and the expense incurred for watchmen in protecting it.⁴⁰ A city authorized a canal corporation to change the course of a sewer into which a street and house were drained, the owner of the latter having consented to the corporation's making the change on its promise to hold him harmless from the consequences. The drain became obstructed and the water flowed back into the house. In an action against the city for the obstruction, under a declaration alleging that the defendants obstructed the drain so that water and filth flowed into the plaintiff's cellar and destroyed his property therein and put him to trouble and expense to get the water out, the plaintiff was held entitled to damages for any injury which affected his estate or diminished its value for use and occupation by reason of the inconvenience and annoyance of flooding the cellar and of unwholesome and disagreeable smells, or of insects thereby generated or attracted to the house; and also his reasonable expense in preventing or removing the nuisance and of changes and repairs thereby rendered necessary and which he could not, by reasonable care and diligence, have avoided.⁴¹ Where a sewer caved in a property owner recovered for permanent injury to his building the cost of repairs and for the loss of rent during the time they were being made.⁴² The value of the property injured limits the recovery; hence expenses in excess thereof are not recoverable though the injury is permanent.⁴³

If the diversion of water prevents the running of a mill there may be a recovery for the loss of the use thereof, and evidence

³⁹ *Creech v. Humpulips B. & R. I. Co.*, 37 Wash. 172.

⁴⁰ *Barnes v. Berendes*, 139 Cal. 32.

⁴¹ *Krebs v. Bambrick B. C. Co.*,

144 Mo. App. 649; *Beatrice G. Co.*

v. Thomas, 41 Neb. 662; *Emery v.*

Suth. Dam. Vol. IV.—16.

Lowell, 109 Mass. 197; *Mayor, etc. v. Small*, 108 Ga. 309, 323.

⁴² *Vanderslice v. Philadelphia*, 103 Pa. 102.

⁴³ *Stevenson v. Ebervale C. Co.*,

201 Pa. 112.

of what the mill had previously earned may be received.⁴⁴ Where the defendant withheld water which furnished the motive power of a mill fully equipped with workmen and appliances and which had been in profitable operation the plaintiff was held to be entitled to recover for loss of profits if he could show with reasonable certainty what they amounted to and that their loss was the direct result of the wrong done. If the claimant's proof did not appear to be reasonably satisfactory as to the amount of the loss then the value of the use of the water to him, situated as it was, could have been resorted to.⁴⁵ This would mean the value of the use of the water to the mill fully equipped with workmen, whose wages must be paid and which was operating at a profit, not the mere rental value of the real estate to a lessee who would hire his own workmen.⁴⁶ If the recovery is for lost profits there should be added thereto the amount necessarily paid for expenses during the time the mill was not operated because of the wrong of the defendant.⁴⁷ These being recovered, there should not also be a recovery for

⁴⁴ *Spadra Creek C. Co. v. Eureka A. C. Co.*, 104 Ark. 359; *Woodin v. Wentworth*, 57 Mich. 278.

In *Dudley v. New Britain*, 77 Conn. 322 it was said: The damage which consists in a depreciation in the usable value of the plaintiff's property may be ascertained without determining with mathematical certainty the precise amount of that value with the stream unpolluted and its precise amount after the pollution; the amount of damage in such case is intrinsically approximate, depending largely on the sound judgment of the trier, and it is sufficient if the evidence furnishes data from which the amount found may be inferred with reasonable certainty and without resort to mere conjecture; *Pickens v. Boom Co.*, 58 W. Va. 11.

⁴⁵ *Pollitt v. Long*, 58 Barb. 20;

Bates v. Holbrook, 89 App. Div. (N. Y.) 548. See *Bricker v. Conemaugh S. Co.*, 32 Pa. Super. Ct. 283. In accord as to profits lost: *Ebcy S. Co. v. Snohomish River B. Co.*, 73 Wash. 52.

If the proof shows that there was uncertainty and irregularity in the catching of fish on a certain shore and fails to show that the conditions of successful fishing were not as favorable immediately after the plaintiff's weir was injured as before he cannot recover the loss of the profits he might have made. *Lamond v. Seacoast C. Co.*, 108 Me. 155; *Wright v. Mulvaney*, 78 Wis. 89, 9 L.R.A. 807, 23 Am. St. 393.

⁴⁶ *Lakeside P. Co. v. State*, 45 App. Div. (N. Y.) 112.

⁴⁷ *Grant v. St. Louis, etc. R. Co.*, 149 Mo. App. 306.

the rental value of the mill.⁴⁸ Where a millstream was obstructed by stones and dirt cast therein, loss of custom, the expense of remedying the injury, increased cost of machinery to operate and increased cost of operating were elements of the damage.⁴⁹ The profits lost by an established mercantile house in consequence of the obstruction of a street may be recovered if their amount is shown with reasonable certainty.⁵⁰ The profits which could have been realized from ice on a pond may be recovered.⁵¹ The evidence in a case in which damages are sought for the obstruction or detention of the natural flow of water must be such as to afford a basis for ascertaining the injury done upon the theory that the plaintiff was entitled to that flow only, and not by the profits made in a year when the plaintiff had the use of more than the natural flow of water and more than he was entitled to.⁵² Injury resulting from the spreading of noxious weeds over land is not too remote to be recovered for, the defendant having provided an insufficient ditch to carry off water.⁵³ The damage done is not necessarily indirect because it resulted from the operations of nature in connection with the nuisance.⁵⁴

§ 1051. **Same subject.** A railroad company, by permitting a horse killed by its locomotive to remain on the side of its track so near a house as to render its occupancy unwholesome, is subject to an action by the owner thereof, and he may show, not only the sickness of himself, but also of his wife, his family and its different members to affect the damages.⁵⁵ Such a

⁴⁸ *Weeks v. State*, 48 App. Div. (N. Y.) 357.

⁴⁹ *Atlanta & B. A. L. R. v. Wood*, 160 Ala. 657.

⁵⁰ *American C. Co. v. Caswell* (Tex. Civ. App.), 141 S. W. 1013; *Same v. Davis*, id. 1019.

⁵¹ *Lawton v. Herrick*, 83 Conn. 417.

⁵² *Weare v. Chase*, 93 Me. 264.

⁵³ *Illinois Cent. R. Co. v. Heisner*, 45 Ill. App. 143.

⁵⁴ *Bradbury M. Co. v. Laclède G. Co.*, 125 Mo. App. 96.

⁵⁵ *Cumberland R. Co. v. Bays*, 153 Ky. 159; *Ellis v. Kansas City, etc. R. Co.*, 63 Mo. 131; *Jarvis v. St. Louis, etc. R. Co.*, 26 Mo. App. 253; *Savannah, etc. R. Co. v. Parish*, 117 Ga. 893.

In *Cumberland R. Co. v. Bays*, 159 Ky. 609, a verdict for \$1,000 for injuries from foul and offensive odors caused by the negligence of the defendant railroad company in burying the carcasses of dead animals in and near a pond lying on defendant's right of way and ex-

company has been held liable for an injury to a traveler on a highway resulting from the fright of a horse by the odor arising from the body of an animal which had been so killed and left on its land adjacent to the highway. Such injury is the natural and probable consequence of the nuisance;⁵⁶ as is an injury to a person who falls because of the accumulation of ice on a way used for travel.⁵⁷ The unsightliness of an embankment on the land of a railroad company is not a ground of damage to an adjoining land owner; it is otherwise as to obstruction of view, light and air, and injury arising from smoke, cinders and vibration.⁵⁸ A plaintiff suffering from a nuisance by water flooding the ground about his house, destroying his shrubbery and garden and injuring the health of his family, may not only recover for the injury to the house and lot, but he may prove physicians' bills paid, loss of time of his family on account of sickness caused by stagnant water, not as constituents of the measure of damages, but for the purpose of showing the extent to which the value of the property has been lessened by reason of the acts complained of.⁵⁹ Where there may be a nuisance regardless of injury to realty, unhealthiness is an element of damage,⁶⁰ at least to the extent of the time lost

tending into plaintiff's premises was held not excessive.

⁵⁶ *Louisville & N. R. Co. v. Wade*, 11 Ky. L. Rep. 904.

⁵⁷ *Cavanagh v. Block*, 192 Mass. 63, 6 L.R.A.(N.S.) 310, 116 Am. St. 220; *Hynes v. Brewer*, 194 Mass. 435, 9 L.R.A.(N.S.) 598.

⁵⁸ *Danville & I. Harbor R. R. Co., v. Tidrick*, 137 Ill. App. 553. *Houston East, etc. R. Co. v. Reasonover, infra*, is in accord as to unsightliness, but is opposed as to obstruction of view.

⁵⁹ *Kemper v. Louisville*, 14 Bush 87; *Francis v. Schoellkopf*, 53 N. Y. 152; *Wiel v. Stewart*, 19 Hun 272; *Lockett v. Ft. Worth, etc. R. Co.*, 78 Tex. 211; *Cleveland, etc. R. Co. v. King*, 23 Ind. App. 573, 582,

quoting the text; *Malmstrom v. People's D. D. Co.*, 32 Nev. 246; *Farver v. American C. & F. Co.*, 24 Pa. Super. Ct. 579.

⁶⁰ *Central R. Co. v. Champion*, 169 Ala. 622; *Tutwiler C., etc. Co. v. Nichols*, 146 Ala. 364, 119 Am. St. 34; *Georgia, etc. R. Co. v. Jernigan*, 128 Ga. 501; *Glasgow v. Altoona*, 27 Pa. Super. Ct. 55; *Cohen v. Rittimann (Tex. Civ. App.)*, 139 S. W. 59, citing the text; *Weber v. Berlin*, 8 Ont. L. R. 302; *Eufaula v. Simmons*, 86 Ala. 515; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Aurora v. Gillett*, 56 Ill. 132; *Hunt v. Lowell G. L. Co.*, 8 Allen 169, 85 Am. Dec. 697; *French v. Connecticut River L. Co.*, 145 Mass. 261; *Allen v. Boston*, 159 Mass. 324, 38

and expense incurred on account of it.⁶¹ The later cases go further and allow the recovery of such sums as will fairly and reasonably compensate for the bodily sickness, pain and discomfort and annoyance suffered by reason of the nuisance,⁶² either by the plaintiff or his family,⁶³ and also for the mental suffering of a person injured in body.⁶⁴ Impairment of health caused by mental anguish and nervous agitation has been recov-

Am. St. 423; *Berge v. Minneapolis G. Co.*, 60 Minn. 296; *Pelmothe v. Phillips*, 20 New South Wales L. R. 58; *Gempp v. Bassham*, 60 Ill. App. 84.

⁶¹ *Towaliga Falls P. Co. v. Sims*, 6 Ga. App. 749; *Houston East*, etc. R. Co. v. *Reasonover*, 36 Tex. Civ. App. 274; *Birmingham W. Co. v. Martini*, 2 Ala. App. 652; *Loughran v. Des Moines*, 72 Iowa 382; *Paris v. Allred*, 17 Tex. Civ. App. 125; *Munk v. Watertown*, 67 Hun 261; *Rosenheimer v. Standard G. L. Co.*, 36 App. Div. (N. Y.) 1, citing *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. 366, 1 L.R.A. 296; *Schmidt v. Cook*, 12 N. Y. Misc. 449; *Fischer v. Sanford*, 12 Pa. Super. Ct. 435; *Swift v. Broyles*, 115 Ga. 885; *Brown v. Chicago & A. R. Co.*, 80 Mo. 457, are to the same effect.

⁶² *Vernon v. Wedgeworth*, 148 Ala. 490; *Smith v. Sedalia*, 182 Mo. 1 (loss of comfortable use and occupation); *Sherman G. & E. Co. v. Belden* (Tex. Civ. App.), 123 S. W. 119; *Continental O. & C. Co. v. Thompson* (Tex. Civ. App.), 136 S. W. 1178; *Missouri*, etc. R. Co. v. *Perry*, 46 Tex. Civ. App. 374; *Daniel v. Ft. Worth*, etc. R. Co., 96 Tex. 327; *Central R. Co. v. Steverson*, 3 Ala. App. 313; *Birmingham W. Co. v. Martini*, *supra*; *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576, 14 Am. St. 319. See *Central Georgia Power Co. v. Parker*, 141 Ga. 198.

⁶³ *Hall v. Carter* (Tex. Civ. App.), 157 S. W. 461 (discomfort); *Pierce v. Wagner*, 29 Minn. 355; *United States S. Co. v. Sisam*, 191 Fed. 293, 37 L.R.A.(N.S.) 976; *Missouri*, etc. R. Co. v. *Perry*, *supra*; *Farver v. American C. & F. Co.*, 24 Pa. Super. Ct. 579; *Daniel v. Ft. Worth*, etc. R. Co., 96 Tex. 327; *Haskell v. Hartrick* (Tex. Civ. App.), 135 S. W. 1057. *Contra*, *Towaliga Falls P. Co. v. Sims*, *Birmingham W. Co. v. Martini*, *supra*.

Evidence of the extent to which health is affected is competent only to show the extent of depreciation in the value of the use of the property. *Cumberland R. Co. v. Bays*, 153 Ky. 159. See *City of Louisville v. Hehemann*, 161 Ky. 523; *Southern R. Co. v. Routh*, 161 Ky. 196; *Soderburg v. Chicago, St. P., M. & O. R. Co.*, 167 Iowa 123.

⁶⁴ *Louisville & N. R. Co. v. Wade*, *Houston East*, etc. R. Co. v. *Reasonover*, *supra*.

In *Illinois Cent. R. Co. v. Engle*, 102 Miss. 878, a woman who was ill and on her way to a physician was detained from crossing the defendant's road by the blocking of a highway crossing for a period of 44 minutes. A verdict for \$1,000 was excessive by one-half.

Mental anguish is not a ground for recovery in the absence of bodily injury. *Henry v. Southern R. Co.*, 93 S. C. 125.

ered for though there was no bodily impact.⁶⁵ Injury to business resulting from the illness of help employed has been regarded a ground of damage.⁶⁶ But in the absence of knowledge by the defendant of the condition of the health of the plaintiff's wife a recovery for her illness caused by fright has been denied.⁶⁷ In a Georgia case the trial court instructed in favor of the recovery of the diminished rental value and also for the destruction of the home and its enjoyments, including physical discomforts and pain. This was said to be error because it permitted the recovery of double damages.⁶⁸ But it is held elsewhere that if a homestead is affected the owner may recover, in addition to its lessened rental value for the inconvenience and discomfort suffered and the deprivation of the comfortable enjoyment of it by himself and his family.⁶⁹ The

The mental pain and anxiety suffered by the plaintiff in consequence of illness in his family may not be recovered for; it might be otherwise as to the loss of the services due from a member of the family as a result of sickness. *Atlantic C. L. R. Co. v. Knapp*, 139 Ga. 422.

The impairment of the comfort of a place of residence is an element of damages though the value of the property has been increased by that which causes such impairment. *Virginian R. Co. v. London*, 114 Va. 334.

The physical ills which may be recovered for must be traceable directly and with reasonable certainty to the nuisance. Where the health of the plaintiff's wife was affected by an ailment which made her nervous and unnecessarily apprehensive as to the effect of the nuisance the defendant was not responsible therefor though her mental suffering was increased by it. *Cook v. Mohawk*, 207 N. Y. 311.

⁶⁵ *Shellabarger v. Morris*, 115 Mo. App. 566.

Physical illness resulting from fright or nervous shock may be recovered for though there has been no physical impact; it is otherwise as to mere fright which does not result in physical injury. *Green v. Shoemaker*, 111 Md. 69, 23 L.R.A. (N.S.) 667.

⁶⁶ *Woodstock H. & S. Mfg. Co. v. Charleston L. & W. Co.*, 84 S. C. 306.

⁶⁷ *Denison, etc. R. Co. v. Barry*, 98 Tex. 248.

⁶⁸ *Swift v. Broyles*, *supra*.

There cannot be a recovery for lost time and for the money paid for doing the work the plaintiff would have done, nor for lost time and the loss of a crop which resulted from illness. The plaintiff should have secured help and saved the crop, in which case the expense would have been recoverable. *Towaliga Falls P. Co. v. Sims*, *supra*.

⁶⁹ *Cumberland R. Co. v. Bays*, *supra*; *Pierce v. Wagner*, *supra*; *Randolf v. Bloomfield*, 77 Iowa 50, 14 Am. St. 268; *Gempp v. Bassham*, 60 Ill. App. 84; § 1047;

same elements enter into the damage to a religious corporation when the nuisance interferes with the holding of its regular services.⁷⁰ If the operation of a railroad directly interferes in a special manner with the use of school premises all the elements of damage may be shown, as noise naturally caused thereby.⁷¹ One who occupies his home is not required to leave it, but may assume that the nuisance will be abated. "The diminution of the rental value of the premises during the continuance of the nuisance was not the limitation of plaintiff's right to recover, but he might have damages for actual inconvenience and physical discomforts which materially impaired the healthful enjoyment and occupancy of his home, and for actual injury to his property caused directly thereby without his fault."⁷² There cannot be a recovery for mere loss of sleep, discomfort and inconvenience caused by loud concussions in the air, no physical

Churchill v. Burlington W. Co., 94 Iowa 89; *Weston P. Co. v. Pope*, 155 Ind. 394; *New York C. J. F. Co. v. Wynkoop*, 29 App. (D. C.) 594, 11 L.R.A.(N.S.) 542; *Jones v. Royster G. Co.*, 6 Ga. App. 506; *Labasse v. Piat*, 121 La. 601; *Thomason v. Railroad*, 142 N. C. 300. See *Gossett v. Southern R. Co.*, 115 Tenn. 376, 112 Am. St. 846; *Adrich v. Wetmore*, 56 Minn. 20.

⁷⁰ *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739.

⁷¹ *Illinois Cent. R. Co. v. Trustees of Schools*, 112 Ill. App. 488.

⁷² *Anderson v. Chicago, etc. R. Co.*, 85 Minn. 337, citing *Berger v. Minneapolis G. Co.*, 60 Minn. 296. See *Gossett v. R. Co.*, *infra*; *Central Georgia Power Co. v. Pope*, 141 Ga. 186, citing the text.

Expenses incurred for the rent of a house remote from the nuisance and in going to and from there to the farm on which the nuisance was situated are too remote. *Atlantic C. L. R. Co. v. Knapp*, 139 Ga. 422.

In an action by husband and wife as tenants in common all the facts which affect the value of the property may be shown as bearing upon the extent of the recovery; but there cannot be a recovery for the personal injury suffered by each on account of the nuisance, as for annoyance and inconvenience. This element of the injury must be recovered for in separate actions. *Jefferson F. Co. v. Rich*, 182 Ala. 633.

Where a builder conducted his operations so negligently as to compel the removal of the tenant of adjoining premises the rules of damages applicable in cases of nuisance were applied, and liability for the discomfort of the family, the cost of storing the furniture up to the time of the expiration of the lease and for the difference in the cost of living in the house and the place to which removal was made were recovered for, also the damage done to the contents of the house and the cost of moving them over what it

injury or impairment of health resulting;⁷³ nor because a person obliged to leave his home was forced to accept the charity of his neighbors.⁷⁴ Where there has been a recovery for sickness and medicine and medical bills there cannot be a further recovery for the loss of seed resulting from the sickness; that loss is too remote.⁷⁵ A trustee of property, suing as such and not as occupant of it, may not recover for trouble arising from sickness, sorrow, suffering or death in her family, although caused by the nuisance, but may show the facts to prove the unhealthy condition of the premises.⁷⁶

According to some courts the scope of liability is less extended where the nuisance is caused by a drain or sewer constructed by a municipality, which drain or sewer becomes choked with refuse and overflows the premises of an adjacent land-owner. The corporation is liable only for the damage done to the property, not for physicians' bills, medicines, increased family expenses, loss of time or mental anguish resulting from illness caused by the sewer or drain.⁷⁷ The New York case cited is not authority for this doctrine in its full extent, at least if the person injured in health was not the owner of the premises affected by the nuisance. That case was much relied on by the North Carolina court, which makes no mention of the ground upon which the court based its judgment. The North Carolina court rested its decision upon the theory that the rule of liability as to municipal corporations is quite different from that of individuals or private corporations. "In actions for damage

would have been at the expiration of the lease. *McFadden v. Thompson-S. Co.*, 116 App. Div. (N. Y.) 285.

⁷³ *Gossett v. Southern R. Co.*, 115 Tenn. 376, 1 L.R.A.(N.S.) 97, 112 Am. St. 846.

⁷⁴ *Axtell v. Northern Pac. R. Co.*, 9 Idaho 392.

⁷⁵ *Smith v. San Antonio* (Tex. Civ. App.), 57 S. W. 881.

⁷⁶ *Cohen v. Bellenot* (Va.), 32 S. E. 455.

⁷⁷ *Williams v. Greenville*, 130 N. C. 93, 89 Am. St. 860, 57 L.R.A. 207, 15 Am. Neg. Rep. 150 (one judge

dissented); *Hughes v. Auburn*, 161 N. Y. 96, 7 Am. Neg. Rep. 139, 46 L.R.A. 636. See *Glasgow v. Altoona*, 27 Pa. Super. Ct. 55, and to the effect that death is too remote where it results from drinking water contaminated by sewage which percolated into the well from which the water was taken. *Wharton v. Bradford*, 209 Pa. 319.

Sickness caused by the nuisance may be considered only for the purpose of showing the extent to which the property was lessened in value. *Hines v. Rocky Mount*, 162 N. C.

against a municipal corporation, where the act complained of was done in pursuance of its legislative or judicial powers, or in the exercise of its authorized police powers, the doctrine of *respondeat superior* does not apply except as to property rights. And such defendant is only liable for injuries caused by neglect to perform some *positive duty* devolved upon it by reason of its incorporation, such as keeping the public streets in repair, or damage to property, or when it receives a pecuniary benefit from it. The reason for this distinction, that it is liable [as to its liability] for damage, seems to lie in the fact of ownership—vested rights, which no one has the right to invade, not even the government, unless it be for public purposes, and then only by paying the owner for it. This right to take property does not fall under the doctrine of police power, and the doctrine of *respondeat superior* applies.” This reasoning is not convincing; the objections to it will readily occur to the professional mind. The distinction which is attempted to be made is not recognized in the cases generally, and, therefore, it has not been answered by judicial argument. In a Massachusetts case, however, the point was made by counsel that the only damage a plaintiff could recover from the defendant city for the injury done him by a sewer placed in a highway, which leaked into his cellar, and was not upon his property, was for such as affected his property, and that injury to his health or business was wrongly allowed to be included in the damages. The answer was such damages were specially alleged, and are clearly recoverable.⁷⁸ In a later case⁷⁹ the trial court was of opinion that the liability of a city for disconnecting a sewer was limited to the expense the plaintiff would incur by connecting his estate with a new sewer. The reviewing court regarded this as error. If the plaintiff was entitled to recover at all he was entitled to all the damages to his estate that were the natural and proximate result of the act complained of, and such as reasonably might

409, L.R.A. 1915C 751. Notice the dissenting opinions.

⁷⁸ *Allen v. Boston*, 159 Mass. 324, 38 Am. St. 423, citing *Hunt v. Lowell G. L. Co.*, 8 Allen 169, 85

Am. Dec. 697; *French v. Connecticut River L. Co.*, 145 Mass. 261.

⁷⁹ *O'Brien v. Worcester*, 172 Mass. 348, 5 Am. Neg. Rep. 171.

be supposed to have been within the contemplation of the parties, if, at the time of the doing of the act, they had taken thought of the consequences likely to ensue. Applying this rule, the plaintiff was entitled to recover for injury to the real estate and reasonable compensation for his trouble and expense in respect to his property, unless and except to the extent to which, by reasonable care and precaution, he could have guarded against such injury. These views are in accord with those of the Maryland court, which has ruled that a city is liable for a personal injury sustained in consequence of the fall of articles negligently stacked on a street.⁸⁰

In a Texas case in which, as a result of the obstruction of a highway, the plaintiff's children were unable to attend school and he lost his proportion of the school fund, he was entitled to recover that sum unless the difficulty could have been surmounted by the expenditure of a less amount.⁸¹ A trespasser who maintains a bog hole on its right of way is liable for the loss of cattle caused by it; but liability does not continue after its occupation became lawful.⁸² The working of quarries and blasting of rock, whereby large quantities of stones are thrown upon the dwelling-house and premises of plaintiff, breaking the doors, windows and roof, is, as to such injuries, a trespass; and if by such operations persons on and about the premises are kept in continual fear and jeopardy of their lives, rendering a proper attention to business full of apprehension and danger, such acts constitute a nuisance, and in case therefor the damages for diminution of the value of the property for the purpose of renting, and the prevention of the plaintiff's servants from performing their labor, and for injury from leakage in the roof through holes so caused may be recovered.⁸³ The owner of a ferry established by law may have an action against another who sets up a ferry in opposition to him without authority and uses unwarrantable means to divert his customers; and may recover

⁸⁰ *Havre de Grace v. Fletcher*, (Tex. Civ. App.), 131 S. W. 839; 112 Md. 562.

⁸¹ *Sabine, etc. R. Co. v. Johnson*, Benjamin v. Gulf, etc. R. Co., 49 Tex. Civ. App. 473.

⁸² *St. Louis, etc. R. Co. v. West* ⁸³ *Scott v. Bay*, 3 Md. 431.

the defendant's clear gains from the rival ferry.⁸⁴ One who wrongfully builds a levee on the land of another will not be made to answer for the damages caused by cutting it by a mob, such damages being too remote.⁸⁵ Clearly there was an intervening cause. A florist who has sold injured plants supposing them to be sound cannot recover for the injury resulting to his business reputation. Such damage is altogether too shadowy and indirect for legal consideration and must be regarded as an unexpected, unnatural and accidental consequence of the defendants' wrong.⁸⁶ Damage to unimproved land through the presence of oil on adjoining land does not include the increase in insurance rates on houses which may be erected thereon.⁸⁷ The diminution of a water supply is not the proximate cause of the use of impure water and resulting illness.⁸⁸ If sewage is turned into a stream which runs through a farm, experts may testify as to bacteria being in the water, how far the germs may be carried and the dangers resulting therefrom.⁸⁹

§ 1052. **Exemplary damages.** One who creates or continues a nuisance with malice or wantonness subjects himself to exemplary damages; ⁹⁰ but these should not be awarded for the con-

⁸⁴ *Stark v. McGowen*, 1 N. & McC. 387, 9 Am. Dec. 712; *Chenango B. Co. v. Lewis*, 63 Barb. 111.

⁸⁵ *Bentley v. Fischer L. & Mfg. Co.*, 51 La. Ann. 451.

⁸⁶ *Dow v. Winnepesaukee G. & E. Co.*, 69 N. H. 312, 76 Am. St. 173, 42 L.R.A. 569. See *Parkes v. Seasongood*, 152 Fed. 583.

⁸⁷ *Houston L. & L. Co. v. Texas Co.* (Tex. Civ. App.), 140 S. W. 818.

⁸⁸ *Woodstock I. Works v. Stockdale*, 143 Ill. App. 335.

⁸⁹ *Hollenbeck v. Marion*, 116 Iowa 69.

The loss of employment resulting to the owner of growing crops destroyed is not an element of the damages in addition to their value. *Pace v. St. Louis S. R. Co.*, 174 Mo. App. 227.

⁹⁰ *Black v. Hankins*, 6 Ala. App. 512; *Sloss-S. S. & I. Co. v. Mitchell*, 181 Ala. 576; *Southern R. Co. v. Lewis*, 165 Ala. 555, 138 Am. St. 77; *Atlanta & B. A. L. R. v. Wood*, 160 Ala. 657; *Yazoo, etc. R. Co. v. Sanders*, 87 Miss. 607, 3 L.R.A. (N.S.) 1119; *Bratton v. Catawba P. Co.*, 80 S. C. 260; *Arnold v. Chicago, etc. R. Co.*, 86 Kan. 12; *Bishop v. Readsboro C. Mfg. Co.*, 85 Vt. 141; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Besso v. Southworth*, 71 Tex. 765, 10 Am. St. 814; *Central R. Co. v. Windham*, 126 Ala. 552; *Louisville & N. R. Co. v. Bolton*, 18 Ky. L. Rep. 824, 1 Am. Neg. Rep. 61; *Bentley v. Fischer L. & Mfg. Co.*, 51 La. Ann. 451; *Walker v. Vicksburg, etc. R. Co.*, 52 La. Ann. 2036; *Berlin v. Thompson*, 61 Mo. App. 234; Wil-

tinuance of a nuisance if it has been abated with reasonable promptness,⁹¹ nor in the absence of a reckless disregard of the rights of others,⁹² or if the failure to abate it was not the result of wilfulness or wantonness;⁹³ nor if the defendant acted under assumed municipal authority in doing what was done,⁹⁴ or in pursuance of a desire to avert serious injury to third parties.⁹⁵ If a nuisance is not abated after an action is brought to recover damages therefor that fact may be considered in determining whether exemplary damages should be awarded or not; but the fact that there is a failure to abate it during the pendency of a bill in equity to restrain the continuance of it has no bearing upon that question.⁹⁶ The continuance of a nuisance after its existence has been judicially declared is cause for imposing exemplary damages.⁹⁷ By seeking relief in equity the right to recover such damages is waived.⁹⁸

§ 1053. **Removal of support to land.** The removal of the lateral support of land which causes it to drop away is a legal injury for which the owner is entitled to damages. There is incident to the land in its natural condition an absolute right of support from that adjoining; and if land not subject to artificial pressure sinks and falls away in consequence of the removal of such support the owner of the latter is entitled to damages to the extent of the injury.⁹⁹ Such right exists against

liams v. Fulmer, 151 Pa. 405, 31 Am. St. 767.

Punitive damages are recoverable where the injury was wilful or was the result of that reckless indifference to the rights of others that is equivalent to an intentional violation of them. Schumacher v. Shawhan Distillery Co., 178 Mo. App. 361.

⁹¹ Oursler v. Baltimore & O. R. Co., 60 Md. 358.

⁹² Cumberland R. Co. v. Bays, 153 Ky. 159.

⁹³ Central R. Co. v. Steverson, 3 Ala. App. 313.

⁹⁴ Fontenot v. Colorado, etc. R. Co., 122 La. 779; Lewis v. Same, 122 La. 571.

⁹⁵ Lynch v. Troxell, 207 Pa. 162.

⁹⁶ Keiser v. Mahanoy City G. Co., 143 Pa. 276; Krebs v. Bambrick C. Co., 144 Mo. App. 649.

⁹⁷ Gorham v. New Haven, 79 Conn. 670, citing the text; Ganster v. Metropolitan E. Co., 214 Pa. 628; Standard Oil Co. v. Kinnaird, 13 Ky. L. Rep. 269; Paddock v. Somes, 51 Mo. App. 320. See § 1038.

⁹⁸ Karns v. Allen, 135 Wis. 48.

⁹⁹ Schmoie v. Cotton, 167 Ind. 364,

the public as well as against an individual,¹ and, according to the preponderance of authority, it exists against a railroad company.² The courts are not agreed as to the measure of the wrongdoer's liability. The weight of authority favors the view that it is not the cost of restoring the lot to its former situation or building a wall to support it, but is the diminution of its value by reason of the defendant's act.³ The existence of the excavation is not an element of the injury, but the lessened value of the plaintiff's land by reason of the falling, caving or washing of the soil as the natural result of the removal of its lateral support.⁴ It has been decided, though, as it seems, upon untenable ground, that in estimating the difference in the value of the land the entire lot and the improvements on it may be taken as the value of the land alone.⁵ All the damages which may reasonably be apprehended to result from the wrong done are

citing the text; *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Thurston v. Hancock*, 12 Mass. 220; *Foley v. Wyeth*, 2 Allen 131, 79 Am. Dec. 771; *Beard v. Murphy*, 37 Vt. 99, 86 Am. Dec. 693; *Farrand v. Marshall*, 19 Barb. 380; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Baltimore, etc. R. Co. v. Reaney*, 42 Md. 117; *Charless v. Rankin*, 22 Mo. 566; *Hay v. Cohoes Co.*, 2 N. Y. 172; *Carlin v. Chapel*, 101 Pa. 348, 47 Am. Rep. 722; *Stimmel v. Brown*, 7 Houst. 219; *Rigney v. Chicago*, 102 Ill. 64, citing the text; *Moellering v. Evans*, 121 Ind. 195, 6 L.R.A. 449; *Schultz v. Bower*, 57 Minn. 493, 47 Am. St. 630; *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285, citing the text; *Mosier v. Oregon N. Co.*, *infra*, citing the text; *Matulys v. Philadelphia & R. C. & I. Co.*, 201 Pa. 70.

¹ *Stearns v. Richmond*, 88 Va. 992, 29 Am. St. 758; *Parke v. Seattle*, 5 Wash. 1, 20 L.R.A. 68,

34 Am. St. 839; *Smith v. Seattle*, 20 Wash. 613.

² *Schmoe v. Cotton*, *supra*; *Mosier v. Oregon N. Co.*, 39 Ore. 256; *McCullough v. St. Paul, etc. R. Co.*, 52 Minn. 12; *Roushlang v. Chicago & A. R. Co.*, 115 Ind. 106; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283; *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 16 L.R.A. 330; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233. *Contra*, *Horstman v. Covington & L. R. Co.*, 18 B. Mon. 218; *Boothby v. Androscoggin & K. R. Co.*, 51 Me. 318.

³ *McGuire v. Grant*, *Moellering v. Evans*, *supra*, quoting the text; *Schultz v. Bower*, 57 Minn. 493, 47 Am. St. 630; *Ulrick v. North Dakota L. & T. Co.*, *supra*, citing the text. Compare *Snarr v. Granite C. & S. Co.*, 1 Ont. 102. See § 1017.

⁴ *Schultz v. Bower*, 64 Minn. 123.

⁵ *Williams v. Missouri F. Co.*, 13 Mo. App. 70.

recoverable in one action,⁶ the right to which accrues when injury is sustained.⁷

In Massachusetts and Pennsylvania a different measure of damages is favored. Chief Justice Gray, after stating that the plaintiff's bank was left in such a condition that, by the effect of rains and frost, it was rendered insufficient to hold his soil in its natural condition, said: "The necessary inference is that by the operation of natural and ordinary causes upon the land as it was left by the excavations of the defendant, and which he took no precaution to guard against, part of the soil of the plaintiff's land slid and fell off; and for the injury so caused to her soil this action may be maintained. But she cannot maintain an action for the injury to her fences and shrubbery, because her natural right and her corresponding remedy are confined to the land itself, and do not include buildings or other improvements thereon. * * * It is agreed that the damages occasioned to the plaintiff by loss of, and injury to, her soil alone, caused by the acts of the defendant, amount to

⁶ *Id.*; *Lamb v. Walker*, 3 Q. B. Div. 389; *Jones v. Seattle*, 23 Wash. 753, quoting the text. But see §§ 114 *et seq.*

Where the defendant by removing the lateral support of his land caused the asphalt or pitch which formed the main ingredient of the plaintiff's land to melt and ooze forth into his own land and appropriated it to his own use damages were recoverable both for the injury caused by the subsidence and for loss of the pitch. *Trinidad A. Co. v. Ambard*, [1899] App. Cas. 594.

In an action against a city to recover for the removal of lateral support in grading a street the depreciation in the value of the plaintiff's property caused by an approaching slide, although the slide began to approach the property two years prior to the commencement of the action, should not be considered

in fixing the damages. *Smith v. Seattle*, 20 Wash. 613.

Where a prescriptive right to the support of a wall existed and a partly built wall fell because of an excavation made on adjoining land the defendant was liable for the loss of rent caused by delay in erecting buildings of which such wall formed part and for architect's fees incurred by the plaintiff in supervising the re-erection of such wall. *A'Beckett v. Warburton*, 14 Viet. L. R. 308.

Where undermined property has been injured by a subsidence depreciation in its value because of the probability of future subsidence is a present injury in so far as it affects its market value. *Tunnicliffe v. West Leigh C. Co.*, [1906] 2 Ch. Div. 22.

⁷ *Schmoe v. Cotton*, 167 Ind. 364. See § 114.

\$95. We are of opinion that she can recover that sum and no more. She is clearly not entitled to recover the cost of putting her land into, and maintaining it in, its former condition, because that is no test of the amount of the injury. She cannot recover the difference in market value because it does not appear that that difference is wholly due to the injury to her natural right in the land; it may depend upon the present shape of the lot, upon the improvements thereon, or upon other artificial circumstances which have nothing to do with the natural condition of the soil.”⁸ In a Pennsylvania case the trial court allowed a recovery of damages upon the rule that applies where property is taken or injured in the exercise of the right of eminent domain. This was held erroneous. That rule is adopted, said the supreme court, because there is a lawful right to inflict the injury, and the damage is permanent in its character and requires a compensation which shall be the price of the privilege to continue it. But in the ordinary actions between private persons to recover damage for trespass upon land the injury is to be compensated by allowing the actual damage sustained up to the time suit was brought. This compensation is to be ascertained, not by showing the difference in the market value of the land before and after the injury, but by proving what was the precise and actual damage done by the defendant to the plaintiff’s land. In the particular class of cases here involved the right to compensation is more than usually restricted because of the peculiar manner in which the injury is inflicted, and on account of the relative rights of the parties. The view of the Massachusetts court was approved. “To hold that the proper measure of damages is the diminution in the value of the lot, as affected by the acts of the defendant, is, practically, to hold that the measure is the difference between the market value of the land before and after the injury, which, as we have before seen, and have recently decided,⁹ is not the true measure in litigations between private parties. In the ordinary actions of trespass upon land the

⁸ *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312.

⁹ *Robb v. Carnegie*, 145 Pa. 324, 27 Am. St. 694, 14 L.R.A. 329.

measure is the amount of the injury actually done to the plaintiff's land, and we see no reason to depart from that rule in this case. As there was no cutting or loss of timber, and no removal of any mineral, and as there is no liability for injury to buildings or fences, it would seem that the only element of damage is the loss of the soil. We do not, however, prejudge that question. If there were other elements of actual damage to the plaintiff's land they should be considered, but not, as we think, on the principle of allowing the difference in market value, either of the lot with the buildings, or without them, before and after the injury, or by determining its diminution in value."¹⁰

It is well settled that where the owner of a lot builds upon his boundary line and the building is thrown down by reason of excavations made upon the adjoining lot, in the absence of improper motive and carelessness¹¹ in the execution of the work, no recovery can be had for such injury,¹² at least in excess of that which the plaintiff would have been entitled to if the land had not been built upon.¹³ This is upon the assumption that the land slides or subsides by reason of the buildings upon it. If the damage done to buildings is not the result of their weight upon the land then it may be considered in estimating the damages done by the removal of the lateral support.¹⁴ Though the

¹⁰ *McGettigan v. Potts*, 149 Pa. 155.

¹¹ "Negligence or want of due care in withdrawing lateral support in excavating or mining on adjoining land, for which there is liability for injury to a neighbor's buildings, means positive negligence or manifest want of due care in the excavations or mining so far as they affect, or are liable to affect, adjoining improvements." *Matulys v. Philadelphia & R. C. & I. Co.*, 201 Pa. 70.

¹² *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Matulys v. Philadelphia & R. C. & I. Co.* *supra*; *Gayford v. Nicholls*, 9 Ex. 702; *Humphries v. Brogden*, 12 Q.

B. 739; *Partridge v. Scott*, 2 M. & W. 220; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Brown v. Windsor*, 1 Crompt. & J. 29; *Moellering v. Evans*, 121 Ind. 195; *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770; *Beard v. Murphy*, 37 Vt. 693; *Charless v. Rankin*, 22 Mo. 566; *Winn v. Abeles*, 35 Kan. 85, 57 Am. Rep. 138; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *McGettigan v. Potts*, 149 Pa. 155; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312.

¹³ *Bohrer v. Dienhart H. Co.*, 19 Ind. App. 489.

¹⁴ *Brown v. Robins*, 4 Hurl. & N.

adjacent owner is not obliged to refrain from excavating near his line, except to preserve the lateral support of the adjoining land in its natural condition, still, if there are buildings upon the latter he is bound to proceed with care for their protection and must give reasonable notice of his intended excavation to the owner and also make the excavation with care.¹⁵ Failing to observe proper care in making the excavation, the damages recoverable include the injury to the buildings as well as the soil, and are to be estimated by the diminished value of the property, and not by the cost of replacing it.¹⁶ The rule that the right to lateral support between adjoining owners does not include the right to the support of an artificial structure has no application when the structure abuts on a highway.¹⁷ One who interferes with that support will be compelled, in an action for an injunction to restrain further excavation, to restore the highway.¹⁸

Owners of the surface are entitled to absolute subjacent support; they have a right to the support of their land with any erections thereon,¹⁹ and may recover to the extent of their actual loss, including the value of buildings on the land.²⁰ A

186; *Stroyan v. Knowles*, 6 id. 454; *Stearns v. Richmond*, 88 Va. 992, 29 Am. St. 758. See *Parke v. Seattle*, 5 Wash. 1, 34 Am. St. 839, 20 L.R.A. 68.

¹⁵ *Harris v. Ryding*, 5 M. & W. 60; *Cooley on Torts* 595; *Wyrley C. Co. v. Bradley*, 7 East 368; *Noonan v. Pardee*, 200 Pa. 474, 86 Am. St. 722, 55 L.R.A. 410; *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401; *Moellering v. Evans*, *Bohrer v. Dienhart H. Co.*, *supra*.

The duty of the person who makes an excavation adjoining the land of another to use due care in doing so extends to everything connected therewith. Where the defendant removed the earth from the wall of an adjoining building in such manner that the earth removed sloped up to the street, and allowed

bricks placed in the street and gutter to remain therein, thereby causing the water from a heavy rain to flow from the street into the excavation, whereby such wall was injured, he was, according to a majority of the court, liable for the injury. *Bohrer v. Dienhart H. Co.*, *supra*.

¹⁶ *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285.

¹⁷ *Milburn v. Fowler*, 27 Hun 568.

¹⁸ *Finnegan v. Eckerson*, 26 N. Y. Misc. 574.

¹⁹ *Noonan v. Pardee*, *supra*; *Piedmont, etc. C. Co. v. Kearney*, 114 Md. 496.

²⁰ *Hext v. Gill*, L. R. 7 Ch. App. 699; *Bononi v. Backhouse*, El., B. & E. 622, 9 H. of L. Cas. 503; *Smith v. Thackerah*, L. R. 1 C. P. 564; *Cooley on Torts* 595.

permanent injury must be compensated for by the lessened value of the property if the cost of repairing it would exceed such value.²¹ If the owner of improvements is not chargeable with negligence in making them and they are injured through the want of due care he may recover their value, although the lot upon which they stood did not abut upon the land on which the excavation was made.²² Where there is gross negligence merely the removal of lateral support to land designed for a burial place and upon which trees have been set out does not give a right to recover for injured feelings.²³

§ 1054. **Interference with business.** The interruption or impairment of an established business is an element of damage which may be proved as a distinct injury²⁴ or as bearing upon the inquiry how much the value of the plaintiff's use of the premises affected has been lessened by the defendant's wrong-doing. If a stream is fouled the damages must be assessed with respect to the improvements made for ordinary and useful purposes in connection with it.²⁵ The nature and extent of the business interfered with and its past productiveness may be proved, not with a view to measure the damages by expected profits prevented by the nuisance, but to assist the jury in the exercise of their judgment with a view to awarding adequate compensation.²⁶ It is established in England that

²¹ *Piedmont, etc. C. Co. v. Kearney, supra.*

²² *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421.

²³ *White v. Dresser*, 135 Mass. 156, 46 Am. Rep. 454.

²⁴ *Central Georgia Power Co. v. Pope*, 141 Ga. 186; *Syracuse S. S. Co. v. Rome, etc. R. Co.*, 42 App. Div. (N. Y.) 203, affirmed without opinion 168 N. Y. 650.

In *Cunningham v. Stein*, 109 Ill. 375, the plaintiff was allowed to show a falling off in the sale of beer made by him after the construction of a factory which polluted a stream near his brewery and befouled the air.

²⁵ *Sanderson v. Pennsylvania C. Co.*, 102 Pa. 370.

²⁶ *Simmons v. Brown*, 5 R. I. 229; *Pollitt v. Long*, 58 Barb. 20; *White v. Moseley*, 8 Pick. 356; *Bucknam v. Nash*, 12 Me. 474; *St. John v. Mayor, etc.*, 6 Duer 315, 13 How. Pr. 527; *Park v. C. & S. W. R. Co.*, 43 Iowa 636 (this case has often been cited in Iowa. See *Dairy v. Iowa Cent. R. Co.*, 113 Iowa 716); *Shafer v. Wilson*, 44 Md. 268; *Stetson v. Faxon*, 19 Pick. 147; *Bonner v. Welborn*, 7 Ga. 296; *St. Louis, etc. R. Co. v. Capps*, 67 Ill. 607; *Terre Haute v. Hudnut*, 112 Ind. 542; *French v. Connecticut River L. Co.*, 145 Mass. 261; *East Jersey W. Co.*

where there is an unlawful obstruction of the right of access to a highway, whereby customers are prevented from entering a place of business, lost profits may be recovered.²⁷ This rule is favored in Georgia, Pennsylvania, and Minnesota.²⁸ It has been applied where an overhanging wall prevented the erection of a building in which to conduct an established business which had been carried on in the vicinity,²⁹ and where the crops on a dairy farm were destroyed.³⁰ For obstructing the water below a mill by means of a dam so as to prevent its running it has been held in New York that the owner and occupier of the mill is only entitled to recover the value of its use during the time he is necessarily deprived thereof and the amount of the permanent diminution of value by the erection of the dam. It was intimated that damage from the deterioration or fall in the market price of saw-logs on hand to be sawed, suffered without negligence of the plaintiff in omitting to make other disposition of them, should be disallowed as being analogous to unearned and contingent profits.³¹ It is believed that this intimation is not supported by the supposed analogy because the loss in question is not a loss of profits; and upon the cases truly analogous such loss should be compensated.³² If a boat is injured by an obstruction in a navigable river her charter value during the time of detention may be recovered and also the cost of repairs

v. Bigelow, 60 N. J. L. 201; Van Wie v. Southern Wisconsin P. Co., 148 Wis. 410; Asia v. Pool, 47 Wash. 515. See Blackman v. Mauldin, 164 Ala. 337, 27 L.R.A.(N.S.) 670.

²⁷ Rose v. Graves, 5 Man. & G. 613; Lyon v. Fishmongers' Co., 1 App. Cas. 662; Fritz v. Hobson, 14 Ch. Div. 542; Madigan v. Wellington & M. R. Co., 2 New Zealand L. R. 209 (Sup. Ct.); Benjamin v. Storr, L. R. 9 C. P. 400, 407.

²⁸ Brunswick & W. R. Co. v. Hardey, 112 Ga. 604; Harvey v. Georgia, etc. R. Co., 90 Ga. 66; Aldrich v. Wetmore, 56 Minn. 20; Foust v. Pennsylvania R. Co., 212 Pa. 213.

²⁹ Barnes v. Berendes, 139 Cal. 32.

³⁰ Sacchi v. Bayside L. Co., 13 Cal. App. 72.

³¹ Walrath v. Redfield, 18 N. Y. 457, 11 Barb. 368.

³² Blackman v. Mauldin, 164 Ala. 337, 27 L.R.A.(N.S.) 670; Plummer v. Penobscot L. Ass'n, 67 Me. 363; Ward v. New York, etc. R. Co., 47 N. Y. 29; Manville v. Western U. Tel. Co., 37 Iowa 214, 18 Am. Rep. 8; Shepard v. Milwaukee G. Co., 15 Wis. 318, 82 Am. Dec. 679; Thunder Bay River B. Co. v. Speechly, 31 Mich. 336. See Davelaar v. Milwaukee, 123 Wis. 413.

made necessary.³³ Where the owner of a boat was compelled by an obstruction placed across a river to unload his cargo he was entitled to recover for the value of the use of the boat for the time it was delayed, including reasonable wages paid to the crew;³⁴ but he could not recover for damage to the cargo which he left exposed to the weather and which was injured thereby, nor the cost of loading and unloading it. It seems that if the plaintiff had procured other means of transporting the cargo the reasonable cost of doing so could have been recovered.³⁵

A loss of rent for neglecting to keep privies and drains in repair has been recovered for,³⁶ and also a depreciation in the value of property resulting from a like cause though the nuisance had been discontinued.³⁷ Recovery has also been had as for a permanent injury for establishing a brothel on property adjoining tenements held for renting.³⁸ In such a case a fair means of arriving at the actual damage would be to ascertain the loss of rent and depreciation of the value of the property caused by the nuisance; that is, how much less the property would sell for on account of the existence of the nuisance and what loss of rent has resulted from the same cause. But in ascertaining these facts all circumstances that would show a depreciation in value should be considered;³⁹ and the damage recovered must be the actual depreciation shown to be caused by the existence of the nuisance. Where property is changing in character, and what has been a good residence neighborhood is invaded by business establishments which destroy its quiet, it is a matter of common observation that it passes through a period in which it is neither good for business of the better class nor for residences; and drinking saloons and other establishments, more or less objectionable or disreputable, settle down for a time in what were once the residences of wealthy citizens.

³³ *Missouri River P. Co. v. Hannibal, etc. R. Co.*, 79 Mo. 478.

³⁴ *Blackman v. Mauldin*, *supra*.

³⁵ *Farmers' Co-op. Mfg. Co. v. Alberman & R. R. Co.*, 117 N. C. 579, 53 Am. St. 606, 29 L.R.A. 700.

³⁶ *Jutte v. Hughes*, 67 N. Y. 268.

³⁷ *Babb v. Curators of State University*, 40 Mo. App. 173.

³⁸ *Givens v. Van Studdiford*, 4 Mo. App. 498, 86 Mo. 149, 56 Am. Rep. 421; *Besso v. Southworth*, 71 Tex. 765, 10 Am. St. 814.

³⁹ *Id.*; *Illinois, etc. R. Co. v. Grabbill*, 50 Ill. 241.

When a bawdy house is opened in such a neighborhood it may be very difficult to say how much any depreciation of value is attributable to that fact alone. But if it be shown that after the defendant's house was so occupied other disreputable houses sprang up in the neighborhood the mere fact that it may be impossible to say how much of the damage was occasioned by the nuisance on the defendant's premises and how much by the other brothels, will not bar a recovery.⁴⁰ If the injury complained of is to property the damages are to be ascertained by the diminution in its value for the purposes for which, during the continuance of the nuisance, the property was used or would have been used but for the wrong done or suffered.⁴¹

§ 1055. **Mitigation of damages.** Neither the right of action nor the amount of the recovery is affected by the abatement of a nuisance so far as damages were sustained prior thereto.⁴² The fact that the plaintiff might have abated a nuisance caused by obstructing a ditch, but did not, it being necessary to go upon the defendant's land for that purpose, will not affect his right of action or the damages.⁴³ Where, however, the plaintiff has

⁴⁰ *Givens v. Van Studdiford*, *supra*. See § 1059.

⁴¹ *Clark v. Pennsylvania R. Co.*, 145 Pa. 438, 27 Am. St. 710; § 1047.

The right to recover for the interruption of an established business, though the required proof as to the extent of the loss be made, does not exist if the plaintiff as a member of an association has submitted its enterprise to the control and management of an association and has been guided by it in the extent to which it has operated its plant, at least if it is not shown that such control would not have been exercised during the time the nuisance existed. *Davelaar v. Milwaukee*, 123 Wis. 413.

⁴² *Cincinnati, etc. R. Co. v. Ward*, 120 Ill. App. 212; *Barstow I. Co. v. Black*, 39 Tex. Civ. App. 80; *Tuebner v. California St. R. Co.*, 66

Cal. 171; *Gleason v. Gary*, 4 Conn. 418; *Pierce v. Dart*, 7 Cow. 609; *Renwick v. Morris*, 3 Hill 621; *People v. Albany*, 11 Wend. 539; *Gloystein v. Commonwealth*, 17 Ky. L. Rep. 1187.

By claiming the absolute and exclusive right to use the premises in question the defendant loses any advantage he might have been entitled to from the efforts made by the plaintiff to abate the nuisance. *Creech v. Humptulips B. & R. Imp. Co.*, 37 Wash. 172.

⁴³ *Fairfield v. Salem*, 213 Mass. 296; *Chicago, etc. R. Co. v. Carey*, 90 Ill. 514; *White v. Chapin*, 102 Mass. 138; *Walrath v. Redfield*, 11 Barb. 368; *Heaney v. Heeney*, 2 Denio 625; *Fromm v. Ide*, 68 Hun 310. See *Gilbert v. Kennedy*, 22 Mich. 133.

A plaintiff is not bound to remove

access to the nuisance or the means or opportunity of avoiding or mitigating the injury it causes it is his duty to abate it or to take the proper measures for preventing or lessening the damages therefrom.⁴⁴ Where this duty arises damages will be limited to such as are or would be suffered if it had been performed, added to the expense incident to the performance of it.⁴⁵ What might have been realized by one whose crop has

obstructions in a navigable river which cause him special injury. *French v. Connecticut River L. Co.*, 145 Mass. 261.

A plaintiff need not remove objectionable matter from a public street; he has no control over the street or right to interfere with it. *Cumberland G. Co. v. Baugh*, 151 Ky. 641, 43 L.R.A.(N.S.) 1037.

⁴⁴ *Carroll Springs Dist. Co. v. Schnepfe*, 111 Md. 420; *Mahoney v. Kansas City*, 106 Mo. App. 39; *Taylor v. Canton*, 30 Pa. Super. Ct. 305; *Chase v. New York, etc. R. Co.*, 24 Barb. 273; *Jacksonville v. Doan*, 145 Ill. 32; *Slavin v. State*, 152 N. Y. 45; *Beatrice G. Co. v. Thomas*, 41 Neb. 662, 43 Am. St. 711; *Mayor v. Dannenberg*, 113 Ga. 1111. *Contra*, *Jarvis v. St. Louis, etc. R. Co.*, 26 Mo. App. 253; *Pad-dock v. Somes*, 102 Mo. 226, 10 L.R.A. 254.

In *McCarty v. Boise City C. Co.*, 2 Idaho 226, the action was to recover damages to the plaintiff's land caused by leakage from the defendant's irrigating ditch, the defect in which the defendant knew of, and which it permitted to continue for more than a year. There was no error in refusing to permit him to show that the plaintiff might have prevented the injury to his land by incurring small expense. The court understood the rule to be that, where one person suffers injury by the carelessness of another, occur-

ring unexpectedly and in a transitory manner, the one so suffering must go to some trouble to avoid or lessen the damage if a temporary expedient or slight expense will do so; but if one whose carelessness or negligence causes a continuing injury to another, having knowledge of the evil and the cause of it, deliberately stands by, having an equal opportunity to prevent the damage as the one suffering it, and permits it to continue without an attempt to prevent it, he cannot avoid his responsibility by showing that the one injured might have avoided the damage by a slight expense. Reference is made to *Ker-whacker v. Cleveland, etc. R. Co.*, 3 Ohio St. 172, 12 Am. Neg. Cas. 513, 62 Am. Dec. 246; *Richmond & D. R. Co. v. Anderson*, 31 Gratt. 812, 12 Am. Neg. Cas. 635, 31 Am. Rep. 750; *Same v. Medley*, 75 Va. 499, 40 Am. Rep. 734; *Fraser v. Sears Union W. Co.*, 12 Cal. 555; *Snyder v. P., C. & St. L. R. Co.*, 11 W. Va. 14; *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506, 7 Am. Neg. Cas. 340; *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705. See *Roberts v. Baldwin*, 155 N. C. 276.

⁴⁵ *Groh v. South*, 119 Ind. 297; *Sloss-S. S. & I. Co. v. Mitchell*, 181 Ala. 576; *Johnson v. Marcum*, 152 Ky. 629; *Barnes v. Berendes*, 139 Cal. 32; *Towaliga Falls P. Co. v. Sims*, 6 Ga. App. 749; *Cincinnati, etc. R. Co. v. Gillespie*, 130 Ky. 213;

been destroyed if he had replanted the land is too uncertain to be made the subject of proof in mitigation.⁴⁶ If the plaintiff, having the opportunity without incurring a liability for trespass, neglects to exercise ordinary care and diligence to prevent injury he may be denied any recovery on the ground of contributory negligence.⁴⁷ He is not obliged, however, to take notice of the defendant's threat to commit a wrong and thereupon to take such measures; it is sufficient for him if he exercises ordinary care in the preservation of his property after he has knowledge that wrong has been done.⁴⁸ The defendant cannot show that less damage would have been done if the plaintiff's premises had been better constructed.⁴⁹ The owner of property which is endangered by the act of another is not barred of his remedy by declining the offer of the latter to remove it

Malstrom v. People's D. D. Co., 32 Nev. 246; *Stevens v. State*, 65 N. Y. Misc. 240; *Downey v. Pennsylvania R. Co.*, 219 Pa. 32; *Emery v. Lowell*, 109 Mass. 197; *Fowle v. New Haven & N. Co.*, 112 Mass. 334, 17 Am. Rep. 106; *O'Riley v. McChesney*, 3 Lans. 278; *Terry v. Mayor*, 8 Bosw. 504.

If the injury is more than trivial and the expense of preventing it will be considerable the plaintiff's rights will not be affected by non-action. *Madisonville, etc. R. Co. v. Cates*, 138 Ky. 257, 137 Am. St. 379. The reasonableness of the latter must be shown. *Colorado C. Co. v. Sims*, 42 Tex. Civ. App. 442.

⁴⁶ *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

⁴⁷ *Sloss-S. S. & I. Co. v. Mitchell*, 161 Ala. 278; *Atchison, etc. R. Co. v. Jones*, 110 Ill. App. 626, quoting the text; *Simpson v. Keokuk*, 34 Iowa 568; *Van Pelt v. Davenport*, 42 id. 308; *Irwin v. Sprigg*, 6 Gill 200, 46 Am. Dec. 667; *Standard Oil Co. v. Kinnaird*, 13 Ky. L. Rep. 269. *Contra*, *Jarvis v. St. Louis, etc. R. Co.*, 26 Mo. App. 253; *Paddock v.*

Somes, 102 Mo. 226, 10 L.R.A. 254; *Grant v. St. Louis, etc. R. Co.*, 149 Mo. App. 306. See *Carroll Springs Dist. Co. v. Schnepfe*, 111 Md. 420.

The doctrine of contributory negligence does not apply in actions for nuisance. But if the plaintiff has co-operated in producing the condition of which he complains the liability of the defendant is lessened to the extent the plaintiff is responsible therefor. *Bowman v. Humphrey*, 132 Iowa 234, 6 L.R.A.(N.S.) 1111.

The action is for an invasion of a property right and is not based on negligence; hence contributory negligence is not a defense. *Groh v. South*, *supra*.

The owner of land used as a pasture is not bound to remove his animals therefrom to prevent their being injured by polluted water unless he could do so at a moderate expense, nor to sell them at any time. *Benjamin v. Gulf, etc. R. Co.*, 49 Tex. Civ. App. 473.

⁴⁸ *Plummer v. Penobscot L. Ass'n*, 67 Me. 363.

⁴⁹ *Davis v. Smith*, 144 N. C. 297.

to a place of safety, or assist in doing so; to be effectual the offer should be accompanied by a proposition to effectuate it at the expense of the party making it. "A man usually locates his barn or his house with reference to the convenience of the location. The barn or the house is also a lawful structure doing a legitimate business, and it might very reasonably happen that the value of a barn would be very largely depreciated by moving it to another location, with reference to ingress and egress to and from the barn, and with reference to many things that are ordinarily taken into consideration when a barn is located. This choice of location cannot be taken from the owner and given to somebody else. A person who wishes to go into business, be it ever so legitimate, cannot say to another person who has his houses and buildings on a certain location which has been chosen by him, 'you must permit me to move your houses to another location on your premises or the business which I am instituting will damage them, and if you do not permit I will not be responsible for the damages incurred.' So that, at least, there must be taken into consideration the difference between the value of the property after it is moved and its value where it was located by its owner."⁵⁰ The rights of the owner of property are not affected because he remains in possession of it in the face of possible danger to himself.⁵¹ It is no defense that the plaintiff rented or purchased the premises injured after the business causing the nuisance had been established, with knowledge of its existence, and for a lessened consideration on that account;⁵² nor that the business is necessary to be carried

⁵⁰ *Kuhmis v. Lewis River B. & L. Co.*, 51 Wash. 196.

⁵¹ *Frick v. Kansas City*, 117 Mo. App. 488.

⁵² *Bigbee F. Co. v. Scott*, 3 Ala. App. 385; *Smith v. Phillips*, 8 Phila. 10; *Central R. v. English*, 73 Ga. 366; *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 38; *Downey v. Pennsylvania R. Co.*, 219 Pa. 32; *Risher v. Aiken C. Co.*, 147 Iowa 459; *St. Louis S. R. Co. v. Clayton*, 54 Tex. Civ. App. 512; *Cohen v.*

Rittimann, — Tex. Civ. App. —, 139 S. W. 59, citing the text; *San Antonio, etc. R. Co. v. Gurley*, 37 Tex. Civ. App. 283; *Richards v. Railroad*, 56 W. Va. 592; *Ramey v. Baltimore, etc. R. Co.*, 235 Ill. 502. It was said in the last case: A party injured by an imperfect structure or negligent act is not bound to assume that the structure will be permanent or that such act will be continued, but may regard them as of a transient character. The

on and is useful to the public.⁵³ The operation and effect of natural agencies are presumed to be contemplated by a wrongdoer, and he cannot avoid or mitigate his liability because the injury done has been increased thereby.⁵⁴ Hence, where an obstruction in a navigable stream delays the rafting of logs when high water usually occurs the increased expense of rafting them during a season of low water may be recovered.⁵⁵ Keeping a nuisance similar to that complained of does not defeat a recovery.⁵⁶ Where water is polluted the person who is entitled to have it flow naturally over his own property may decline the use of any other water. "We cannot see how such evidence could be used in mitigation of damages for infringement of an undisputed right. No wrongdoer can trespass on the right of a citizen and mitigate his wrong by saying, 'You can secure as valuable a right elsewhere.'"⁵⁷ The plaintiff's co-operation in producing the injury complained of may be shown to mitigate

damage suffered by the wrongful acts of defendant might or might not occur, and plaintiff had the right, in leaving the land, to act upon the presumption that the nuisance would not be continued. See § 1057.

A purchaser of land abutting on a street who bought with knowledge that it might be used for a lawful purpose may not recover because of its proper use for such purpose, though the extent of the use is increased; his redress is limited to the injury sustained by the use of additional land. *Oklahoma City & T. R. Co. v. Dunham*, 39 Tex. Civ. App. 575.

⁵³ *Smith v. Phillips*, 8 Phila. 10; *Shirely v. Cedar Rapids, etc. R. Co.*, 74 Iowa 169, 4 Am. St. 471; *Marcy v. Fries*, 18 Kan. 353. Compare *Dunsmore v. Central Iowa R. Co.*, 72 Iowa 182.

⁵⁴ *Houston v. Williams* (Tex. Civ. App.), 153 S. W. 387; *Houston v. Merkel* (Tex. Civ. App.), 153 S. W.

385; *Southern R. Co. v. Lewis*, 165 Ala. 555, 138 Am. St. 77; *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 38; *Brink v. Kansas City, etc. R. Co.*, 17 Mo. App. 177; *Bird v. Hannibal, etc. R. Co.*, 30 id. 365.

⁵⁵ *Gates v. Northern Pac. R. Co.*, 64 Wis. 64.

⁵⁶ *Randolf v. Bloomfield*, 77 Iowa 50, 14 Am. St. 268. *Contra*, *Holbrook v. Griffiths*, 127 Iowa 505.

⁵⁷ *Stevenson v. Ebervale C. Co.*, 203 Pa. 316, 201 Pa. 112; *Lawton v. Herrick*, 83 Conn. 417; *Stein v. C. & O. R. Co.*, 132 Ky. 322; *Hoover v. New Holland W. Co.*, 43 Pa. Super. Ct. 262.

Obstruction of view is not to be considered in determining the decreased value of property if the erection complained of was made with the consent of the plaintiff, under authority and was reasonably necessary for the public convenience. *Louisville & N. R. Co. v. Jackson*, 139 Ga. 543.

the liability of the defendant; but because contributory negligence is not involved in actions for nuisance the action is not thereby defeated.⁵⁸

§ 1056. **Same subject; deduction for benefits.** If some incidental advantage accrues to the plaintiff from the act of the defendant which causes the nuisance that circumstance may be considered in mitigation.⁵⁹ In an action for damages occasioned by the filling up by the defendant of his land, adjacent to that of the plaintiff, whereby the free flow of water off the latter's land had been prevented, the jury were held properly instructed that they should take into consideration the evidence on both sides bearing on this point, and if they were satisfied that the filling up had actually benefited the plaintiff's estate in any particular they should make an allowance for such benefit, and give the plaintiff such sum in damages as they found would fully indemnify and compensate him for all the damages actually sustained.⁶⁰ The authorities of the city in which the plaintiff's premises were situated gave a railroad company the right to locate and operate their road on the street in front of those premises on condition that they should macadamize certain neighboring streets and construct a sewer; these improvements were made. In an action for damages to the plaintiff for occupying the street in front of his premises without extinguishing his right therein as a highway the company were entitled to show in diminution that the work so done enhanced the value of his property.⁶¹ The benefit occasioned to a meadow

⁵⁸ *Bowman v. Humphrey*, 132 Iowa 234, 6 L.R.A.(N.S.) 1111; *Steber v. Chicago, etc. R. Co.*, 139 Iowa 153. Some cases to the contrary are cited in one of the preceding notes to this section.

⁵⁹ *Brown v. Virginia-C. C. Co.*, 162 N. C. 83, 45 L.R.A.(N.S.) 773, citing the text; *Hicks v. Drew*, 117 Cal. 305, citing this section.

⁶⁰ *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Brower v. Merrill*, 3 Pin. 46.

So far as water diverted from a

stream is returned thereto the damages sustained by a lower proprietor are mitigated. *Mannville Co. v. Worcester*, 138 Mass. 89, 52 Am. Rep. 261.

⁶¹ *Porter v. North Missouri R. Co.*, 33 Mo. 128.

In *Palmer Co. v. Ferrill*, 17 Pick. 58, it was held that in assessing damages under the statute for flowing lands the proper rule was to estimate the loss arising to the proprietor from the direct injury done to the land, taken as a whole, by

below a mill-dam by a ditch dug at the time of the erection of the dam by its owner through his own land below the meadow cannot be set off against the damage done the meadow by subsequent flowing occasioned by the dam; and the cost of the ditch is immaterial in assessing such damages.⁶²

In New Hampshire it has been held that the damage caused in washing away the bank of a stream, flowing land and depreciating the grass thereon by a mill-owner accumulating water in the wet season and letting it off in the summer, cannot be mitigated by any benefit that such flowing makes on any other part of the same proprietor's land.⁶³ The case so holding is approved in New Jersey, under circumstances indicated by the following excerpt from the opinion of the court of errors and appeals: It is the right of every owner of land upon a stream to have the water come to him in its natural flow, undiminished in quantity and unimpaired in quality, and, it may be added, with no increase of the volume except from natural causes. Therefore, it is an actionable nuisance at common law for a mill owner or other person to turn a new stream into the stream or, by means of a reservoir, to increase the volume of water naturally flowing in the stream. It is no defense to an action for such an injury that the person complaining is benefited by the increase in the volume of water, for no person can be compelled to have his premises improved, and has a right to their enjoyment in their natural condition and according to his tastes and inclination.⁶⁴ The fact that, in consequence of a land owner's efforts there has been as much accretion to his land in one place as was lost because of the defendant's act in another does not mitigate the liability of the latter.⁶⁵ A party liable for conducting a tannery and other offensive business, where they constitute a nuisance to the owner of houses for rent, is not entitled to show in mitigation that since his tannery has been operated

the flowing, deducting therefrom any benefit which may be done to the same land by the same cause.

⁶² *Gile v. Stevens*, 13 Gray 146.

⁶³ *Gerrish v. New Market Mfg.*

Co., 30 N. H. 478; *Talbot v. Whipple*, 7 Gray 122.

⁶⁴ *East Jersey W. Co. v. Bigelow*, 60 N. J. L. 201.

⁶⁵ *Ami Co. v. Tide Water L. Co.*, 51 Wash. 171.

it has enhanced the value of the plaintiff's premises and the rental thereof, in consequence of the number of persons employed therein creating a demand for dwellings in the vicinity.⁶⁶ In other words, an injury which substantially impairs the comfort, convenience and enjoyment of a home cannot be mitigated by showing that the nuisance has increased the monetary value of the property constituting the home.⁶⁷ If damages for permanent depreciation in value are recovered, special benefits resulting to the property are doubtless to be estimated.⁶⁸ If benefit results to property from the grading of a street or other public improvement and the work is done with reasonable skill, the damages recoverable are thereby diminished.⁶⁹ But if, as the result of negligence or unskilfulness in doing the work, damage ensues the benefits resulting cannot affect the damages.⁷⁰

To entitle the defendant to show any incidental benefit to the plaintiff it must accrue directly from the act or business which causes or constitutes the nuisance and confer the benefit in the same manner as it operates to produce the injury: the allowance for benefits must be confined to the proximate consequences of the act complained of and be effects of like kind with the opposite injuries for which the recovery is sought.⁷¹ In a decision in Georgia⁷² the defendant diverted water and caused it to flow upon and injure adjacent land and a building thereon. He sought to show that the market value of the property was increased by the act which caused the damage. The court said: If by his wrongful act the defendant caused a diminution in the market value of the plaintiffs'

⁶⁶ *Ducktown S., C. & I. Co. v. Barnes* (Tenn.), 60 S. W. 593; *Houston v. Merkel* (Tex. Civ. App.), 153 S. W. 385; *Francis v. Schoellkopf*, 53 N. Y. 153.

⁶⁷ *Virginian R. Co. v. London*, 114 Va. 334.

⁶⁸ *Chicago F. & B. Co. v. Major*, 30 Ill. App. 276; *Same v. Sanche*, 35 id. 174.

⁶⁹ *Schroeder v. Joliet*, 189 Ill. 48; *Hurt v. Atlanta*, 100 Ga. 274.

The distinction between the rule

applicable in such cases and in cases between individuals is indicated in *Farkas v. Towns*, 103 Ga. 150, 3 Am. Neg. Rep. 775, 68 Am. St. 88.

⁷⁰ *Atlanta v. Word*, 78 Ga. 276; *Ewing v. Louisville*, 140 Ky. 726, 31 L.R.A. (N.S.) 612.

⁷¹ *Jeffersonville, etc. R. Co. v. Esterle*, 13 Bush 667; *Covington v. Berry*, 120 Ky. 582; *Tracewell v. Wood County Court*, 58 W. Va. 283; *Meridian v. Higgins*, 81 Miss. 376.

⁷² *Farkas v. Towns*, *supra*.

lot they would be entitled to compensation from him for the loss which they sustained. In reply to evidence supporting a claim of this character the defendant would have the right to show that the market value, in consequence of the act complained of, had in fact been increased. Proof of increase in market value would give the defendant no right to recoup against the plaintiffs for the amount of such increase, but would simply show that there had been no decrease in market value, and, therefore, the plaintiffs were not entitled to recover on that account. But an increase in market value could not be set off against any compensation to which the plaintiffs were entitled for actual physical injuries to their lot and the building thereon, nor could it be set off against damages which they sustained by reason of a diminution of the value of their property for use. A wrong-doer cannot escape liability for the destruction of his neighbor's house by showing that, in consequence of the act which caused its destruction, the lot upon which the house stood is worth more than it was before the house was destroyed. His neighbor was entitled to possess, use and enjoy both his house and his lot in their existing conditions, and cannot, after the destruction of the former, be compelled to sell the lot or to devote it to a different use in order to obtain compensation for the loss which he has sustained.⁷³ Nor could such wrong-doer escape liability for any diminution in the value of the premises for use by showing that the market value of the property had been increased.⁷⁴ It had been decided in an earlier case in Georgia⁷⁵ in which a railroad company which had illegally obstructed a street and thereby prevented the plaintiff's customers from going to his place of business, that it was not a defense that new and increased custom will result to the plaintiff's business by reason of the

⁷³ *Davis v. East Tennessee, etc. R. Co.*, 87 Ga. 605; *Gerrish v. New Market Mfg. Co.*, 30 N. H. 478; *Marcy v. Fries*, 18 Kan. 353; *Francis v. Schoellkopf*, 53 N. Y. 153; *Arminius C. Co. v. Landrum*, 113 Va. 7, 38 L.R.A.(N.S.) 272, citing the text.

⁷⁴ *Ackerman v. True*, 175 N. Y. 353; *Gulf, etc. R. Co. v. Blue*, 46 Tex. Civ. App. 239; *Jones v. Royster G. Co.*, 6 Ga. App. 506.

⁷⁵ *Harvey v. Georgia, etc. R. Co.*, 90 Ga. 66. See *Mayrant v. Columbia*, 82 S. C. 273.

obstruction itself, as by placing a depot across the alley; it was also ruled that an increase in the value of his property could not be considered as a set-off against the injury to the business.

It has been held in Massachusetts that tenants who have continued in the occupancy of premises diminished in value by a nuisance in consideration of reduced rents given by the landlord cannot maintain an action to recover for the decreased value of the premises to them.⁷⁶ This view has been approved by the New York court of appeals.⁷⁷ There are forcible objections to it, which are well expressed in an opinion by Dixon, J.⁷⁸ The adjustment of the rent is not a satisfaction of the damages suffered by the tenant from the defendant's wrong. "By the letting the tenants acquired the right to the enjoyment of the property unimpaired by any wrongful acts of the defendant. That, through fear of such acts, they had been enabled to obtain that right at a diminished price, neither licensed the acts nor relieved the defendant in any degree from the duty of reparation. The measure of the tenants' damages did not depend upon the amount of rent which they paid, but upon the diminution in the value of the use of the premises resulting from the wrongful diversion of water. The landlords in leasing to the tenants at reduced rates were not to be regarded as agents of the defendant adjusting with the tenants the compensation for the injury to be done. Both landlords and tenants were acting independently of the defendant, and not in any sense detracting from the rights which they then had or thereafter might acquire against the defendant. Notwithstanding their acts, the wrong-doer remained answerable to the landlords for lessening the value of the reversion, and to the tenants for lessening the value of the use during the term." The deduction in the rent was of course set off against the tenants' damages.⁷⁹

§ 1057. **Damages affected by interest in estate.** The damages recoverable against the party responsible for a nuisance will

⁷⁶ *Baker v. Sanderson*, 3 Pick. 348.

⁷⁷ See § 1057.

⁷⁸ *Halsey v. Lehigh Valley R. Co.*, 45 N. J. L. 26.

⁷⁹ *Id.*

be limited to the title or right of the plaintiff as in trespass.⁸⁰ Where a husband and wife joined in an action on the case for permanently obstructing a right of way appurtenant to her inheritance and she died while it was pending, the suit did not abate; the surviving husband recovered the whole amount of damages sustained until the death of the wife, and of those accruing afterwards a proportion equal to his interest in her estate as heir.⁸¹ A reversioner can only sue in respect of permanent injury which will continue to affect the property when his interest comes into possession; but the remoteness of the time when the possession may revert is not a bar to an action if the nuisance is permanent.⁸² It has been ruled that when the land damaged is held for the purpose of letting it on building leases and selling the ground rent any depreciation in the value of such rent is not a cause of damage to the reversioner because that is not the natural way of dealing with a reversion.⁸³ Where the reversioner had contracted to lease land to builders and to make, and had made them, advances, and sought to recover for the depreciation in his securities resulting from an injury done to the buildings it was held that the builders' right to leases depended upon their payment of whatever advances had been made, and the reversioner's recovery was determinable by the sum necessary to repair the injury directly caused by the nuisance, and by ascertaining how far the houses before they were repaired would have been a sufficient security for the

⁸⁰ *Sayers v. Missouri Pac. R. Co.*, 82 Kan. 123, 27 L.R.A.(N.S.) 168; *Bentley v. Atlanta*, 92 Ga. 623; *Hufnagel v. Mt. Vernon*, 49 Hun 286; *Francis v. Schoellkopf*, 53 N. Y. 153; *Seely v. Alden*, 61 Pa. 305, 100 Am. Dec. 642; *Staple v. Spring*, 10 Mass. 72. See §§ 1012, 1013.

The rights of a settler on public land should be defined by the court and the jury left to fix his interest and damages. *Ellsworth, etc. R. Co. v. Gates*, 41 Kan. 574; *McLeod v. Spencer*, 21 Okla. 165, 17 L.R.A.(N.S.) 958, 129 Am. St. 774.

Possession is sufficient evidence of title against one who does not claim title. *Long v. Louisville & N. R. Co.*, 128 Ky. 26, 13 L.R.A.(N.S.) 1063.

⁸¹ *Jeffcoat v. Knotts*, 11 Rich. 649.

⁸² *Sloss-S. S. & I. Co. v. Mitchell*, 181 Ala. 576; *Shelfer v. City of London, El. L. Co.*, [1895] 1 Ch. 287. See *Bigbee F. Co. v. Scott*, 3 Ala. App. 333.

⁸³ *Rust v. Victoria G. D. Co.*, 36 Ch. Div. 113, 131.

advances. If there was a deficiency he was entitled to so much of the sum required to pay the damage done the houses as, in addition to their value in their injured state, would have been sufficient to make good the advances.⁸⁴ Damages were allowed for delay in letting vacant land which had been overflowed.⁸⁵

It has been held by one of the intermediate Missouri courts that the right of a tenant to sue for the damages caused by overflowing his crops is not affected by the fact that he rented the land after the erection of the embankment which caused the injury, and with knowledge that it was standing. If he is not prevented from cultivating the land his recovery is limited to the injury done his crop.⁸⁶ A case in New York is hardly harmonizable with this view, and, though it was affirmed by the court of appeals, is not to be regarded as sound in view of a later decision next referred to, unless it can be distinguished as is indicated therein. The plaintiff was aware of the existence of the nuisance when he became a tenant, and might have ascertained that the stream of which he complained had been polluted by the defendant's sewage for many years, that it had been judicially declared to be a public nuisance, and that it could not be abated for some time. Under these circumstances it was presumed that the rent was based on the existing conditions, and hence the tenant was not damaged.⁸⁷ But in the case referred to it is held that a tenant who renews his lease knowing that a nuisance exists on the premises may recover damages sustained during the renewal period. The reason of the rule is thus tersely given: If the act complained of is a nuisance it is a wrong, the existence of which cannot be justified at any time as against any one injuriously affected thereby.⁸⁸ A tenant may recover for injury to fixtures on the lease-

⁸⁴ *Id.*

⁸⁵ *Id.*

The difference in the value of crops as affected by a nuisance is the measure of redress in favor of a tenant from year to year. *Martin v. Schwertley*, 155 Iowa 347, 40 L.R.A.(N.S.) 160.

⁸⁶ *McKee v. St. Louis, etc. R. Co.*, 49 Mo. App. 174. See § 1055.

⁸⁷ *Yoos v. Rochester*, 92 Hun 481, affirmed without opinion, 159 N. Y. 541.

⁸⁸ *Bly v. Edison E. I. Co.*, 172 N. Y. 1, 58 L.R.A. 500; *Smith v. Phillips*, 8 Phila. 10, and other cases

hold if he is required to keep them in repair.⁸⁹ Under some circumstances the owner, though not in possession, may recover all the damage done by a nuisance—as where, in consequence of it, he has given his tenants a reduction of rent at their request in consideration of their continuing as tenants. “After such an agreement they could not maintain an action against the defendant for damages occasioned by the obstructions complained of. That agreement and the plaintiff’s recovery in this case will be a good bar to any action that may be brought in the names of the tenants.”⁹⁰

§ 1058. **Private remedy for public nuisance.** A nuisance may be both public and private in its character; in so far as it is public the person who suffers a peculiar damage therefrom has a right of action.⁹¹ There are three things which one who

cited in the opinion in the principal case.

⁸⁹ *Sacchi v. Bayside L. Co.*, 13 Cal. 73.

⁹⁰ *Baker v. Sanderson*, 3 Pick. 352; *Sumner v. Tileston*, 7 id. 198. It is said in *Bly v. Edison Co.*, *supra*, that *Yoos v. Rochester*, *supra*, falls in this category. See *Van Sielen v. City of New York*, 64 App. Div. (N. Y.) 437, as modified in 172 N. Y. 504. See, also, last paragraph of § 1056.

A license to use the water of a spring on the land of a third party does not give cause for recovery against one who has rightfully interfered with its exercise. *Ball v. Sydney & L. R. Co.*, 46 Nova Scotia 507.

⁹¹ *Ort v. Bowden* (Tex. Civ. App.), 148 S. W. 1145; *Roessler-II. C. Co. v. Doyle*, 73 C. C. A. 174, 142 Fed. 118; *Arizona C. Co. v. Gillespie*, 12 Ariz. 190; *Oliver v. Klamath Lake N. Co.*, 54 Ore. 95; *Foust v. Pennsylvania R. Co.*, 212 Pa. 213; *Barksdale v. Charleston, etc. R. Co.*, 83 S. C. 287; *Haskell v. Hartrick* (Tex. Civ. App.), 136 Suth. Dam. Vol. IV.—18.

S. W. 1057; *Sholin v. Skamania B. Co.*, 56 Wash. 303, 28 L.R.A.(N.S.) 1053; *Park v. C. & S. W. R. Co.*, 43 Iowa 636; *Crommelin v. Cox*, 30 Ala. 318, 68 Am. Dec. 120; *Abbott v. Mills*, 3 Vt. 521, 23 Am. Dec. 222; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *Myers v. Malcolm*, 6 Hill 292; *Hay v. Cohoes Co.*, 3 Barb. 48; *Fort Plain B. Co. v. Smith*, 30 N. Y. 62; *Welton v. Martin*, 7 Mo. 307; *Grigsby v. Clear Lake W. Co.*, 40 Cal. 396; *Venard v. Cross*, 8 Kan. 248; *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654; *Greene v. Nunnemacher*, 36 Wis. 50; *Ford v. Santa Cruz R. Co.*, 59 Cal. 290; *Holmes v. Corthell*, 80 Me. 31; *French v. Connecticut River L. Co.*, 145 Mass. 261; *Jacksonville v. Doan*, 145 Ill. 23, aff’g 48 Ill. App. 247; *Crane Co. v. Stammers*, 83 Ill. App. 329; *Harley v. Merrill B. Co.*, 83 Iowa 73; *Schoen v. Kansas City*, 65 Mo. App. 134; *Bueckholz v. New York, etc. R. Co.*, 148 N. Y. 640; *Potter v. Indiana, etc. R. Co.*, 95 Mich. 389; *Page v. Mille Lacs L. Co.*, 53 Minn. 492, overruling *Swanson v. Mississippi & R. R. B. Co.*,

sues on account of a public nuisance must show, in addition to the existence thereof, before he can recover. 1. A particular, or, more exactly speaking, a peculiar, injury to himself beyond that which is suffered by the rest of the public. 2. The injury to him must, according to some courts, be direct, and not merely consequential. 3. It must be of a substantial character, not fleeting or evanescent.⁹² Justice Fry has observed of the expression "fleeting or evanescent" that that is not deemed to be so which results in substantial damage; the language has not so much reference to time as to the effects upon the plaintiff.⁹³ One who has sustained damage peculiar to himself from a common nuisance has a cause of action against the person creating or maintaining it although a like injury has been sustained by numerous other persons.⁹⁴ Grover, J., thus forcibly states this doctrine: "The idea that if by a wrongful act a serious injury is inflicted upon a single individual recovery may be had therefor against the wrong-doer, and that if by the same act numbers are so injured no recovery can be had by any one, is absurd. * * * It is said that holding the defendant liable to respond in an action to each one injured will lead to a multiplicity of actions. This is true, but it is no defense to the wrong-doer when called upon to compensate for the damages sustained from his wrongful act to show that he, by the same act, inflicted a like injury upon numerous other persons. The position is unsustained by any authority."⁹⁵ While

42 Minn. 532, 7 L.R.A. 673, and *Lammers v. Brennan*, 46 Minn. 209; *Knowles v. Pennsylvania R. Co.*, 175 Pa. 623, 52 Am. St. 860; *Richi v. Chattanooga B. Co.*, 105 Tenn. 651.

⁹² Per Lord Justice Brett in *Benjamin v. Storr*, L. R. 9 C. P. 406, except as to the qualification in the second proposition.

⁹³ *Fritz v. Hobson*, 14 Ch. Div. 542, 556.

⁹⁴ *Central Georgia Power Co. v. Pope*, 141 Ga. 186, citing the text;

Hoyt v. McLaughlin, 250 Ill. 442; *Brooks v. Delaware, etc. R. Co.*, 80 N. J. L. 678; *American C. Co. v. Caswell* (Tex. Civ. App.), 141 S. W. 1013; *Same v. Davis*, id. 1019; *Francis v. Schoellkopf*, 53 N. Y. 153; *Bannon v. Rohmeiser*, 17 Ky. L. Rep. 1738; *Farmers' Co-op. Mfg. Co. v. Albermarle & R. R. Co.*, 117 N. C. 579, 53 Am. St. 606, 29 L.R.A. 700; *Indianapolis W. Co. v. American S. Co.*, 57 Fed. 1000.

⁹⁵ *Fisher v. Zumwalt*, 128 Cal. 493.

in the application to particular cases there is some conflict,⁹⁶ yet there is none whatever in the rule itself. That rule is that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom except such as is common to the entire community; yet he is liable at the suit of one who has sustained damage peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury. When the injury is common to the public, and special to none, redress must be sought by a criminal prosecution in behalf of all."⁹⁷ The plaintiff must suffer some special damage beyond that which is suffered in common with the public.⁹⁸ The continuance of the damage is not the test applied to determine the existence of the right of action in an individual. In a recent case in the court of King's Bench it was determined that a public nuisance which obstructs the view from a private house is cause for recovery on the basis of rents lost though the tenancy was but for a single day.⁹⁹ The damage sustained by an individual may be

⁹⁶ See *Stetson v. Faxon*, 19 Pick. 147; *Farrelly v. Cincinnati*, 2 Disney 516; *Page v. Mille Lacs L. Co.*, 53 Minn. 492, and local cases referred to in the opinion; *South Carolina S. Co. v. Wilmington, etc. R. Co.*, 46 S. C. 327, 33 L.R.A. 541; *Dudley v. Kennedy*, 63 Me. 465.

⁹⁷ Cases cited in note 4, *supra*; *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *First Baptist Church v. Schenectady, etc. R. Co.*, 5 Barb. 83. See *Shawbut v. St. Paul, etc. R. Co.*, 21 Minn. 502.

⁹⁸ *Birmingham R., L. & P. Co. v. Smyer*, 181 Ala. 121, 47 L.R.A. (N.S.) 597; *Stoutemeyer v. Sharp*, 89 Ark. 175, 21 L.R.A. (N.S.) 74; *Reynolds v. Presidio & F. R. Co.*, 1 Cal. App. 229; *Chicago, etc. R. Co. v. de Freilas*, 134 Ill. App. 228;

Rhymer v. Fretz, 206 Pa. 230, 98 Am. St. 777; *Liermann v. Milwaukee*, 132 Wis. 628, 13 L.R.A. (N.S.) 253; *Dudley v. Kennedy*, 63 Me. 465; *Yolo County v. Sacramento*, 36 Cal. 193; *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634; *Cole v. Sprowl*, 35 Me. 161, 56 Am. Dec. 696; *Harrison v. Sterett*, 4 Har. & McH. 540; *Bunyon v. Bordine*, 14 N. J. L. 472; *Baxter v. Winooski T. Co.*, 22 Vt. 114; *Hatch v. Vermont, etc. R. Co.*, 28 Vt. 142; *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482; *Marini v. Graham*, 67 Cal. 130; *McCloskey v. Kreling*, 76 Cal. 511; *Hogan v. Central Pac. R. Co.*, 71 Cal. 83; *Gilbert v. Greeley, etc. R. Co.*, 13 Colo. 501.

⁹⁹ *Campbell v. Paddington*, [1911] 1 K. B. 869.

either direct or consequential,¹ and to permit of recovery must be specially alleged.²

§ 1059. **Joint and several liability; distinction between private and public nuisance.** All persons who jointly participate in the creation of a nuisance or in its maintenance during the same period may be held liable jointly or severally as in other cases of tort.³ But parties liable only as tenants or grantees of the premises on which a nuisance is situated cannot be held jointly liable with the party creating it; for, while the creator of a nuisance continues to be liable in the tenant's or grantee's time, the latter are not liable before their connection with the property. And in case of a succession of tenants each is severally liable during his term only; and successive grantees in the same manner.⁴ One who purchases premises with a nuisance upon them, they being subject to a demise for a term, so that he is without opportunity for abating the nuisance, does not make himself liable for it.⁵ An independent contractor may be jointly and severally liable for temporary damages, but not for

¹ *Rose v. Miles*, 4 M. & S. 101; *De Laney v. Blizzard*, 7 Hun 7; *Goggans v. Myrick*, 131 Ala. 286.

² *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421; *Memphis, etc. R. Co. v. Hicks*, 5 Sneed 427; *Swain v. Tennessee C. Co.*, 111 Tenn. 430.

³ *Adler v. Pruitt*, 169 Ala. 213, 32 L.R.A.(N.S.) 889; *De Lashmutt v. Chicago, etc. R. Co.*, 148 Iowa 556; *Pickerill v. Louisville*, 125 Ky. 213; *Flynn v. Butler*, 189 Mass. 377; *Clark v. Patapsco G. Co.*, 144 N. C. 64, 119 Am. St. 931; *Moore v. Koppin* (Tex. Civ. App.), 135 S. W. 1033; *San Antonio, etc. R. Co. v. Gurley*, 37 Tex. Civ. App. 283; *Arnold v. Chicago, etc. R. Co.*, 86 Kan. 12; *Chicago-V. C. Co. v. Wilson*, 67 Ill. App. 443; *Kewanee v. Ladd*, 68 id. 154; *Hyde Park Thomson-H. L. Co. v. Porter*, 167 Ill. 276; *Kansas City v. Slangstrom*, 53 Kan. 431; *Stickley v. Chesapeake & O. R. Co.*, 93 Ky. 323; *Moore v.*

Townsend, 76 Minn. 64, 6 Am. Neg. Rep. 95; *Cooley on Torts* 133, 134.

If the action is barred as to one defendant only, as by his neglect to file a claim against a county as required by statute, all the damages may be recovered against the others. *Nalley v. Carroll County*, 135 Ga. 835.

⁴ *Greene v. Nunnemacher*, 36 Wis. 50; *Lull v. Fox & W. Imp. Co.*, 19 Wis. 101; *Hess v. Buffalo, etc. R. Co.*, 29 Barb. 391; *Wayland v. St. Louis, etc. R. Co.*, 75 Mo. 548.

A grantee is not liable for the erection or continuance of a nuisance caused by his grantor on land not owned by the latter. *Wayland v. R. Co.*, *supra*; § 1035.

⁵ *Williamson v. Friend*, 1 New South Wales St. Rep. (Eq.), 133, disapproving a dictum of *Littledale, J.*, in *King v. Pedley*, 1 Ad. & E. 822, 827.

permanent damages if he has duly performed his contract; his liability ceases when his control of the thing causing the nuisance terminates.⁶

If several, independently and without concert, create a private nuisance they are not jointly liable; but each is liable in respect to his own wrongful act and for the damages which resulted therefrom.⁷ A dam was filled by deposits of coal dirt from different mines on the stream above the dam; some mines were worked by the defendants and their tenants, and others by persons entirely unconnected with the defendants. The court held that the latter were not liable for the combined results of all the deposits; that the ground of the action was not the deposit of the dirt in the dam by the stream, but the negligent act above; throwing the dirt into the stream was the tort; the deposit only the consequence. The liability of the defendants began with their acts on their own land, and was wholly separate and independent of concert with others. Their tort was several when committed, and it did not become joint because its consequences united with other consequences; and they were not liable for the acts of their tenants not done by their authority or command.⁸ "It may be difficult to determine how much dirt came from each colliery, but the relative proportion thrown

⁶ Willis v. White, 150 N. C. 199, 134 Am. St. 906.

⁷ City of Henderson v. Robinson, 152 Ky. 245; Harley v. Merrill B. Co., 83 Iowa 73; Correll v. Cedar Rapids, 110 Iowa 333, 15 Am. Neg. Rep. 144; St. Louis S. R. Co. v. Morris, 76 Ark. 542; Tackaberry v. Sioux City S. Co., 154 Iowa 358, 40 L.R.A.(N.S.) 102; Bowman v. Humphrey, 124 Iowa 744; Newark v. Chestnut Hill L. Co., 77 N. J. Eq. 23; Whalen v. Union B. & P. Co., 145 App. Div. (N. Y.) 1; Howard v. Buffalo (Misc.), 122 N. Y. Supp. 1095; Standard B. & P. Co. v. Cleveland, 25 Ohio C. C. 380; Sherman G. & E. Co. v. Belden, 103 Tex. 59, 27 L.R.A.(N.S.) 237; McFadden v. Missouri, etc. R. Co., 41 Tex. Civ. App.

350; San Antonio, etc. R. Co. v. Gurley, *supra*. Compare Upson C. & M. Co. v. Williams, 7 Ohio C. C. (N.S.) 293, holding that in an action against one of several whose acts have produced a nuisance if there is no effort to show the amount contributed by the others to the injury or the extent of the defendant's responsibility for the injury, the jury may not apportion the damages equally among the defendants.

⁸ Eckman v. Lehigh, etc. C. Co., 50 Pa. Super. Ct. 427; Little Schuylkill N., etc., Co. v. Richards, 57 Pa. 142, 98 Am. Dec. 209; Standard B. & P. Co. v. Cleveland, 2 Ohio C. C. (N.S.) 111.

in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held liable for the torts of others without concert. It would be simply to say because the plaintiff fails to prove the injury one man does him he may therefore recover from that one all the injury that the others do."⁹ Where the owners of different tracts of land, acting separately, constructed and maintained different ditches, whereby waters were turned into a canon and then commingled and passed through it and overflowed the plaintiff's land, covering it with sand, they were not jointly liable for the damages.¹⁰

The defendant constructed a covered channel for a small brook that ran through his premises. The channel proved insufficient for all the water that came down the brook in times of heavy rain, and by its obstruction caused water to overflow upon and injure the adjoining premises of the plaintiff. The local authorities, after making such channel, constructed several sewers and drains which emptied into the brook above these premises, by which a considerable quantity of sewage and surface water that would have gone in other directions was let into the brook. It was held that the defendant was not liable for any damage beyond that caused by the natural flow of the

⁹ *Eckman v. Lehigh, etc. Co.*, 50 Pa. Super. Ct. 427; *Watson v. Colusa-P. M. & S. Co.*, 31 Mont. 513; *Howard v. Buffalo (Misc.)*, 122 N. Y. Supp. 1095; *Columbus v. Rohr*, 10 Ohio C. C. (N.S.) 320; *Standard B. & P. Co. v. Cleveland*, 25 Ohio C. C. 380; *Swain v. Tennessee C. Co.*, 111 Tenn. 430; *Pulaski A. C. Co. v. Gibboney S. B. Co.*, 110 Va. 444, 24 L.R.A.(N.S.) 1185; *Chipman v. Palmer*, 9 Hun 517, 77 N. Y. 51; *Wallace v. Drew*, 59 Barb. 413; *Van Steenburgh v. Tobias*, 17 Wend. 562, 31 Am. Dec. 310, 1 Am. Neg. Cas. 235; *Russell v. Tomlinson*, 2 Conn.

206, 1 Am. Neg. Cas. 74; *Adams v. Hall*, 2 Vt. 9, 1 Am. Neg. Cas. 252; *Buddington v. Shearer*, 20 Pick. 477; *Auchmuty v. Ham*, 1 Denio 495, 1 Am. Neg. Cas. 229; *Partenheimer v. Van Order*, 20 Barb. 479; *Elgin v. Welch*, 16 Ill. App. 483; *Loughran v. Des Moines*, 72 Iowa 382; *Mansfield v. Hunt*, 19 Ohio C. C. 488, citing the text. But see *Boyd v. Watt*, 27 Ohio St. 259; *Givens v. Van Studdiford*, 4 Mo. App. 498; *United States S. Co. v. Sisam*, 191 Fed. 293, 37 L.R.A.(N.S.) 967.

¹⁰ *Miller v. Highland D. Co.*, 87 Cal. 430, 22 Am. St. 254.

water, including its increased flow from heavy rains and other natural causes; that he and the city which constructed such sewers were not joint tort-feasors.¹¹ There may be a like limitation where the wrongful acts have produced consequences multiplied by unforeseen and extraordinary natural causes. A railway company threw the waste water from its tank upon the premises of another, where it spread and froze, doing damage to the property of the owner; it was held that the company could not claim exemption from liability on the ground that the freezing of the water was the act of nature, for such result from the wrongful act might have been foreseen. To excuse from liability for an act of nature in combination with the defendant's act it must have been such as could not have been foreseen or prevented by the exercise of ordinary care and prudence.¹² Where all the water which so freezes on another's lot is not the water turned thereon by the defendant, but a part is flowing surface water in its natural course, the defendant is liable only for the damages resulting from the water caused to flow upon the land by himself. The jury should not return nominal damages in such a case merely because they cannot determine how much of the actual damage was so caused. They must estimate in the best way they can how much of the whole damage was occasioned by the water turned on the land by the defendant.¹³

Joint and several liability may attach to persons who are not joint tort-feasors, as where their acts are separate and distinct as to place and time, but culminate in producing a public nuisance which injures the person or property of another.¹⁴

¹¹ Sellick v. Hall, 47 Conn. 260.

¹² Chicago, etc. R. Co. v. Hoag, 90 Ill. 339; Cobb v. Smith, 38 Wis. 21. See Ohio & M. R. Co. v. Combs, 43 Ill. App. 119.

¹³ Chicago, etc. R. Co. v. Hoag, *supra*; Learned v. Castle, 78 Cal. 454.

¹⁴ Valparaiso v. Moffitt, 12 Ind. App. 250, 54 Am. St. 522.

It is said in West Muncie S. Co.

v. Slack, 164 Ind. 21, if a party deliberately places himself in opposition to the entire community by performing an act which, in combination with the independent wrongful acts of others, violates a statute and creates a public nuisance he is not in a position to assert he should be held responsible to individuals specially damaged only for the actual loss he alone has

In a New York case three persons owned in severalty adjoining lots. A continuous brick wall formed the front of the three buildings on the lots. The buildings were destroyed by fire, which left standing only the front wall and parts of the partition walls. Shortly after the fire the front wall began to incline toward the street and afterwards fell upon and killed a person lawfully there. The wall all fell and the material from it, situate on two of the lots, caused the injury, no part of that comprising the wall of the other lot having struck the deceased. In an action against all the lot owners they were held jointly and severally liable because their misconduct created a public nuisance.¹⁵ There is a West Virginia case in harmony with this

occasioned them. He must have anticipated the natural and probable consequences of his acts—the violation of a public right; and the public interest requires he shall, if need be, bear the full burden of the wrong he has assisted in inflicting. Nor is it material that his act of itself, and without reference to the co-operation of others, would not create a public nuisance. He must be deemed to know, in a case such as the present, that, if his wrong combines with similar acts of third parties, the result will be to intensify the public and private injury. The welfare of the community demands that he who thus intentionally and aggressively assists either in creating or maintaining a public nuisance in defiance of positive enactment shall answer in civil damages for all injurious consequences proximately resulting therefrom to private individuals who bring themselves within the requirements of the law.

¹⁵ *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. 676. See *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185, citing, besides local cases, *Klauder v. McGrath*, 35 Pa. 128.

In cases of this kind, as well as where the injury complained of results in part from lawful acts of the defendant and in part from his unlawful acts, the plaintiff is not to be left without redress because of the difficulty of apportioning the effects of such acts. In a case of the latter class it was found that a substantial part of the plaintiff's loss was occasioned by the tortious act, and conceded that the residue of the loss was attributable to some lawful act of the defendant, inseparable in its consequences from the tortious act, and the court said: To say that the plaintiff must be denied a substantial recovery because of the impossibility of distinguishing between the consequences that were lawfully originated and those that were unlawfully imposed upon him is to say that in such circumstances the best approximation to justice attainable in a court of law is to require the injured party to bear the entire burden of loss. From the standpoint of natural justice, it would be better to permit the wrongdoer to bear the whole. *Jenkins v. Pennsylvania R. Co.*, 67 N. J. L. 331, 57 L.R.A. 309. See *Chi-*

view,¹⁶ and following it the rule has there been declared to be that a party charged with responsibility for a nuisance cannot defend on the ground that various others maintained works similar to his and threw their refuse into the same stream, and that the plaintiff's injury came as well from their acts as from the defendants.¹⁷

§ 1060. **Pleading.** The general allegation of damage will suffice to let in proof and warrant the recovery of all such damages as naturally and necessarily result from the wrongful act complained of to the premises described in the complaint;¹⁸ the law implies such damages; that is, damages of that sort, and proof is necessary only to show their extent and amount.¹⁹ But where the damages actually sustained do not necessarily result from the act complained of and consequently are not implied the plaintiff must state in his declaration the particular

cago, etc. R. Co. v. Hoag, 90 Ill. 339; Paxson Co. v. Board of Chosen Freeholders, 201 Fed. 656.

Where water is diverted from a river by several parties the damages are not to be apportioned among them in proportion to the amount of water each used, at least where one of them accumulated water in reservoirs in times of surplus in order to use it when the supply was low, and when the plaintiff was most affected. The parties' liability was apportioned on the basis of the current flow diverted by each in times of low water. Weidman S.-D. Co. v. Newark, 83 N. J. L. 50.

¹⁶ Johnson v. Chapman, 43 W. Va. 639.

¹⁷ Day v. Louisville C. & C. Co., 60 W. Va. 27, 10 L.R.A.(N.S.) 167.

¹⁸ Mississippi Cent. R. Co. v. Magee, 93 Miss. 196.

¹⁹ Exley v. Southern C. O. Co., 151 Fed. 101; Muncie P. Co. v. Keesling, 166 Ind. 479; 1 Chitty Pl. 395; Solms v. Lias, 16 Abb. Pr. 311; Taylor v. Dustin, 43

N. H. 493; De Forest v. Leete, 16 Johns. 122; Bristol Mfg. Co. v. Gridley, 28 Conn. 201; Burrell v. New York & S. S. S. Co., 14 Mich. 39; Teagarden v. Hetfield, 11 Ind. 522; Ellicott v. Lamborne, 2 Md. 131; Gempp v. Bassham, 60 Ill. App. 84.

The deposit of earth and like substances is the natural result of the overflow of land by water, and the damage resulting may be recovered although the items thereof were not specially pleaded. Hunt v. Iowa Cent. R. Co., 86 Iowa 15, 41 Am. St. 473.

Under a declaration claiming for injuries to an entire original lot which was divided into sub-lots damages to any part of the land may be recovered. Hetzel v. Baltimore & O. R. Co., 169 U. S. 26, 42 L. ed. 648.

Under an allegation of damage to property its destruction may be shown. Monarch Mfg. Co. v. Omaha, etc. R. Co., 127 Iowa 511.

damage which he has sustained for notice thereof to the defendant; otherwise the plaintiff will not be permitted to give evidence of it on the trial.²⁰ The damages which enter into or constitute the general measure of recovery are those provable under the usual allegation of damage; but in many cases of tort there is no such state of facts that the whole injury would be covered by any general rule more precise than the elementary principle which entitles the injured party to just compensation. The question, therefore, whether any particular injurious result of the tortious act committed by the defendant, not stated in the pleadings, can still be proved to enhance the damages must depend on whether it is the necessary consequence of that act. If not the direct consequence it must be alleged, and so specifically as that the defendant may be apprised of the claim. Where the use of a mill was impaired by the obstruction of the water by a dam below on the stream, and the declaration alleged that the obstruction subjected the plaintiff to great loss and expense by the interruption of the business of the mill and in depriving him of the profits thereof, it was held he was not entitled to recover for the loss or diminution of rent. "Profits," say the court, "are clearly distinguishable from rents. Both terms are technical in their nature, and neither necessarily includes the other; there may be profits without rent, and *vice versa*."²¹ A special demurrer will lie to a petition, which alleges that the plaintiff had lost his part of the crops grown on the land in consequence of the illness of the croppers brought about by the nuisance, for failure to set out the char-

²⁰ *King L. Co. v. Bowen*, 7 Ala. App. 462; *Eeraert v. Eureka L. Co.*, 43 Mont. 517; *Texas, etc. R. Co. v. Looney*, 33 Tex. Civ. App. 495; *Holmes v. Corthell*, 80 Me. 31; *Squier v. Gould*, 14 Wend. 159; *Plimpton v. Gardiner*, 64 Me. 360; *Taylor v. Dustin*, 43 N. H. 498; *Spencer v. St. Paul, etc. R. Co.*, 21 Minn. 362; *Wampach v. Same*, id 364; *Ellicott v. Lamborne*, 2 Md

131; § 39; *Houston, etc. R. Co. v. Lackey*, 12 Tex. Civ. App. 229.

If it is alleged that the nuisance has caused several distinct injuries the complaint is ambiguous and uncertain if it does not specify the amount of damage produced by each. *Grandona v. Lovdal*, 70 Cal. 161.

²¹ *Plimpton v. Gardiner*, 64 Me. 360.

acter and quantity of crops alleged to have been destroyed.²² In an action for obstructing a right of way leading to an estate held by the plaintiff's wife in mortgage the declaration contained only the general allegation of damages; and it was held that those for the consequent diminution of rents could not be recovered because not specially alleged.²³ So in an action for obstructing a natural water course and thereby injuring the plaintiff's buildings, loss of rents was treated as special damages.²⁴ In an action for the pollution of the water of a stream which ran through the plaintiff's land he was not permitted to prove the cost of boiling and skimming the water to fit it for household purposes, in the absence of an allegation that the water was, and had to be, so treated.²⁵ It was also held that proof was inadmissible to show that the rental value of the farm was diminished by the wrong done in polluting the waters of such stream because the complaint failed to allege that the plaintiff rented the farm or was prevented from renting it for that reason.²⁶

The plaintiff, owner of a paper mill, set forth in his declaration as its *gravamen* that earth, sand and other substances were washed into his mill-dam and so filled and choked the dam as to make it in a great degree useless to him in the working of his mill. The court held that he could not offer evidence to prove he could not wash his rags because the stream was rendered impure and muddy by the earth and clay deposit in and upon the margin, and that by reason of such impurity of the water he was prevented from making white paper. That the manufacture of paper is one thing and the preparation of the materials is another distinct process; and evidence showing damage as resulting from the interruption of the latter is not proper unless

²² Central Georgia Power Co. v. Harris, 141 Ga. 196.

²³ Adams v. Barry, 10 Gray 361.

²⁴ Parker v. Lowell, 11 Gray 353; Healey v. Kelley, 21 R. I. 489; Hodges v. Pine Product Co., 135 Ga. 134, 33 L.R.A.(N.S.) 74. Compare Muncie P. Co. v. Keesling 166 Ind. 479.

Petition in an action for damage, caused by defendant's backing the water in a stream, held good in part and bad in part. Central Georgia Power Co. v. Stubbs, 141 Ga. 172; Central Georgia Power Co. v. Fincher, 141 Ga. 191.

²⁵ Porter v. Froment, 47 Cal. 165.

²⁶ Porter v. Froment, 47 Cal. 165.

the fact is expressly pleaded. That the fact that the plaintiff owned a paper mill operated by water from the dam in question did not necessarily suggest the additional fact that he made white paper in his mill, and that the rags for the same were washed from the water in the dam. His inability to wash his rags and make paper could not, therefore, be regarded as the necessary and inseparable consequence of the washing of the earth into and filling up of the dam, and he could not recover for those particular injuries without specially alleging them.²⁷ But where the allegation was that the defendant failed to keep the privies, drains and drain pipes connected with his building in proper repair, but suffered the same to become and remain out of order so that water and filth escaped therefrom and percolated through the wall of the plaintiff's house on adjoining premises and into the cellar in such quantities as to soak and cover its floor and to make the same permanently unfit for use and, also, to greatly injure the walls and other portions of the building, and to create such an offensive stench and smell as to interfere with the use of said premises and with the letting thereof, it was held that the allegations were sufficient to authorize evidence of the loss of the use of the cellars and of the rental thereof.²⁸ Under an allegation of a continuous nuisance there may be a recovery for occasional nuisances caused in the manner pleaded.²⁹

²⁷ *Ellicott v. Lamborne*, 2 Md. 131.

²⁸ *Jutte v. Hughes*, 67 N. Y. 267.

A prayer for damages up to the time of filing the petition limits the period of their recovery accordingly.

Nations v. Harris (Tex. Civ. App.), 151 S. W. 334.

²⁹ *Cohen v. Bellenot* (Va.), 32 S. E. 455.

CHAPTER XXVI.

TAKING PROPERTY FOR PUBLIC USE.

§ 1061. The power of eminent domain; right to compensation; what is a taking.

1062. Consequential injury to property not taken.

1063. What is just compensation; costs; nominal damages.

1064. Measure of compensation.

1065. Injury to property not taken.

1066-1070. Same subject; what facts pertinent.

1071. Same subject; remote damages.

1072, 1073. Same subject; expenditures to lessen loss.

1074. Basis for estimating value of land.

1075. Same subject; value for condemnor's purpose.

1076. Compensation for wrong-doer's improvements.

1077. Compensation affected by title and nature of interest condemned, and purpose of use; taking railroad property for street and telegraph uses; proof of value.

1078. Same subject; condemnation of railroad property for railroad uses.

1079. Same subject; injury to franchise; ascertainment of its value.

1080. Same subject; elevated railroad and subway cases.

1081. Same subject; injuries to various interests; damages in favor of tenants.

1082. Same subject; to whom payment due; existence of servitude or easement; rights remaining in owner.

1083. Assessment of damages and benefits, time of; mitigation of liability by act of third party.

1084-1087. Deduction for benefits; what benefits special.

1088. What lands considered in assessing benefits and damages.

1089. Proof of value and damages.

1090. Effect of judgment for compensation—Abandonment of proceedings.

1091. Interest.

§ 1061. The power of eminent domain; right to compensation; what is a taking. By the exercise of the right or power of eminent domain an individual owner may be compelled to sell and surrender his property when the public necessities require it.¹ Not only land, but incorporeal rights connected therewith, may be taken for public use.² The taking is deemed

¹ Fletcher v. Peck, 6 Cranch 145, San Francisco, etc. R. Co. v. Caldwell, 31 Cal. 367.
³ L. ed. 180; Trombley v. Humphrey, 23 Mich. 474, 9 Am. Rep. 94;

² Furniss v. Hudson River R. Co.,

to be for such use as well when the state or some municipal division thereof exercises the power as when it is invoked by certain private corporations in aid of their undertakings to subserve the public interest, as for railroads, canals and other improved means of travel, transportation or communication.³ This right of eminent domain can be exercised to take private property only on the inseparable condition of making just compensation therefor,⁴ which must be of a pecuniary nature,⁵ and is secured by constitutional inhibition of the exercise of the right except upon its payment, unless the taking is done by the state, when it may await the owner's demand for compensation.⁶ Statutes which provide for the exercise of the right universally direct how the amount shall be ascertained and paid. Many statutes give a right to compensation for consequential

5 Sandf. 551; *Ladd v. Boston*, 151 Mass. 285; *Lycoming G. & W. Co. v. Moyer*, 99 Pa. 615; *Story v. New York E. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Newman v. Metropolitan E. R. Co.*, 118 N. Y. 618, 7 L.R.A. 289; *Metropolitan, etc. R. Co. v. Springer*, 171 Ill. 170; *Leonard v. Rutland*, 66 Vt. 105.

³ *Buffalo, etc. R. Co. v. Brainard*, 9 N. Y. 100; *Weir v. St. Paul, etc. R. Co.*, 18 Minn. 155; *Boston W. P. Co. v. Boston, etc. R. Co.*, 23 Pick. 360; *Giesy v. Cincinnati, etc. R. Co.*, 4 Ohio St. 308.

⁴ *In re Twelfth Ave. South*, 74 Wash. 132; *Lewis Township I. Co. v. Royer*, 38 Ind. App. 151; *Brown v. Chicago, etc. R. Co.*, 66 Neb. 106; *Bonaparte v. Camden, etc. R. Co.*, Baldwin 226; *Bloodgood v. Mohawk, etc. R. Co.*, 18 Wend. 9; *Cooley's Const. Lim. ch. 15*; *Bradshaw v. Rogers*, 20 Johns. 103; *Carson v. Coleman*, 11 N. J. Eq. 106; *Symonds v. Cincinnati*, 14 Ohio 148; *Ginn v. Moultrie, etc. D. Dist.*, 188 Ill. 305.

Where the taking is by the gov-

ernment which has provided a fund for the payment of damages possession may be entered upon before they have been assessed. *United States v. O'Neill*, 198 Fed. 677.

Advance payment is not required where incidental damage results from changing a street grade. *McGrew v. Granite B. P. Co.*, 247 Mo. 549.

⁵ *Id.*; *Von Richthofen v. Bijou I. Dist.*, 52 Colo. 527; *Martin v. Tyler*, 4 N. D. 278, 25 L.R.A. 838; *Chicago, etc. R. Co. v. Melville*, 66 Ill. 329; *Same v. McGrew*, 104 Mo. 282; *Weekler v. Chicago*, 61 Ill. 142; *Sutton v. Louisville*, 5 Dana 28; *Ferris v. Bramble*, 5 Ohio St. 199; *Covington Short Route T. Co. v. Piel*, 87 Ky. 267; *In re New York, etc. R. Co.*, 49 Hun 539; *Board of Levee Dist. v. Webb*, 188 Fed. 67; *Chattahoochee Valley R. Co. v. Bass*, 9 Ga. App. 83. Compare *Welch v. Tippery*, 66 Neb. 604.

⁶ *Litchfield v. Bond*, 105 App. Div. (N. Y.) 229, citing *People v. Adirondack R. Co.*, 160 N. Y. 236.

injuries that are not within the requirement to make just compensation;⁷ for the legislature may authorize the exercise of the right of eminent domain without providing for all consequential damage. In the past few years there has been an extension of the liability for such damage. Nearly all the new and revised constitutions require that compensation shall be made for property "injured," "damaged" or "destroyed," as well as for that "taken."⁸ The imposition of that liability by constitution or statute creates no new right, but preserves the common-law right to recover in respect to any injury resulting from the enterprise, although that enterprise which is the cause of the injury has the sanction of law.⁹

The land-owner cannot be deprived of the compensation secured by the constitution or by statute except by his own act of waiver or discharge, or by his dereliction.¹⁰ The right to it exists not only when land is taken, but, in some states, when

⁷ *Clemens v. Connecticut Mut. L. Ins. Co.*, 184 Mo. 46, 105 Am. St. 526, 67 L.R.A. 362; *Smith v. Sedalia*, 244 Mo. 107. See *Earle v. Commonwealth*, 180 Mass. 579, 57 L.R.A. 292; *Imlay v. Union Branch R. Co.*, 26 Com. 249, 68 Am. Dec. 392.

⁸ See ch. 2, *Lewis on Eminent Domain*, 2d ed.

Only such damages may be recovered as the statute prescribes. *Johns v. Salamanca*, 129 App. Div. (N. Y.) 717.

⁹ *Columbia, etc. B. Co. v. Geisse*, 35 N. J. L. 563; *Austin v. Augusta T. R. Co.*, 108 Ga. 671, 47 L.R.A. 755; *Pennsylvania Co. v. Pennsylvania*, etc. R. Co., 151 Pa. 334, 31 Am. St. 762; *Beidler v. Sanitary Dist.*, 211 Ill. 628, 67 L.R.A. 820. See *South Bound R. v. Burton*, 67 S. C. 515.

¹⁰ *Chicago & N. R. Co. v. Miller*, 233 Ill. 508; *People v. Calder*, 89 App. Div. (N. Y.) 503; *Western, etc. R. Co. v. Johnston*, 59 Pa. 290. See *Driscoll v. Taunton*, 160 Mass.

486; *Kremer v. Chicago, etc. R. Co.*, 51 Minn. 15, 38 Am. St. 468.

A corporation which enters upon and appropriates the land of another to its own use, without right, cannot transfer its privileges to another so as to justify a continuance of the wrong in its vendee, as if the latter were an innocent purchaser. It is a taking in both instances without making compensation. *Stickney v. Chesapeake & O. R. Co.*, 93 Ky. 323.

Taxes due from the owner of condemned land to the condemnor, and which, though not a lien, are a personal indebtedness, may be deducted from the award. *Buckhout v. New York*, 82 App. Div. (N. Y.) 218.

Where a statute provides a definite and complete method of adjudication of damages for a taking, and of the amount of compensation due to owners of land as a consequence thereof, an owner who fails to take advantage of the statutory method of recovering his damages is with-

it is in any manner injuriously invaded though not taken.¹¹ Where a railroad corporation claiming to act under legislative authority removed a natural barrier situated between the land, the injury to which was in question, and the railroad, such barrier having theretofore completely protected the meadow on such land from the effects of freshets and floods in a neighboring river, it was held that, although the barrier was wholly beyond the boundaries of the land, yet, as its removal caused the water to overflow such land the owner had the same right to compensation as though a portion of it had been taken by the company.¹² If, however, land is not taken or touched in the construction and operation or use of a public work there can be no claim for damages for any consequential injury unless the constitution or a statute uses a broader term than "taken." Under the sanction of the legislature a railroad bridge was built over a stream within the limits of a city; on the destruction of the bridge by fire the city proceeded to erect another bridge on substantially the same site, but built it so that it might be used not only for a railroad bridge, but also for the accommodation of foot passengers and teams. The plaintiff, who owned a foundry on the stream and mainly relied on it for power to propel his machinery, sought to enjoin the construction of the bridge until compensation was awarded him for the loss produced by building the piers for the bridge in the channel of the stream. It was held that no cause of action existed, as his land was not touched and the damage, if there was any at all, was too indirect or consequential.¹³

out remedy. *Taylor v. Drainage Dist.*, 167 Iowa 42.

¹¹ *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. ed. 557; *Eaton v. B. C. & M. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Grand Rapids B. Co. v. Jarvis*, 30 Mich. 308; *Stetson v. Chicago*, etc. R. Co., 75 Ill. 74; *Conniff v. San Francisco*, 67 Cal. 45; *Chapman v. Staunton*, 246 Ill. 394.

¹² *Eaton v. R. Co.*, *supra*; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Aurora v. Reed*, 57 Ill. 29, 11

Am. Rep. 1; *Toledo, etc. R. Co. v. Morrison*, 71 Ill. 616; *St. Louis, etc. R. Co. v. Capps*, 72 Ill. 191; *Gillham v. Madison County R. Co.*, 49 Ill. 488.

¹³ *Swett v. Troy*, 12 Abb. Pr. (N.S.) 100; *Cleveland, etc. R. Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84; *Davidson v. Boston & M. R. Co.*, 3 Cush. 91; *Kokomo v. Mahan*, 100 Ind. 242; *In re Thompson*, 43 Hun 416; *Longworth v. Meriden & W. R. Co.*, 61 Conn. 451; *Lincoln v.*

This is, substantially, the doctrine of the supreme court of the United States, which declares that the remedy for a consequential injury resulting from the state's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta, and the restriction to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority.

* * * The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly v. Green Bay Co.*¹⁴ and in *Eaton v. Railroad Co.*¹⁵ In those cases it was held that permanent flooding of private property may be regarded as a taking. In those cases there was a physical invasion of the real estate of the private owner and a practical ouster of his possession.¹⁶ This rule is not affected by an act of congress requiring condemnation proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted, where the state statute relates only to the damages which are to be allowed as a condition upon which railroad companies may condemn lands, and the proceedings instituted by the United States are for the condemnation for river improvement purposes. In the case in which this was held these conclusions were announced:

Commonwealth, 164 Mass. 368; *Pennsylvania Co. v. Pennsylvania*, etc. R. Co., 151 Pa. 334, 31 Am. St. 762. See *Fitchburg R. Co. v. Boston & M. R. Co.*, 3 Cush. 58; *In re Union Village*, etc. R. Co., 53 Barb. 457; *Radeliff v. Mayor*, 4 N. Y. 195, 53 Am. Dec. 357; *Talcott v.*

Des Moines, 134 Iowa 113, 12 L.R.A. (N.S.) 696, 120 Am. St. 419; *Selden v. Jacksonville*, 28 Fla. 558, 29 Am. St. 278, 14 L.R.A. 370.

¹⁴ 13 Wall. 166, 20 L. ed. 557.

¹⁵ 51 N. H. 504, 12 Am. Rep. 147.

¹⁶ *Transportation Co. v. Chicago*, 99 U. S. 635.

Suth. Dam. Vol. IV.—19.

First, that a mere temporary flooding, not amounting to a "taking," and not the result of negligent construction or maintenance, is an injury consequential upon the proper and lawful improvement of a navigable river, and is not such an injury as would be actionable. Second. To now seek compensation for the remainder of the land on the theory that the dam will be so constructed and maintained as to permanently flood the remainder and amount to a "taking" of such land is premature. Third. Neither the anticipated change in the current of the river, nor the anticipated increase in danger from fire during the work of construction, are proper subjects for compensation. Both are injuries purely consequential, and constitute no actionable claim against the government.¹⁷

§ 1062. **Consequential injury to property not taken.** The general scope of the provisions of the several constitutions concerning the taking, injuring or damaging of private property under the power of eminent domain cannot be discussed here. The necessity for doing so does not exist because the subject has been fully considered and treated of in a recent work.¹⁸ It will serve the writer's purpose to call attention to a few of the leading cases which construe such provisions as require compensation to be made for property "injured," "damaged" or "destroyed." After some fluctuation in opinion and contrariety of decision, the Illinois court has settled its doctrine to be, that under the clause in the constitution of that state which provides for compensation if property is "damaged," "a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character, that it does not require that the damage shall be caused by a trespass or an actual physical invasion of the owner's real estate; but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party damaged may recover," if his damage is special and

¹⁷ *High Bridge L. Co. v. United States*, 69 Fed. 320, 16 C. C. A. 460.

¹⁸ *Lewis on Eminent Domain*. See article in 8 *Va. Law Reg.* 525.

such as gave him a right of action at common law.¹⁹ This is in harmony with recent cases in other states.²⁰ The right to compensation when property is "damaged" is not restricted to a case in which its owner would be entitled to recover as for a tort at common law. "If he is consequentially damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation for such damage, if it is special to him over and above that which is sustained by the public in general."²¹ Nearly all the cases agree that the injury

¹⁹ *Rigney v. Chicago*, 102 Ill. 64; *Chicago, etc. R. Co. v. Ayres*, 106 id. 511; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638; *Chicago, etc. R. Co. v. Leah*, 152 Ill. 249; *Same v. Eaton*, 136 Ill. 9; *Chicago North Shore St. R. Co. v. Payne*, 192 Ill. 239, 94 Ill. App. 466; *Metropolitan, etc. R. Co. v. Goll*, 100 id. 332. See *Chicago v. Spoor*, 190 Ill. 340.

Under a statute providing that a railroad company shall pay all damages occasioned by laying out, making and maintaining its road or by taking land or materials therefor, the fact that the change of the grade of a street made the use thereof by a property owner on another part of the street inconvenient does not show that he was specially damaged, though his only means of communication with other streets was by using that the grade of which was being altered. But it was otherwise where the latter street was closed for a long time, cutting off his access to other streets. *Putnam v. Boston & P. R. Corp.*, 182 Mass. 351.

²⁰ *Mason City, etc. R. Co. v. Wolf*, 148 Fed. 961; *Black v. Minneapolis*, etc. R. Co., 122 Iowa 32; *Swain v. Pemigewasset P. Co.*, 76 N. H. 498; *Dickerman v. Duluth*, 88 Minn. 288; *Less v. Butte*, 28 Mont. 27, 98 Am. St. 545, 61 L.R.A. 601; *Stehr v. Mason City, etc. R. Co.*, 77 Neb. 641;

124 Am. St. 872; *South Buffalo R. Co. v. Kirkover*, 176 N. Y. 301; *Arkansas Valley & W. R. Co. v. Witt*, 19 Okla. 262, 13 L.R.A.(N.S.) 237; *Swift v. Newport News*, 105 Va. 108, 3 L.R.A.(N.S.) 404; *Griffin v. Shreveport & A. R. Co.*, 41 La. Ann. 808; *Chicago, etc. R. Co. v. Hazels*, 26 Neb. 364; *Pennsylvania, etc. R. Co. v. Walsh*, 124 Pa. 544, 10 Am. St. 611; *Same v. Ziemer*, 124 Pa. 560; *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. 290; *Louisville v. Hegan*, 20 Ky. L. Rep. 1532; *Henderson v. McClain*, 19 Ky. L. Rep. 1450; *Stewart v. Council Bluffs*, 84 Iowa 61; *Alabama & V. R. Co. v. Bloom*, 71 Miss. 247; *Vicksburg v. Herman*, 72 Miss. 211; *Spencer v. Metropolitan St. R. Co.*, 120 Mo. 154, 22 L.R.A. 668; *O'Brien v. Philadelphia*, 150 Pa. 589; *Hobson v. Philadelphia*, 150 Pa. 595; *Blair v. Charleston*, 43 W. Va. 62, 64 Am. St. 837, 35 L.R.A. 852; *Eachus v. Los Angeles, etc. R. Co.*, 103 Cal. 614, 42 Am. St. 149; *A. & N. R. Co. v. Boerner*, 34 Neb. 240, 33 Am. St. 637; *Omaha v. Flood*, 57 Neb. 124; *Hurt v. Atlanta*, 100 Ga. 274. See *Pueblo v. Strait*, 20 Colo. 13, 46 Am. St. 273, 24 L.R.A. 392.

²¹ *Manning v. Shreveport*, 119 La. 1044, 13 L.R.A.(N.S.) 452; *Myers v. Charlotte*, 146 N. C. 246; *Fyfe v. Turtle Creek*, 22 Pa. Super. Ct.

or damage must be special.²² If noise, smoke, dust, cinders or things of that sort are shown to have damaged the property itself they may be considered in fixing the amount of recovery,²³ but they are to be disregarded if they result merely in an inconvenience or only cause discomfort to the occupants of the property.²⁴ Mississippi appears to be an exception. There the owner of property abutting on a street in which a railroad track is laid may recover for the physical inconvenience resulting to himself in the enjoyment of his property regardless of whether the fee of the street is in him or in the public, and though the inconvenience necessarily arises from the proper management of the road.²⁵ In Pennsylvania all elements of damage caused by the operation of trains over land previously condemned must be excluded on the condemnation of other land.²⁶ In Kentucky if the proximity of a railroad to a dwelling is such as to prevent reasonable ingress and egress to and from the premises, or to necessarily cause soot and cinders to enter the dwelling there is a taking of property.²⁷ There is

292; *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109; *St. Louis v. Brown*, 155 Mo. 545.

²² *Cram v. Laconia*, 71 N. H. 41, 57 L.R.A. 282; *Pennsylvania Co. v. Stanley*, 10 Ind. App. 421, 38 id. 421; *Ft. Worth, etc. R. Co. v. Downie*, 82 Tex. 383.

²³ *Baker v. Pennsylvania R. Co.*, 236 Pa. 479; *Smith v. St. Paul, etc. R. Co.*, 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. 889; *Stehr v. Mason City, etc. R. Co.*, 77 Neb. 641, 124 Am. St. 872; *Tidewater R. Co. v. Shartzler*, 107 Va. 562; *Illinois Cent. R. Co. v. Turner*, 194 Ill. 575, and local cases cited; *Calumet & C. C. & D. Co. v. Morawetz*, 195 Ill. 398; *Idaho & W. R. Co. v. Nagle*, 184 Fed. 598; *Mason City, etc. R. Co. v. Wolf*, 148 Fed. 961. See § 1066.

²⁴ *Harrison v. Denver City T. Co.*, 54 Colo. 593, 44 L.R.A.(N.S.) 1164; *Grossman v. Houston, etc. R. Co.*,

99 Tex. 641; *Illinois Cent. R. Co. v. Trustees of Schools*, 212 Ill. 406; *Acker v. Knoxville*, 117 Tenn. 224; *Wagner v. Bristol B. L. R. Co.*, 108 Va. 594, 25 L.R.A.(N.S.) 1278; *Reardon v. San Francisco*; *Eachus v. Los Angeles, etc. R. Co.*, 103 Cal. 614, 42 Am. St. 149; *Aldrich v. Metropolitan West Side E. R. Co.*, 195 Ill. 456, 57 L.R.A. 237; *Austin v. Augusta T. R. Co.*, 108 Ga. 671, 47 L.R.A. 755 (two judges dissenting), and numerous cases referred to in the majority opinion; *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320; *McMahon v. St. Louis, etc. R. Co.*, 41 La. Ann. 827; *Metropolitan West Side E. R. Co. v. Goll*, 100 Ill. App. 323.

²⁵ *Alabama & V. R. Co. v. Bloom*, 71 Miss. 247.

²⁶ *Baker v. R. Co.*, *supra*.

²⁷ *Fulton v. Short Route R. T. Co.*, 85 Ky. 640; *Louisville & N. R. Co. v. Finley*, 86 Ky. 294; *Stickley*

both an injury and a taking of property in that state by the location of a municipal pest house which endangers the lives or health of the occupants of adjacent premises by subjecting them to contagious or infectious disease.²⁸ But there is no taking within the meaning of the Washington constitution where in blasting for the construction of a highway under the authority of the state stones are thrown upon a railroad track so as to endanger the safe operation of the railroad, as such act is merely a tort, and does not permanently impair the value of the fee of the land for the railroad's use.²⁹ The special damage done to an abutting owner by changing the grade of a street is within the meaning of the word "damaged."³⁰ An excavation upon the land owned by a railroad company which does not encroach upon private property nor impair the support thereof, or effect its full use and enjoyment or any right appurtenant to it is not a ground for awarding compensation.³¹ But there cannot be a recovery for the injury done to improvements put upon land after the grade was fixed,³² and, according

v. Chesapeake & O. R. Co., 93 Ky. 323; Henderson v. McClain, 102 Ky. 402, 39 L.R.A. 349; Camden I. R. Co. v. Smiley, 27 Ky. L. Rep. 75.

²⁸ Paducah v. Allen, 23 Ky. 701.

²⁹ Great Northern R. Co. v. Quigg, 213 Fed. 873.

³⁰ Hickman v. City of Kansas, 120 Mo. 110, 23 L.R.A. 658; Davis v. Missouri Pac. R. Co., 119 Mo. 180; Harmon v. Omaha, 17 Neb. 548; Harvard v. Crouch, 47 Neb. 133; Montgomery v. Townsend, 80 Ala. 489, 60 Am. Rep. 112; Montgomery v. Maddox, 89 Ala. 181; Enterprise L. Co. v. Porter, 155 Ala. 426; McElroy v. Kansas City, 21 Fed. 257; Hot Springs R. Co. v. Williamson, 45 Ark. 436; Rearden v. San Francisco, 66 Cal. 492; Atlanta v. Green, 67 Ga. 386; Ft. Worth v. Howard (Tex.), 22 S. W. 1059.

In such cases only such damages are recoverable as the statute pre-

scribes. Johns v. Salamanca, 129 App. Div. (N. Y.) 717.

³¹ Mason City, etc. R. Co. v. Wolf, 148 Fed. 961.

³² Clinkenbeard v. St. Joseph, 122 Mo. 641; Blair v. Charleston, 43 W. Va. 62, 35 L.R.A. 852, 64 Am. St. 837; Gray v. Salt Lake City, 44 Utah 204.

The reason given for the rule stated in the text is that an owner must be deemed to have purchased his property with the understanding that the city is obliged by law to make the street safe for travel, and to do so must establish a grade. So it was held that where a grade had been duly established of public record, though the street was not constructed to grade for many years, the owner must be held charged with notice of the legal grade of the street, and bound to construct his improvements in accordance

to some courts, the improvements are not to be regarded in fixing the damage done by changing the grade of a street.³³ By removing a building after proceedings have been begun to condemn the land to which it was removed for the purpose of having it valued as a part of the realty the owner forfeits the right to have it so valued, and it will be appraised as personalty.³⁴ The right of the abutting owner to be compensated for the difference between the value of his property just before a street was vacated and its value immediately thereafter is not affected because he has access to his property by another street.³⁵ Loss of business is not to be regarded in fixing the damage which results from the elevation of a railroad track and the depression of a street under the subway, the work being done on the right of way.³⁶ The same rule applies where the change of the grade of a street is made by a city.³⁷ Under a statute making the injury which may be sustained an element of damage the expense of removing personal property from condemned land may be recovered.³⁸

In Nebraska the liability for consequential injury to prop-

therewith. *Gray v. Salt Lake City*, *supra*.

And it has been held that the converse of the last stated proposition is true, that where a grade has been established of record, and the owner improves his property on the faith of and with reference to the record grade, he may recover if the record grade is later changed, though the street was never constructed to the record grade. *City of Louisville v. Lausberg*, 161 Ky. 361. To a similar effect are *Spokane v. Ladies Benev. Soc.*, 83 Wash. 382 (where the decision is put on the ground of estoppel and natural justice), and *Louisville v. Koshewa*, 161 Ky. 359.

Where a city makes and files plans showing an intention to raise the grade of a street, but not showing sufficiently what the intended

grade is, an owner who improves his property with buildings between the time of filing and the time when the street is actually constructed to grade may recover for such damage as may be caused to such buildings thereby. *In re Grant Avenue*, 152 N. Y. Supp. 13.

³³ *Dale v. St. Joseph*, 59 Mo. App. 566; *Groff v. Philadelphia*, 150 Pa. 594; *Enterprise L. Co. v. Porter*, *supra*.

³⁴ *In re New York*, 196 N. Y. 255, 36 L.R.A.(N.S.) 273.

³⁵ *Heinrich v. St. Louis*, 125 Mo. 424.

³⁶ *Chicago v. McShane*, 102 Ill. App. 239.

³⁷ *Chicago v. Jackson*, 196 Ill. 496

³⁸ *Blincoe v. Choctaw, etc. R. Co.*, 16 Okla. 286, 4 L.R.A.(N.S.) 890.

erty not taken exists although the property used and from the use of which the injury proceeds was obtained by purchase.³⁹ But the general and better rule is that where property which might have been condemned is purchased the consideration is conclusively presumed to cover all damages to the remainder of the tract for which the owner could have obtained compensation in condemnation proceedings.⁴⁰ But a railroad company which has paid the price awarded for land by constructing its road on a different alignment than it represented it would do must answer for the difference in the value of the land before and after its construction, credit being given for the amount of the award.⁴¹ Where payment is required to be made or secured in advance of doing the work only such injuries are contemplated as are capable of being estimated at the time the work is being done.⁴² The measure of compensation is governed by the difference between the market value of the property before and after the injury.⁴³ It is immaterial to the application of this rule that the fee of the land acquired was dedicated to the public use.⁴⁴ If the property damaged was erected and used for a particular purpose and was available for that purpose only the recovery may be on the basis of its lessened value therefor.⁴⁵

³⁹ *Chicago, etc. R. Co. v. Hazels*, 26 Neb. 364; *Waters v. Greenleaf-J. L. Co.*, 115 N. C. 648.

⁴⁰ *Nummemaker v. Columbia W. P. Co.*, 47 S. C. 485, 34 L.R.A. 222; *Chicago, etc. R. Co. v. Smith*, 111 Ill. 363, 53 Am. Rep. 628; *Watts v. Norfolk & W. R. Co.*, 39 W. Va. 196, 23 L.R.A. 674.

⁴¹ *St. Louis, etc. R. Co. v. Henderson* (Tex. Civ. App.), 32 S. W. 143.

⁴² *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541; *Montgomery v. Townsend*, 84 Ala. 478.

⁴³ *Montgomery v. Townsend*, 80 Ala. 489; *McMahon v. St. Louis, etc. R. Co.*, 41 La. Ann. 827; *Omaha B. R. Co. v. McDermott*, 25 Neb.

714; *Springer v. Chicago*, 135 Ill. 552, 12 L.R.A. 609.

⁴⁴ *Buffalo v. Pratt*, 131 N. Y. 293, 15 L.R.A. 413, 27 Am. St. 592; *In re New York*, 89 App. Div. (N. Y.) 490.

⁴⁵ *Birch v. Lake Roland E. R. Co.*, 83 Md. 382.

So where a bridge over a navigable river was so placed that its abutments restricted the use of plaintiff's coal wharf, and caused loss of time and expense in moving coal from one hatch of a vessel to another in order to discharge, instead of plaintiff's being able to move the vessel up so that the hatch from which the coal was to be discharged should be opposite the place

§ 1063. What is just compensation; costs; nominal damages. There is some conflict of decision in respect to what constitutes just compensation. According to the best authorities, however, it is believed to be remuneration for the net injury which is suffered from the exercise of this sovereign right. The word "compensation" imports that a wrong or injury has been inflicted and must be redressed in money. Money must be paid to the extent of the injury.⁴⁶ This may be less or more than the value of the property taken; but when compensation has been made to the extent of the injury the language and just purpose of the constitution are satisfied.⁴⁷ A loss of the property taken will often be but a part of the injury to its owner; and, on the other hand, the value of the part taken may be wholly or partially compensated in fact by direct and special benefits resulting from taking his adjacent property. Where the value of that taken is not arbitrarily required to be paid for, the constitution or statute requiring only full indemnity, its value and the damages or benefits to the residue, if any, are taken into account and such sum allowed as will make the owner whole.⁴⁸

of discharge, that fact may be considered in fixing the amount of compensation. *Wellington v. Cambridge*, 220 Mass. 312.

⁴⁶ *Jeffery v. Chicago & M. E. R. Co.*, 138 Wis. 1.

A property owner is not bound to adjust his premises to new conditions. *International, etc. R. Co. v. Bell* (Tex. Civ. App.), 130 S. W. 634.

⁴⁷ *Symonds v. Cincinnati*, 14 Ohio 175; *Cincinnati G. T. Co. v. Wilson*, 70 W. Va. 157; *Harman v. Bluefield*, 70 W. Va. 129; *Waterbury v. Platt*, 76 Conn. 435; *Darien & W. R. Co. v. McKay*, 132 Ga. 672 (a reservation in a verdict of the right to remove improvements is ineffectual); *Juvinall v. Jamesburg D. Dist.*, 204 Ill. 106; *St. Louis, etc. R. Co. v. Continental B. Co.*, 198 Mo. 698; *Lehigh Valley R. Co. v.*

State, 66 N. Y. Misc. 432. See *State v. Suffield & T. B. Co.*, 82 Conn. 460; *Rutherford v. Williamson*, 70 W. Va. 402. See § 1076.

⁴⁸ *In re Joint Drainage Dist.*, 160 Iowa 293; *Swain v. Pemigewasset P. Co.*, 76 N. H. 498; *Tri-State Tel. & T. Co. v. Cosgriff*, 19 N. D. 771, 26 L.R.A.(N.S.) 1171; *Warren County v. Rand*, 88 Miss. 395; *Milwaukee T. Co. v. Milwaukee*, 151 Wis. 224; *Martin v. Tyler*, 4 N. D. 278, 25 L.R.A. 838; *Atlanta v. Word*, 78 Ga. 276; *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282, 931; *Phillips v. Scales Mound*, 195 Ill. 353; *San Francisco, etc. R. Co. v. Caldwell*, 31 Cal. 374; *Betts v. Williamsburgh*, 15 Barb. 255; *Commonwealth v. Norfolk*, 5 Mass. 435; *Meacham v. Fitchburg R. Co.*, 4 Cush. 291; *Bangor, etc. R. Co. v. McComb*, 60 Me. 290; *Kilbourne v.*

Where, by reason of the location of a railroad over a part of a lot of land and the filling up of a canal in which the owner of the lot had a privilege, the value of the land was so enhanced that it was worth more than the entire lot was before he was held to have no claim for damages.⁴⁹ The damages caused by the relocation of a highway over land are to be ascertained by the difference between the value of the land with the relocated road and its value with the original road.⁵⁰ It is long settled law in Connecticut that where the owner has a claim for damages for land taken and has received local and special benefits equal thereto, these shall be set off against the damage and he shall be allowed nothing. It is true that his entire benefit may be exhausted in this application, while the benefits received by his neighbors are assessed only a small percentage, and thus there may be a seeming and perhaps a real inequality; but so long as his benefit equals his damage he cannot be said to suffer by the taking of his property for public use and there

Suffolk, 120 Mass. 393, 21 Am. Rep. 522; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Commonwealth v. Coombs, 2 Mass. 492; Same v. Middlesex, 9 id. 388; Matter of Furman St., 17 Wend. 658; People v. Mayor, 4 N. Y. 419; Indiana Cent. R. Co. v. Hunter, 8 Ind. 74; McIntire v. State, 5 Blackf. 384; Greenville, etc. R. Co. v. Partlow, 5 Rich. 421; White v. Charlotte, etc. R. Co., 6 Rich. 47; Upton v. South Reading Branch R. Co., 8 Cush. 600; McMasters v. Commonwealth, 3 Watts 292; Alexander v. Baltimore, 5 Gill 383, 46 Am. Dec. 630; Livermore v. Jamaica, 23 Vt. 361; White v. County Com'rs, 2 Cush. 361; Shaw v. Charlestown, 2 Gray 107; Dickenson v. Fitchburg, 13 Gray 546; Young v. Harrison, 17 Ga. 30; Alton, etc. R. Co. v. Carpenter, 14 Ill. 190; Root's Case, 77 Pa. 276; Green v. Chicago, 97 Ill. 370; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; Chase v. Portland, 86 Me. 367, cit-

ing the text; Stockton v. Chicago, 136 Ill. 434; Wolters v. St. Louis, 132 Mo. 1; Omaha Southern R. Co. v. Todd, 39 Neb. 818; Bennett v. Marion, 106 Iowa 628; Penley's Case, 89 Me. 313; McReynolds v. Kansas City, etc. R. Co., 110 Mo. 484; Board of Education v. Kanawha & M. R. Co., 44 W. Va. 71; Metropolitan, etc. R. Co. v. Stickney, 150 Ill. 362; Osgood v. Chicago, 154 Ill. 194; Stewart v. Council Bluffs, 84 Iowa 61; Lotze v. Cincinnati, 61 Ohio St. 272; West Chicago Park Com'rs v. Boal, 232 Ill. 248; Taber v. New York, etc. R. Co., 28 R. I. 269. See Panhandle & G. R. Co. v. Kirby, 42 Tex. Civ. App. 340; § 1084.

⁴⁹ Whitman v. Boston, etc. R. Co., 3 Allen 133; Bennett v. Hall, 184 Mo. 407; Hurt v. Atlanta, 100 Ga. 274.

⁵⁰ Israel v. Jewett, 29 Iowa 475; Jewett v. Israel, 35 id. 261,

would be an injustice in compelling others to pay him for damage that really has no existence.⁵¹

The damages to be awarded are not to be lessened by a revocable privilege accorded the property owner by the condemning party,⁵² nor by testimony to the effect that it was the intention of such party to repair the injury done.⁵³ The owner is not required to rely on a promise by the condemnor to construct conveniences necessary for the use of land divided by the improvement.⁵⁴ On the other hand, the award is not to be increased because of the effect of the taking on the title to the land.⁵⁵ The rule of avoidable consequences does not make it the duty of one whose property has been taken to incur expense in changing it so that, by adapting it to new uses, he may increase its value.⁵⁶ The assignee of the owner's right of action though he is also the grantee of the premises may recover according to the general rule regardless of what he paid for the property.⁵⁷

In some states costs incurred in obtaining a judgment for damages enter into the judgment and must be allowed as part of the just compensation to which the property owner is

⁵¹ *Trinity College v. Hartford*, 32 Conn. 478; *Nichols v. Bridgeport*, 23 id. 189, 60 Am. Dec. 636; *Nicholson v. New York, etc. R. Co.*, 22 Conn. 74, 56 Am. Dec. 390.

⁵² *St. Louis, etc. R. Co. v. St. Louis Union S. Y. Co.*, 120 Mo. 541.

So where a street railway company operated a system which was in part within and in part without a city, and the city took the part within its limits, an ordinance was held unconstitutional in so far as it attempted to compel the street railroad to accept, as part of its compensation, joint running rights over the part of the system taken, instead of compensation in money. *State v. Superior Court*, 77 Wash. 593.

And where a city closed a street

by building a high wall across its end, although a new street was constructed giving plaintiff a better right of access to the rear of his land, it was held that the condemnor could not mitigate damages thereby, for the reason that the new street might be vacated at any time, plaintiff having no rights therein. *In re Closing of Attorney Street*, 162 App. Div. (N. Y.) 469.

⁵³ *Colorado M. R. Co. v. Brown*, 15 Colo. 193.

⁵⁴ *Great Western R. Co. v. Ackroyd*, 44 Colo. 454.

⁵⁵ *In re New York (Misc.)*, 119 N. Y. Supp. 1054.

⁵⁶ *Ft. Worth v. Howard*, 3 Tex. Civ. App. 537.

⁵⁷ *Lynchburg v. Mitchell*, 114 Va. 229.

entitled.⁵⁸ This rule extends to such reasonable costs and disbursements as are taxable in favor of the prevailing party in similar proceedings incurred by a property owner in securing both the ascertainment and payment of the compensation due him, including costs incurred in fruitless endeavors to collect the award made in condemnation proceedings.⁵⁹ But in Connecticut the defendant in condemnation proceedings cannot recover costs incurred. "In assessing damages in a personal action for an unlawful injury the legal costs and expenses which may have fallen upon the plaintiff by reason of the acts complained of cannot be considered. Under a statute he may be awarded the taxable costs, but if so they come as an addition to his just compensation, and he could not claim them at common law unless it were a proper case for the allowance of smart money. The same rule applies, and with even greater reason, to *in rem* proceedings under the power of eminent domain, for here the injury to or taking of the defendant's property is done by right, or, at least, under color of right."⁶⁰ This is probably the law in California.⁶¹ The condemning party has been held not to be liable for the counsel fees paid by the property owner.⁶² It is otherwise in Iowa under certain circumstances,⁶³ as well as in New

⁵⁸ *Mountrail County v. Wilson*, 27 N. D. 277; *Epling v. Dickson*, 170 Ill. 329; *United States v. Dumplin Island*, 1 Barb. 24; *Monongahela W. Co., In re*, 223 Pa. 323; *Grays Harbor B. Co. v. Lownsdale*, 54 Wash. 83, 104 id. 267 (costs of successful appeal); *Brainerd v. State*, 74 N. Y. Misc. 100 (including the cost of an abstract of the title, the blueprints of the appropriation maps and printing the claim). See *Coatsworth v. Lehigh Valley R. Co.*, 73 N. Y. Misc. 645.

Costs may also be allowed against one claiming damages without title to the land for which compensation was claimed as where such unfounded claim caused a large ex-

pense in determining the fact that claimants had no title. *In re Cypress Avenue*, 87 Misc. (N. Y.) 111.

⁵⁹ *Stolze v. Milwaukee, etc. R. Co.*, 113 Wis. 44, 90 Am. St. 833.

⁶⁰ *New Milford W. Co. v. Watson*, 75 Conn. 237, citing *Stevens v. Danbury*, 53 Conn. 9.

⁶¹ *San Francisco, etc. R. Co. v. Leviston*, 134 Cal. 412.

⁶² *In re Board of Water Supply*, 81 N. Y. Misc. 19; *Schneider v. Schneider*, 36 Colo. 518; *Jones v. School Board*, 140 Iowa 179; *San Jose, etc. R. Co. v. Mayne*, 83 Cal. 566. See § 1072.

⁶³ *Richardson v. Centerville*, 137 Iowa 253. Only the services rendered on appeal can be recovered

York.⁶⁴ It is competent for the legislature to impose liability therefor.⁶⁵ Nominal damages are not within the issues in condemnation proceedings.⁶⁶ Such damages have been recovered by the owners of land subject to a public easement after deducting therefrom the value of a private easement, the added burden being technical and nominal only.⁶⁷ But it has been said that the owner of land subject to a public easement is not to be denied redress though his damages are small even to insignificance.⁶⁸ The owner of land which has been appropriated by a railroad company without right may waive formal condemnation proceedings and institute an action to recover for all the damages sustained,⁶⁹ which includes the cash value of the land at the time it was taken or destroyed, with interest to the time of the trial; if the land is injuriously affected only the difference between such value at a time immediately preceding the injury and its value as

for. *Hall v. Wabash R. Co.*, 133 Iowa 714. There is no liability if the award is reduced. *Wormley v. Mason City, etc. R. Co.*, 120 Iowa 684.

⁶⁴ In New York costs and allowances in a condemnation proceeding can be recovered only by provision of some statute. In *re School Street*, 162 App. Div. (N. Y.) 158. But where the statute permits such recovery, an owner has been held entitled to recover, in addition to compensation, the expenses incurred in fixing the value of the land taken (*Oneonta, etc. Co. v. Schwarzenbach*, 164 App. Div. (N. Y.) 548), and counsel fees and expenses for expert witnesses who testified as to the value of the land (In *re Commissioners*, 83 Misc. (N. Y.) 186).

⁶⁵ *Sanitary Dist v. Ray*, 199 Ill. 63, 93 Am. St. 102; *Mason City, etc. R. Co. v. Wolf*, 148 Fed. 961; *Globe M. & S. Co. v. Des Moines*, 156 Iowa 267; *Gano v. Minneapolis, etc. R. Co.*, 114 Iowa 713; *Lough v. Same*, 116 Iowa 31.

The condemning party is not liable under the statute if the award is reduced on appeal. *Wormley v. Mason City, etc. R. Co.*, 120 Iowa 684.

In California attorneys' fees cannot be recovered except under a statute, but it is held competent for the legislature to impose such a liability. *Pacific, etc. Co. v. Chubb*, 24 Cal. App. 265.

⁶⁶ *Putney v. Milwaukee L., H. & T. Co.*, 34 Wis. 379; *Swift v. Newport News*, 105 Va. 108, 3 L.R.A. (N.S.) 404; *Applegrove v. Penn. Sch. v. R. Co.*, 132 Pa. 540, 7 L.R.A. 213.

⁶⁷ In *re Olean*, 135 N. Y. 341, 17 L.R.A. 640; *Postal Tel.-C. Co. v. Bruen*, 39 N. Y. Supp. 220.

⁶⁸ *Tri-State Tel. & T. Co. v. Cosgriff*, 19 N. D. 771, 26 L.R.A. (N.S.) 1171.

⁶⁹ *Cohen v. St. Louis, etc. R. Co.*, 34 Kan. 158, 55 Am. Rep. 242; *Boise Valley C. Co. v. Kroeger*, 17 Idaho 384, 28 L.R.A. (N.S.) 968, and cases cited.

it was immediately after the injury, with interest as stated, may be recovered; if the injury is but temporary the recovery may be such sum as is necessary to put the land in its previous condition, with interest thereon to the time of the trial.⁷⁰ In such case the jury may consider all special injuries suffered, including those due to the ordinary and non-negligent operation of trains, which, in Texas, could not otherwise have been considered in fixing the value.⁷¹

§ 1064. Measure of compensation. The general measure of just compensation is the fair market value of the land taken where all the owner's land is taken,⁷² market value being what

⁷⁰ *Boise Valley C. Co. v. Kroeger*, *supra*.

⁷¹ *St. Louis, etc. R. Co. v. Barnes*, — *Tex. Civ. App.* —, 162 S. W. 373.

⁷² *Alabama, etc. Co. v. Keystone, etc. Co.*, — *Ala.* —, 67 So. 833; *Birmingham v. Kennedy*, 9 *Ala. App.* 541; *Alabama, etc. Co. v. Carden*, — *Ala.* —, 66 So. 596; *El Dorado v. Scruggs*, 113 *Ark.* 239; *Vallejo, etc. R. Co. v. Reed, etc. Co.*, 169 *Cal.* 545; *Colusa, etc. R. Co. v. Glenn*, 25 *Cal. App.* 634; *Pacific, etc. Co. v. Chubb*, 24 *Cal. App.* 265; *Scurvin, etc. Co. v. Roberts*, 58 *Colo.* 533; *In re City of Meriden*, 88 *Conn.* 427; *Central, etc. Co. v. Stone*, 142 *Ga.* 662; *Central, etc. R. Co. v. Cornwell*, 141 *Ga.* 643; *Rawson, etc. Co. v. Richardson*, 26 *Idaho* 37; *Sanitary Dist. v. Chicago & A. R. Co.*, 267 *Ill.* 252; *Sanitary Dist. v. Boening*, 267 *Ill.* 118; *Trustees v. Harshman*, 262 *Ill.* 72; *Fisher v. Groff*, 182 *Ind.* 29; *Tracy v. Mt. Pleasant*, 165 *Iowa* 435; *Bales v. Wichita, etc. R. Co.*, 92 *Kan.* 771; *Music v. Big Sandy, etc. R. Co.*, 163 *Ky.* 628; *Sandy Valley, etc. R. Co. v. Bentley*, 161 *Ky.* 555; *West Kentucky, etc. Co. v. Dyer*, 161 *Ky.* 407; *David v. Louisville, etc. R. Co.*, 158 *Ky.* 721; *Chesapeake, etc. R. Co. v. Blankenship*, 158 *Ky.* 270; *Louis-*

iana, etc. R. Co. v. Baton Rouge Brickyard, 136 *La.* 833; *Yazoo, etc. R. Co. v. Teissier*, 134 *La.* 958; *Peaks v. Piscataquis Co. Com'rs*, 112 *Me.* 318; *City of Baltimore v. Kahl*, 124 *Md.* 299; *Patterson v. Baltimore*, 124 *Md.* 153; *Northern, etc. R. Co. v. Oldenburg*, 122 *Md.* 236; *Baltimore v. Megary*, 122 *Md.* 20; *Institution for Savings v. Brookline*, 220 *Mass.* 300; *Suburban, etc. Co. v. Arlington*, 219 *Mass.* 539; *Morgan v. Albert Lea*, 129 *Minn.* 59; *Melvin v. Mound City*, 185 *Mo. App.* 522; *In re Aiken*, 262 *Mo.* 403; *Rule v. Sioux County*, 94 *Neb.* 736; *Carolina, etc. R. Co. v. Armfield*, 167 *N. C.* 464; *Raleigh, etc. R. Co. v. Mecklenburg Mfg. Co.*, 166 *N. C.* 168; *In re Grant Ave.*, 152 *N. Y. Supp.* 13; *Oneonta, etc. Co. v. Schwarzenbach*, 164 *App. Div. (N. Y.)* 548; *Kehres v. New York*, 162 *App. Div. (N. Y.)* 349; *People v. Nelson*, 162 *App. Div. (N. Y.)* 34; *Wichita, etc. R. Co. v. Harvey*, — *Okla.* —, 144 *Pac.* 581; *Harrison v. Pacific Ry. & Nav. Co.*, 72 *Ore.* 553; *Kleppner v. Pittsburgh, etc. R. Co.*, 247 *Pa.* 605; *Parry v. Cambria, etc. R. Co.*, 247 *Pa.* 169; *Marine, etc. Co. v. Pittsburgh, etc. R. Co.*, 246 *Pa.* 478; *Knickerbocker Ice Co. v. Philadelphia*, 246 *Pa.* 84;

the owner, if desirous of selling, would sell for under ordinary circumstances for cash,⁷³ after ample time for making a sale,⁷⁴ and what reasonable persons desirous of purchasing would pay;⁷⁵ and where a part only is taken or the land is damaged

Ebberts v. Edgewood, 243 Pa. 595; *Coons v. McKees Rock Borough*, 243 Pa. 340; *Stephens v. Cambria*, etc. R. Co., 242 Pa. 606; *Appel v. Chicago*, etc. R. Co., 34 S. D. 306, L.R.A. 1915D 397; *Fort Worth v. Morgan*, — Tex. Civ. App. —, 168 S. W. 976; *Houston*, etc. R. Co. v. *Wilson*, — Tex. Civ. App. —, 165 S. W. 560; *San Antonio*, etc. R. Co. v. *Bobo*, — Tex. Civ. App. —, 163 S. W. 377; *St. Louis*, etc. R. Co. v. *Barnes*, — Tex. Civ. App. —, 162 S. W. 373; *Richmond v. Thompson's Heirs*, 116 Va. 178; *Peek v. Hampton*, 115 Va. 855; *Redmond v. Perrigo*, 84 Wash. 407; *Puget Sound*, etc. R. Co. v. *Foster*, — Wash. —, 146 Pac. 154; *Seattle*, etc. R. Co. v. *Land*, 81 Wash. 206; *Johanson v. Seattle*, 80 Wash. 527; *Northern*, etc. R. Co. v. *Union*, etc. Co., 76 Wash. 563; *Buckhannon*, etc. R. Co. v. *Great Scott*, etc. Co., — W. Va. —, 83 S. E. 1031; *Voigt v. Milwaukee County*, 158 Wis. 666; *Peoria*, etc. T. Co. v. *Vance*, 234 Ill. 36; *Decatur v. Vaughan*, 233 Ill. 50; *Kiernan v. Chicago*, etc. R. Co., 123 Ill. 188; *Indiana*, etc. R. Co. v. *Allen*, 100 Ind. 409; *Chaffee's App.*, 56 Mich. 244; *Newman v. Metropolitan E. R. Co.*, 118 N. Y. 618, 7 L.R.A. 289; *Alloway v. Nashville*, 88 Tenn. 511, 8 L.R.A. 123; *San Francisco*, etc. R. Co. v. *Caldwell*, 31 Cal. 374; *Bohm v. Metropolitan E. R. Co.*, 129 N. Y. 576, 14 L.R.A. 344; *OdeH v. New York E. R. Co.*, 130 N. Y. 690; *West Chicago St. R. Co. v. Chicago*, 172 Ill. 198; *Northern Pac.*, etc. R. Co. v.

Coleman, 3 Wash. 238; *Gish v. Castner D. Dist.*, 137 Iowa 711.

The use of "full market value" has been approved. *Crystal City & U. R. Co. v. Boothe* (Tex. Civ. App.), 126 S. W. 700.

⁷³ *Phillips v. Scales Mound*, 195 Ill. 353.

What is meant by the market value of land is the value of the land for the purposes of sale. *Sargent v. Merrimac*, 196 Mass. 171, 11 L.R.A.(N.S.) 996.

⁷⁴ *Kansas City S. R. Co. v. Anderson*, 88 Ark. 129.

⁷⁵ *Virginia*, etc. R. Co. v. *McLean*, 158 N. C. 498; *Milwaukee T. Co. v. Milwaukee*, 151 Wis. 224; *Macon v. Daley*, 2 Ga. App. 355; *McMillen v. Columbia*, 122 Mo. App. 34; *Gillespie v. South Omaha*, 79 Neb. 441; *Stroker v. St. Joseph*, 117 Mo. App. 350; *Weiser Valley L. & W. Co. v. Ryan*, 190 Fed. 417; *Crystal City & U. R. Co. v. Boothe*, *supra*; *Denver*, etc. R. Co. v. *Howe*, 49 Colo. 256; *Calor O. & G. Co. v. Franzell*, 128 Ky. 715, 36 L.R.A.(N.S.) 456; *Opelousas*, etc. R. Co. v. *Bradford*, 118 La. 506; *Metropolitan St. R. Co. v. Walsh*, 197 Mo. 392; *Brown v. Power Co.*, 140 N. C. 333, 3 L.R.A.(N.S.) 912; *Wray v. Knoxville*, etc. R. Co., 113 Tenn. 544; *In re East Galer St.*, 47 Wash. 603; *Guyandot Valley R. Co. v. Buskirk*, 57 W. Va. 417, 110 Am. St. 785; *American States S. Co. v. Milwaukee N. R. Co.*, 139 Wis. 199; *Idaho-W. R. Co. v. Columbia Conference*, etc., 20 Idaho 568; *Ligare v. Chicago*, etc. R. Co., 166 Ill. 249;

the difference in value of the whole before the taking or damage and its value as affected by it.⁷⁶ It is immaterial to the applica-

Shreveport & R. R. Valley R. Co. v. Hinds, 50 La. Ann. 781; Missouri Pac. R. Co. v. Porter, 112 Mo. 361; Cane Belt R. Co. v. Hughes, 31 Tex. Civ. App. 565 (improper to show that the premises had been an old homestead).

Market value is not a universal test, cases often arising where some other method of ascertaining value must be resorted to. Beale v. Boston, 166 Mass. 53, and cases cited. See State v. Suffield & T. B. Co., 82 Conn. 460.

If the land taken, because of its peculiar shape and surroundings, has no actual market value, considered as a separate and independent tract, its value may be fixed by the value of land immediately adjoining of the same average quality, capacity and character. Ohio Southern R. Co. v. Snyder, 5 Ohio Dec. 480.

Mining shafts are permanent improvements and must be paid for. Missouri, etc. R. Co. v. Schmuck, 79 Kan. 545.

⁷⁶ Eastern Texas R. Co. v. Edgings, 30 Tex. Civ. App. 170; Louisiana R. & N. Co. v. Jones, 113 La. 29; Chicago, etc. A. Co. v. McGrew, 104 Mo. 282; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 94 Am. St. 864; Penney v. Commonwealth, 173 Mass. 507, 73 Am. St. 312; Birmingham v. Kennedy, 9 Ala. App. 541; El Dorado v. Scruggs, 113 Ark. 239; Bales v. Wichita Midland Val. R. Co., 92 Kan. 771; Lexington & E. R. Co. v. Napier's Heirs, 160 Ky. 579; Chesapeake, etc. R. Co. v. Blankenship, 158 Ky. 270; Chicago Great Western R. Co. v. Kemper, 256 Mo. 279; Kehres v. New York, 162 App.

Div. (N. Y.) 349; Knickerbocker Ice Co. v. Philadelphia, 246 Pa. 84; Ebberts v. Edgewood, 243 Pa. 595; Appel v. Chicago, etc. R. Co., 34 S. D. 306, L.R.A. 1915D 397; Houston, etc. R. Co. v. Wilson, — Tex. Civ. App. —, 165 S. W. 560; Peek v. Hampton, 115 Va. 855; Northern, etc. R. Co. v. Union, etc. Co., 76 Wash. 563; Colusa, etc. R. Co. v. Glenn, 25 Cal. App. 634; In re City of Meriden, 88 Conn. 427; West Kentucky, etc. Co. v. Dyer, 161 Ky. 407; Peaks v. Piscataquis Co. Com'rs, 112 Me. 318; Kleppner v. Pittsburgh, etc. R. Co., 247 Pa. 605; Marine, etc. Co. v. Pittsburgh, etc. R. Co., 246 Pa. 478; Stephens v. Cambria, etc. R. Co., 242 Pa. 606; Buckhannon, etc. R. Co. v. Great Scott, etc. Co., — W. Va. —, 83 S. E. 1031; City of Lexington v. Chenault, 151 Ky. 774, 44 L.R.A. (N.S.) 301; In re Bensel, 151 App. Div. (N. Y.) 451; Mason City, etc. R. Co. v. Wolf, 78 C. C. A. 589, 148 Fed. 961; Alabama Cent. R. Co. v. Musgrove, 169 Ala. 424; Long Distance Tel. & T. Co. v. Schmidt, 157 Ala. 391; Birmingham B. R. Co. v. Lockwood, 150 Ala. 610; St. Louis, etc. R. Co. v. Maxfield, 94 Ark. 135, 26 L.R.A.(N.S.) 1111; Hercules W. Co. v. Fernandez, 5 Cal. App. 726; Denver v. Bonesteel, 30 Colo. 107; Central Georgia P. Co. v. Mays, 137 Ga. 120; Chattahoochee Valley R. Co. v. Bass, 9 Ga. App. 83; Peoria, etc. T. Co. v. Vance, 225 Ill. 270, 9 R.L.A.(N.S.) 781; Toledo, etc. R. Co. v. Wagner, 171 Ind. 185; Watkins v. Wabash R. Co., 137 Iowa 441; Big Sandy R. Co. v. Dils, 120 Ky. 563; Henderson v. Lexington, 132 Ky. 390, 22 L.R.A.(N.S.) 20;

tion of the rule last stated that a statute provides that the compensation for land taken shall be on the basis of the value of the

Manning v. Shreveport, 119 La. 1044, 13 L.R.A.(N.S.) 452; Cornell v. A. S. Co. v. Boston & P. R. Co., 202 Mass. 585; Minneapolis, etc. E. T. Co. v. Harkins, 108 Minn. 478; New York, etc. R. Co. v. Siebrecht (Misc.), 130 N. Y. Supp. 1005; In re Buffalo, 65 N. Y. Misc. 636; Lambeth v. Southern P. Co., 152 N. C. 371; Chicago, etc. R. Co. v. Mason, 23 S. D. 564; Acker v. Knoxville, 117 Tenn. 224; Price v. Drainage Com'rs, 253 Ill. 114; Bigelow v. West Wisconsin R. Co., 27 Wis. 478; Parks v. Wisconsin Cent. R. Co., 33 Wis. 413; Howe v. Ray, 113 Mass. 88; Tucker v. Massachusetts Cent. R. Co., 118 id. 546; Dickenson v. Fitchburg, 13 Gray 546; Page v. Chicago, etc. R. Co., 70 Ill. 324; Harrison v. Iowa, etc. R. Co., 36 Iowa 323; Curtis v. St. Paul, etc. R. Co., 20 Minn. 28; Colville v. Same, 19 id. 283; Chicago, etc. R. Co. v. Francis, 70 Ill. 238; Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Mix v. La Fayette, etc. R. Co., 67 Ill. 319; Peoria, etc. R. Co. v. Sawyer, 71 Ill. 361; Bloomington v. Miller, 84 Ill. 621; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Wilmington, etc. R. Co. v. Stauffer, 60 Pa. 374, 100 Am. Dec. 574; Cummings v. Williamsport, 84 Pa. 472; Pennsylvania, etc. R. Co. v. Bunnell, 81 id. 414; Shenango, etc. R. Co. v. Braham, 79 id. 447; East Brandywine, etc. R. Co. v. Ranek, 78 id. 454; St. Louis, etc. R. Co. v. Teters, 68 Ill. 144; Jones v. Chicago, etc. R. Co., 70 Ill. 380; Haslam v. Galena, etc. R. Co., 64 Ill. 353; Dearborn v. Boston, etc. R. Co., 24 N. H. 179; Atchison, etc. R. Co. v. Blackshire, 10 Kan. 477; Hooper v. Sa-

vannah & M. R. Co., 69 Ala. 529; Little Rock, etc. R. Co. v. Allen, 41 Ark. 431; Chicago, etc. R. Co. v. Smith, 111 Ill. 363; Chicago & E. R. Co. v. Blake, 116 id. 163; Same v. Bowman, 112 Ill. 595; Reisner v. Union Depot & R. Co., 27 Kan. 382; Wichita & W. R. Co. v. Kuhn, 38 id. 104; Asher v. Louisville & N. R. Co., 87 Ky. 391; Benton v. Brookline, 151 Mass. 250; Grand Rapids, etc. R. Co. v. Chesebro, 74 Mich. 466; Port Huron, etc. R. Co. v. Voorheis, 50 Mich. 506; Wilmes v. Minneapolis & N. R. Co., 29 Minn. 242; Sullivan v. Lafayette Co., 61 Miss. 271; Balfour v. Louisville, etc. R. Co., 62 id. 508; Fremont, etc. R. Co. v. Whalen, 11 Neb. 585; Chicago, etc. R. Co. v. Wiebe, 25 Neb. 542; Philadelphia v. Linnard, 97 Pa. 242; Washburn v. Milwaukee, etc. R. Co., 59 Wis. 364; Bohm v. Metropolitan E. R. Co., 129 N. Y. 576, 14 L.R.A. 344; Odell v. New York E. R. Co., 130 N. Y. 690; Galesburg, etc. R. Co. v. Milroy, 181 Ill. 243; Slattery v. St. Louis, 120 Mo. 183; Harvard v. Crouch, 47 Neb. 133; Chicago, etc. R. Co. v. Sturey, 55 Neb. 137; Thompson v. Citizens' T. Co., 181 Pa. 131; Ft. Worth v. Howard, 3 Tex. Civ. App. 537; Blair v. Charleston, 43 W. Va. 62, 64 Am. St. 837, 35 L.R.A. 852; Board of Education v. Kanawha & M. R. Co., 44 W. Va. 71; Jones v. Seattle, 23 Wash. 753; Chicago v. Anglum, 104 Ill. App. 188; Mayor v. Higgins, 81 Miss. 376; Mead v. Pittsburg, 194 Pa. 392; Kremer v. Chicago, etc. R. Co., 51 Minn. 15, 38 Am. St. 468; Duluth & W. R. Co. v. West, 51 Minn. 163; Missouri Pac. R. Co. v. Porter, 112 Mo. 361;

real estate appropriated.⁷⁷ The "due compensation" the land-owner is entitled to is not affected by his recovery in an action of trespass against the defendant for unlawfully building and operating a railroad over the land which is sought to be condemned.⁷⁸ Where compensation must be made for property

Matter of New York & B. Bridge, 18 App. Div. (N. Y.) 8; Galbraith v. Philadelphia Co., 2 Pa. Super. Ct. 359; Richmond & M. R. Co. v. Humphreys, 90 Va. 425; Enoch v. Spokane Falls & N. R. Co., 6 Wash. 393; Chicago, etc. R. Co. v. Eaton, 136 Ill. 9; Braun v. Metropolitan, etc. R. Co., 166 Ill. 434; Louisville, etc. R. Co. v. Barrett, 91 Ky. 487; Mobile, etc. R. Co. v. Riley, 119 Ala. 260; Mobile & O. R. Co. v. Hester, 122 Ala. 249; West Virginia, etc. R. Co. v. Gibson, 94 Ky. 234; Rourke v. Central Massachusetts E. Co., 177 Mass. 46; Osgood v. Chicago, 154 Ill. 194; Davis v. Northwestern E. R. Co., 170 Ill. 595; Lough v. Minneapolis, etc. R. Co., 116 Iowa 31; Richardson v. Webster City, 111 Iowa 427 (change of street grade).

Other cases state the same rule in somewhat different language, and hold that the measure of damages in such case is the market value of the land taken, added to depreciation in the market value of land not taken, as far as caused by the taking. Central Georgia Power Co. v. Stone, 142 Ga. 662; Illinois Cent. R. Co. v. Stewart, 265 Ill. 35; Trustees v. Harshman, 262 Ill. 72; Music v. Big Sandy, etc. R. Co., 163 Ky. 628; Patterson v. Baltimore, 124 Md. 153; Institution for Savings v. Brookline, 220 Mass. 300; In re Aiken, 262 Mo. 403; Kansas, etc. R. Co. v. Second Street, etc. Co., 256 Mo. 386; People v. Nelson, 162 App. Div. (N. Y.) 34; Puget Sound, etc.

Suth. Dam. Vol. IV.—20.

R. Co. v. Foster, — Wash. —, 146 Pac. 154; Meskill & C. River R. Co. v. Luedinghaus, 78 Wash. 366, 51 L.R.A.(N.S.) 1090.

The value of a portion of a tract of land is to be fixed according to its worth at the place and in the form in which it was regardless of whether that be more or less than the proven value of the whole tract. Union R. Co. v. Raine, 114 Tenn. 569.

This statement of the rule leaves open to the consideration of the jury all the surrounding circumstances with the surface of the land and which go to increase compensation, and all elements of value independently of the surface and which remain in the owner of the fee and mitigate his damage. Missouri, etc. R. Co. v. Schmuck, 69 Kan. 272.

But the rule was not applicable where condemnee owned a large tract of which part was taken by a railroad for a right of way, where the condemnee operated on a part of its land a large cotton manufactory, and on the balance of the land, by far the larger portion of the tract, had constructed dwelling houses which it rented to its employees. In that case the court refused to allow the whole tract to be valued. Raleigh, C. & S. R. Co. v. Mecklenburg Mfg. Co., 166 N. C. 168.

⁷⁷ Haggard v. Independent School Dist., 113 Iowa 486.

⁷⁸ Hopson v. Louisville, etc. R. Co., 71 Miss. 503.

"injured" an abutting owner may recover to the extent of the diminished value of his land caused by a change in the grade of a street whether he owns the fee therein or not.⁷⁹

In some cases the general rule of recompense as stated is not admitted to be just. In Kentucky it has been held that the value of the taken land to its owner, "considering its relative position to his other lands, and the other circumstances which may diminish or enhance that value, can alone afford him a just compensation for its loss."⁸⁰ In a case in which the property condemned consisted of a homestead the jury was directed to assess the owner's damage at the real value in money to him of the premises, and the court refused to instruct that the consequential injury or inconvenience to him should be considered. In answering objections to the instruction and refusal the appellate court observed: "The appellee owned no property adjacent to the property condemned, and the damages he sustained, if any, in addition to the value of the property taken, were caused by the inconvenience and loss resulting from his being deprived of his home and place of business; and to say that no such facts should enter into the estimate of value would be unjust to the owner and place him in a condition where he had sustained actual injury, other than the market value of his property, without affording him any remedy for the wrong. This character of case is unlike an appropriation of a strip of land where the mere market value is the criterion, the taking working no other injury. Here the owner and his family have been deprived of their homestead and his place of business taken from him, and to allow him simply what such property is worth or would bring in the market would not compensate him for the injury sustained."⁸¹ A later case limits the quoted language: "There is a marked difference between the loss of a place of business and the loss of a homestead. One may build up a

⁷⁹ *Enterprise L. Co. v. Porter*, 155 Ala. 426.

⁸⁰ *Music v. Big Sandy & K. R. Co.*, 163 Ky. 628; *Henderson & N. R. Co. v. Dickerson*, 17 B. Mon. 178, 66 Am. Dec. 148; *Robb v.*

Maysville, etc. T. Co., 3 Metc. (Mass.) 117; *Broadway C. M. Co. v. Smith*, 136 Ky. 725, 26 L.R.A. (N.S.) 565. See § 1087.

⁸¹ *Covington, etc. R. Co. v. Piel*, 87 Ky. 267. See § 1068.

substantial property right in the patronage flowing to a particular place, and the loss of this property right by the condemnation of the place may be definitely ascertained; but the mere inconvenience arising from the loss of a home is too ideal and speculative to be ascertained by the verdict of a jury. There is no standard by which to measure such loss."⁸² In Texas it has been said: The owner of property may make any lawful use of it, and the property in question having been used as a homestead and the owner's residence being thereon when the injury was inflicted, it was proper to show the extent of the injury to its use for homestead purposes, that being the purpose for which it was adapted and used.⁸³

The compensation is to be estimated once for all⁸⁴ and, in the absence of any stipulation fixing the manner or extent of the use, according to the full measure of the right which the charter of the condemning party gives it, and not merely according to the mode and time of the exercise of that right in the first instance.⁸⁵ Under a statute of Minnesota the plaintiff may, in

⁸² *Madisonville, etc. R. Co. v. Ross*, 126 Ky. 138, 13 L.R.A.(N.S.) 520.

⁸³ *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170. So in another Texas case it was held that the fact that the owner had lived for many years on the property taken and raised a family thereon, was evidence of its adaptability for homestead purposes. *City of Ft. Worth v. Charbonneau*, — Tex. Civ. App. —, 166 S. W. 387. And in another it was held that the measure of damages for land taken which was part of a tract was its market value considered as part of the tract, and not considered by itself. The reason given for the rule was to avoid hardship, which would otherwise be worked in the instant case where the taking was of the best parts of good farming land, in a farm which contained both good and poor land. The value was fixed

of the whole farm per acre, good and bad, and the measure of damages for taking of the part was the price per acre at which the farm was valued. *San Antonio U. & G. R. Co. v. Bobo*, — Tex. Civ. App. —, 163 S. W. 377.

⁸⁴ *Missouri, etc. R. Co. v. Schmuck*, 79 Kan. 545; *Ferdinand R. Co. v. Bretz*, 47 Ind. App. 642.

Where an easement is taken and compensation awarded all damages are covered, though there is a subsequent extension of the easement by operation of law. *State v. Yates*, 104 Me. 360, 22 L.R.A.(N.S.) 592.

All the consequences of the condemnation must be recovered in one proceeding, including those which may result. *Long Island R. Co. v. State*, 157 App. Div. (N. Y.) 12.

⁸⁵ *Joy v. Grindstone-Neck W. Co.*, 85 Me. 109; *Butler H. R. Co. v. Newark*, 61 N. J. L. 32; *Bracey v. St. Louis, etc. R. Co.*, 79 Ark. 124;

an action of ejectment, recover the value of the use and occupation of the land in addition to the usual compensation for taking it.⁸⁶ The damages for buildings on the condemned land, removed at the expense of the condemnor, but retained by the land-owner, are not their value before removal, but the depreciation in their value in consequence thereof.⁸⁷

§ 1065. **Injury to property not taken.** If property is materially or permanently diminished in value in consequence of the taking of part of it for public use the owner is entitled to full satisfaction in damages. Equity and justice require that he be compensated, not only for the land actually appropriated, but also for the incidental injury to the value of the residue. By so much as the market value of it as a whole is diminished in consequence of the taking and public use of a part, by so much is its owner injured without regard to the cause of such depreciation,⁸⁸ if, of course, the condemnor is responsible for the

Lewis Township I. Co. v. Royer, 38 Ind. App. 151; Howe v. Weymouth, 148 Mass. 605; National Docks, etc. Co. v. United Cos., 53 N. J. L. 217, 26 Am. St. 421; Paterson & N. R. Co. v. Newark, 61 N. J. L. 80.

The powers and purposes of a corporation are ascertainable from its articles of incorporation, and damages may be assessed on the theory that it will exercise any of the powers therein granted. Lewis v. Omaha, etc. R. Co., 158 Iowa 137.

The rule stated in the text is to be limited to consequential damages which are the result of proper construction of the railroad without negligence. If the road is not properly constructed and an overflow of plaintiff's land at high water is caused thereby, he may recover in a subsequent action the amount of the additional damage so caused. Reed v. Chicago, B. & G. R. Co., — Neb. —, 151 N. W. 936.

⁸⁶ Fish v. Chicago, etc. R. Co., 84 Minn. 179.

⁸⁷ St. Louis, etc. R. Co. v. Pfau, 212 Mo. 398.

⁸⁸ United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A. (N.S.) 1135; Rome, etc. R. Co. v. Gleason, 42 App. Div. (N. Y.) 530; Birmingham R., L. & P. Co. v. Long, 5 Ala. App. 510; Nelson v. Atlanta, 138 Ga. 252; United States v. Nahant, 82 C. C. A. 470, 153 Fed. 520; Birmingham R., L. & P. Co. v. Oden, 146 Ala. 495; Denver, etc. R. Co. v. Hannegan, 43 Colo. 122, 16 L.R.A. (N.S.) 874, 127 Am. St. 100; Illinois, etc. R. Co. v. Easterbrook, 211 Ill. 624; Beidler v. Sanitary Dist., 211 Ill. 628, 67 L.R.A. 820; Winnetka v. Clifford, 201 Ill. 475; Carnahan v. Paris, 158 Ill. App. 150; Chiles v. Alton, etc. T. Co., id. 508; Ferdinand R. Co. v. Betz, 47 Ind. App. 642; Union T. Co. v. Pfeil, 39 Ind. App. 51; White v. Cincinnati, etc. R. Co., 34 Ind. App. 287; Klopp v. Chicago, etc. R. Co., 142 Iowa 474; Wichmann v. Kansas City, etc. R. Co., 84 Kan. 339;

depreciation.⁸⁹ Thus, the burden of lateral support put upon land not taken by the improvement of that taken must be regarded.⁹⁰ In a case in Wisconsin it was said to be inconvenient and troublesome to cross the track of a railroad from one part of a farm to another with cattle and agricultural implements; that there was more or less danger to person and property in doing so; that grain and other property near the track were exposed to fire from locomotives; that horses were liable

Boston R. Co. v. Boston, 183 Mass. 254; Detroit v. Detroit United R., 156 Mich. 106; Warren County v. Rand, 88 Miss. 395; Kayser v. Chicago, etc. R. Co., 88 Neb. 343; Champlain S. & S. Co. v. State, 66 N. Y. Misc. 434; In re Walton Ave., 131 App. Div. (N. Y.) 696; Liverman v. Roanoke, etc. R. Co., 114 N. C. 692; Beal v. Railroad Co., 136 N. C. 298; Line v. Philadelphia, etc. R. Co., 218 Pa. 604; Wray v. Knoxville, 113 Tenn. 544; Boyer v. St. Louis, etc. R. Co., 97 Tex. 107; Eastern Texas R. Co. v. Seurlock, 97 Tex. 305; Swift v. Newport News, 105 Va. 108, 3 L.R.A.(N.S.) 404; Abbott v. Milwaukee L., H. & T. Co., 126 Wis. 634, 4 L.R.A.(N.S.) 202; Idaho-W. R. Co. v. Columbia Conference, etc., 20 Idaho 568; Patterson v. Boom Co., 3 Dill. 465; Newgass v. Railway Co., 54 Ark. 140; Metropolitan, etc. R. Co. v. Stickney, 150 Ill. 362, 26 L.R.A. 773; Joliet v. Adler, 71 Ill. App. 456; Bennett v. Marion, 106 Iowa 628; West Virginia, etc. R. Co. v. Gibson, 94 Ky. 234; Brady v. Kansas City C. R. Co., 111 Mo. 329.

⁸⁹ Denver, etc. R. Co. v. Schmitt, 11 Colo. 56; Metropolitan, etc. E. R. Co. v. Goll, 100 Ill. App. 323; Sultan W. & P. Co. v. Wyerhauser T. Co., 31 Wash. 558.

⁹⁰ Manning v. New Jersey S. L. R. Co., 80 N. J. L. 349, 32 L.R.A. (N.S.) 155; Stearns v. Richmond,

88 Va. 992; Morgan v. City of Albert Lea, 129 Minn. 59.

So where a railroad in constructing its tract made excavations on its right of way which deprived an abutter's land of its lateral support, it was held a taking for which the abutter was entitled to recover compensation. Louisville & N. R. Co. v. Culbertson, 158 Ky. 561.

A similar rule was applied where a railroad, whose tract was already constructed and in operation, made excavations on its right of way to obtain earth with which to ballast another track alongside the first, and thereby removed the abutter's lateral support. The act was held a taking. Chesapeake & O. R. Co. v. May, 157 Ky. 708.

So where in grading a street the lateral support of plaintiff's house, which was on a hillside some distance away from the place where the grading was being done, was undermined and the land caused to slide toward the street, it was held to be such a taking as entitled plaintiff to compensation. Johanson v. City of Seattle, 80 Wash. 527.

But where it was held that there was no liability for damage caused by changing the grade of the street, plaintiff could not recover though in making the grade the city excavated in such fashion as to cause plaintiff's land to slide. Best v. City of

to be frightened by passing trains of cars and to run away and destroy property, and that on account of these things the farm was less valuable. The evidence relating to these subjects was not offered for the purpose of laying the basis for the recovery of damages for such remote and speculative injuries, but to account for the decrease in the value of the property. On this subject Cole, J., said: "If in consequence of its exposure to these remote injuries the property is diminished one-half in value, then this decrease in value measures the actual loss to the owner, and, when compensated for this depreciation in the value of his property, he is not receiving compensation for some imaginary injury, some fanciful loss which may or may not occur, but he is paid for the real loss which he sustains by the building of the railroad across his property. If the construction of the road across his land depreciates the property one-half its value in the market, then he is damaged to this extent; it matters not what causes the depreciation in value, whether exposure to fire, annoyance from trains, or danger to person and property; the real question is whether, in consequence of the railroad, the property is diminished in value, and if so, how much; for this will measure the direct and necessary loss which the owner has sustained by the construction of the road over his land."⁹¹ Under a milldam act giving the

Chehalis, 82 Wash. 601; *Schuss v. City of Chehalis*, 82 Wash. 595.

⁹¹ *Snyder v. Western Union R. Co.*, 25 Wis. 60; *Weyer v. Chicago*, etc. R. Co., 68 id. 180; *Little Rock*, etc. R. Co. v. *Allen*, 41 Ark. 431; *Chicago*, etc. R. Co. v. *Greiney*, 137 Ill. 628; *Same v. Eaton*, 136 Ill. 9; *Omaha Southern R. Co. v. Todd*, 39 Neb. 818; *Fremont*, etc. R. Co. v. *Bates*, 40 Neb. 381; *Schuler v. Board of Supervisors*, 12 S. D. 460; *Montana R. Co. v. Freeser*, 29 Mont. 210; *Pierce v. Chicago & M. E. R. Co.*, 137 Wis. 550. See *Hutchinson v. Chicago & N. R. Co.*, 37 Wis. 582; *Neilson v. Chicago*, etc. R. Co., 58 id. 516.

In an Illinois case the jury were instructed that they might consider all injuries and inconveniences which are appreciable and which they believed from the evidence are reasonably probable and likely to result from the use of the land, although such injuries or inconveniences may be largely conjectural, and not susceptible of definite ascertainment. The words "largely conjectural" were held to render the instruction erroneous, but otherwise the supreme court made no criticism upon it. *Chicago & P. R. Co. v. Hildebrand*, 136 Ill. 467.

The inconvenience in going from

person whose land was overflowed or otherwise injured compensation therefor, there may be a recovery if the land is rendered less productive and useful; but not for damages to the health of the owner or his family caused by vapors which do not affect the land,⁹² nor for injuries to land not overflowed though it is rendered less valuable for building purposes by noxious and offensive smells proceeding from adjacent land. It was otherwise as to injury to a well and to the cellar of the dwelling-house on the premises.⁹³ On acquiring a right to overflow lands by impounding the waters of a river, the owner can recover the market value of the land overflowed if it is shown that the subinversion would preclude any reasonable use of the land by the owner.⁹⁴ Where levee commissioners, under authority of statute, had constructed levees which protected the land of plaintiff, among others, from damage by flooding, and where the commissioner, in time of high water blew up the levee in such manner as to allow the river to overflow plaintiff's land, in order to decrease the pressure on other levees, it was held a taking entitling plaintiff to compensation, although had he been left outside the levee when it was constructed he would have had no remedy.⁹⁵ Where the grade of a street is changed the damages may be prescribed by statute. If it provides for damages to the owner of the land or building injured and for injuries to the land or building itself and the expense necessary to restore the same, there cannot be a recovery for the loss of the use of a mill during the time it was being adjusted to the new grade of the street.⁹⁶

If the land is rendered less valuable because it is exposed to

part of a farm to another arising from the railroad, fences and gates is an element of damages. *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557; *Bockoven v. Board of Supervisors*, 13 S. D. 317.

⁹² *Rooker v. Perkins*, 14 Wis. 79, following *Eames v. New England W. Co.*, 11 Mete. (Mass.) 570.

⁹³ *Fuller v. Chicopee Mfg. Co.*, 16 Gray 46.

⁹⁴ *Alabama Power Co. v. Carden*, — Ala. —, 66 So. 596.

⁹⁵ *Jones v. Board of Mississippi Levee Com'rs*, — Miss. —, 66 So. 413, L.R.A. 1915 —, —.

⁹⁶ *Stadler v. Milwaukee*, 34 Wis. 98, approving *Ricket v. Metropolitan R. Co.*, 5 B. & S. 149, L. R. 2 H. of L. 175, and *Bigg v. London*, L. R. 15 Eq. 376, 5 Moak's Eng. 887.

fire,⁹⁷ or if access to it is rendered more difficult,⁹⁸ or if the use of the remainder is made inconvenient by reason of the railroad; or if its value is depreciated by the noise, smoke, or increased dangers caused by such use, all these are to be included in the estimate of damages; not that witnesses are to be called upon to estimate the damages for each or any of them; for though they enter into the estimates the question is what is the market value of the land without, and what is the market value of the remainder of the piece with, the railroad; in other words, what is the value of the piece which is taken, and how much is the residue depreciated in its market value by its separation and by the construction of the railroad. These two sums added together give the amount of compensation to which the injured party is entitled.⁹⁹ The cases are not agreed on this question, and some courts, including the Supreme Court of the United States, hold that such injuries, as far as they are incident to the proper operation of the road, are not a taking,

⁹⁷ *Yazoo & M. Val. R. Co. v. Teissier*, 134 La. 958; *Illinois Cent. R. Co. v. Roskemmer*, 264 Ill. 103; *Chicago Great Western R. Co. v. Kemper*, 256 Mo. 279; *Carolina & Y. R. R. Co. v. Armfield*, 167 N. C. 464; *Wallace v. Chesapeake & O. R. Co.*, 73 W. Va. 347.

Increased cost of obtaining insurance on the property may also be an element proper to be considered in estimating damages. *Wallace v. Chesapeake & O. R. R. Co.*, *supra*.

⁹⁸ *Lund v. Idaho*, etc. R., 50 Wash. 574, 126 Am. St. 916; *United States v. Welsh*, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A.(N.S.) 385 (cutting off a private right of way over the lands of others).

⁹⁹ *Chesapeake & O. R. Co. v. Blenkinship*, 158 Ky. 270; *Illinois Cent. R. Co. v. Roskemmer*, 264 Ill. 103; *Carolina & Y. R. R. Co. v. Armfield*, 167 N. C. 464; *Raleigh, C. & S. R. Co. v. Mecklenburg Mfg. Co.*, 166 N. C. 168; *Wallace v.*

Chesapeake & O. R. Co., 73 W. Va. 347; *Henderson v. New York*, etc. R. Co., 78 N. Y. 423; *In re Utica*, etc. R. Co., 56 Barb. 464; *Helmer v. Colorado*, etc. R. Co., 122 La. 141; *New York*, etc. R. Co. v. *Siebrecht* (Misc.), 130 N. Y. Supp. 1005. Compare *Albany Northern R. Co. v. Lansing*, 16 Barb. 68, with *In re Utica*, etc. R. Co., *supra*.

Where a railroad already operating its trains on a right of way near plaintiff's house causes a side track to be constructed in addition thereto, thus causing more smoke and cinders to be cast on plaintiff's land, there is a new taking which entitles plaintiff to compensation. *Chesapeake & O. R. Co. v. Blankenship*, 158 Ky. 270.

Inconvenience resulting from a change in the location of a crossing may be shown where additional land is condemned. *Klopp v. Chicago*, etc. R. Co., 142 Iowa 474.

entitling an owner to compensation,¹ unless they cause some damage peculiar to the owner, and not shared by others in the vicinity.² Smoke, cinders, etc., emitted by engines used by a city in constructing a bridge is not a taking, as its effect on the value of the land is temporary in its nature.³ The claimant must prove his damages, not necessarily with precision and accuracy, but approximately; unless he does so his recovery cannot exceed a nominal sum.⁴ Where, for the purpose of widening a street, a part of a lot and building was taken, the front wall being torn down, and the removal of the elevator being made necessary, the tenant of the premises, who was bound to pay rent and was obliged to make repairs if he continued to occupy them, was entitled to recover the sum necessary to make the repairs.⁵ The loss of the privilege of tax exemption of property not taken because of the interference with the purpose on account

¹ *Richards v. Washington Terminal Co.*, 233 U. S. 546, 58 L. ed. 1088; *Fink v. Cleveland, C., C. & St. L. R. Co.*, 181 Ind. 539; *Northern Cent. R. Co. v. Oldenburg*, 122 Md. 236; *Chicago Great Western R. Co. v. Kemper*, 256 Mo. 279; *Matthias v. Minneapolis, St. P. & S. S. M. R. Co.*, 125 Minn. 224, 51 L.R.A. (N.S.) 1017.

² *Richards v. Washington Terminal Co.*, 233 U. S. 546, 58 L. ed. 1088; *Matthias v. Minneapolis, St. P. & S. S. M. R. Co.*, 125 Minn. 224.

Where plaintiff's house was situated near a tunnel, and where defendant operated in the tunnel a fanning system which caused all smoke and gases from the tunnel to escape near plaintiff's house, it was held that there was a taking entitling the plaintiff to compensation. *Richards v. Washington Terminal, supra*.

There is a distinction between such damages when due to the ordinary operation of a railroad and the maintenance of roundhouses, freight yards, etc., and for damage caused

by the latter an abutter may recover. The reason given for the distinction is that such adjuncts do not serve the public directly, but are merely incidents to operation, and in establishing them, a railroad acts merely as a private citizen. *Matthias v. Minneapolis, St. P. & S. S. M. R. Co.*, 125 Minn. 224; *Chicago Great Western R. Co. v. Kemper*, 256 Mo. 279. But compare *Northern Cent. R. Co. v. Oldenburg*, 122 Md. 236 (holding that a roundhouse was essential to efficient operation of the railroad).

Where there is a continuous discharge of water from a roundhouse on adjoining land, it amounts to such a taking as will entitle the owner to compensation. *Northern Cent. R. Co. v. Oldenburg, supra*.

³ *Hieber v. City of Spokane*, 81 Wash. 589.

⁴ *Peoria, etc. R. Co. v. Peoria & F. R. Co.*, 105 Ill. 110; *Braun v. Metropolitan, etc. R. Co.*, 166 Ill. 434.

⁵ *Gluck v. Mayor, etc.*, 81 Md. 315, 48 Am. St. 515.

of which the exemption was granted by the taking of part must be compensated for.⁶ Where the cost of restoring property to its natural condition is less than the difference in its diminished value that cost will measure the recovery.⁷ If the land taken and that damaged was put to a particular use the value thereof is to be fixed with reference to the condition in which it was left in view of the prospect of securing the right to devote it to its former use.⁸ The owners of land abutting on an alley which has been closed are entitled to the difference in its market value with the alley open and such value with it closed; the difference between the value of the land to the owners before and after the closing does not measure the damages because the personal and individual convenience and loss from a business standpoint might enter into the computation.⁹ The right to recover damages for the vacation of a street is one concerning which the courts are not agreed, and as to which it is not permissible here to go into. But the owner of abutting property which is damaged by such act waives his right to demand compensation as a condition precedent by inaction while the proceedings to vacate it are pending and is remitted to his action for damages.¹⁰

§ 1066. *Same subject; what facts pertinent.* To ascertain the fact of depreciation as a consequence of the taking and use of part of a parcel of land before the improvement is actually completed and its ultimate effect on the value is practically realized, the consequences of particular facts have to be in some measure anticipated. There is not entire agreement as to the particular facts or kind of facts which may be proved and considered in order to determine such depreciation. In Pennsylvania it has been said that only such can be proved as are fair to be considered as a ground of damages on general principles; such as show injury as the certain and immediate

⁶ *Old South Ass'n v. Boston*, 212 Mass. 299.

⁷ *Morgan v. City of Albert Lea*, 129 Minn. 59; *Ziebarth v. Nye*, 42 Minn. 541; *Sallden v. Little Falls*, 102 Minn. 358, 120 Am. St. 635, 13 L.R.A.(N.S.) 790.

⁸ *Brainerd v. State*, 74 Misc. (N. Y.) 100.

⁹ *Henderson v. Lexington*, 33 Ky. L. Rep. 703.

¹⁰ *Marietta C. Co. v. Henderson*, 121 Ga. 399, 104 Am. St. 156.

consequence of the construction and proposed use of the part taken.¹¹ But this strictness is not observed in all the cases. It is said that such items as diversion of surface water, the invasion of privacy, the deprivation of means of access, the burden of additional fencing, the change of roads, the immediate danger of fire, not arising from negligence, and like matters, are to be considered so far as they affect market value.¹² In other states the facts relied on or available to prove such depreciation are not uniformly subjected to such a precise test as was favored in the state referred to, but their admissibility and force are decided by their supposed tendency to affect in fact the price and value of the property. All the facts which a prudent person desiring to buy the property affected would consider may be

¹¹ The language of Gibson, C. J., has often been quoted in Pennsylvania: "The jurors are to consider the matter just as if they were called on to value the injury at the moment when compensation could be first demanded; they are to value the injury to the property without reference to the person of the owner or the actual state of his business, and in doing that the only safe rule is to inquire what would the property, unaffected by the obstruction, have sold for at the time the injury was committed. What would it have sold for as affected by the injury? The difference is the true measure of compensation." *Schuylkill N. Co. v. Thoburn*, 7 S. & R. 411, approved in *Philadelphia Ball Club v. Philadelphia*, 192 Pa. 632, 73 Am. St. 835. See *New York, etc. R. Co. v. Young*, 33 Pa. 175; *Patten v. Northern Cent. R. Co.*, id. 426, 75 Am. Dec. 612; *Searle v. Lackawanna, etc. R. Co.*, 33 Pa. 57; *Watson v. Pittsburgh, etc. R. Co.*, 37 id. 469; *Lehigh, etc. R. Co. v. Lazarus*, 28 id. 203; *Chambers v. South Chester*, 140 id. 510.

The danger of flooding land in

times of high water though caused by the erection of piers in the bed of a navigable stream is too remote to be considered. *Leard v. Pennsylvania R. Co.*, 229 Pa. 475; *White v. Same*, 229 Pa. 480, 38 L.R.A. (N.S.) 1040. See *Whitehead v. Manor*, 23 Pa. Super. Ct. 314.

¹² *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316; *Eldorado, etc. R. Co. v. Everett*, 225 Ill. 529; *Illinois, etc. R. Co. v. Freeman*, 210 Ill. 270; *Hayes v. Toledo R. & T. Co.*, 6 Ohio C. C. (N.S.) 281, affirmed without opinion, 70 Ohio 425; *Hewitt v. Pittsburg, etc. R. Co.*, 19 Pa. Super. Ct. 304, citing *Dawson v. Pittsburgh*, 159 Pa. 317; *Regenthaler v. Philadelphia*, 160 Pa. 195; *Struthers v. Philadelphia, etc. R. Co.*, 174 Pa. 291.

In general an owner may recover in condemnation proceedings all damages, present and prospective, which are natural, necessary or reasonably incident to the taking. *Mofat v. Denver*, — Colo. —, 143 Pac. 577. To a similar effect see *Calusa & H. R. Co. v. Glenn*, 25 Cal. App. 634.

made the subject of evidence. Hence circumstances are often taken into account which, in no other view, could be a ground of damage.¹³ The increased exposure by fire, not resulting from negligence,¹⁴ by laying and operating railroads near buildings and through fields is very generally allowed to be proved to show damage by depreciation.¹⁵ "As to risk from fire incident to the

¹³ *Arkansas Cent. R. Co. v. Smith*, 71 Ark. 189 (existence of a pond caused by the construction of the road); *East St. Louis, etc. R. Co. v. Illinois State T. Co.*, 248 Ill. 559; *Chicago & A. R. Co. v. Staley*, 221 Ill. 405; *Chicago, etc. R. Co. v. Kelly*, 221 Ill. 498; *Guinn v. Iowa, etc. R. Co.*, 131 Iowa 680; *Sargent v. Merrimac*, 196 Mass. 171, 11 L.R.A.(N.S.) 996; *Helena P. T. Co. v. McLean*, 38 Mont. 388; *Yellowstone Park R. Co. v. Bridger C. Co.*, 34 Mont. 545, 115 Am. St. 546; *In re Clinton St. (Misc.)*, 123 N. Y. Supp. 198; *Brown v. Power Co.*, 140 N. C. 333, 3 L.R.A.(N.S.) 912; *Stuttgart & R. B. R. Co. v. Kocurek*, 101 Ark. 47; *Cleveland, etc. R. Co. v. Smith*, 177 Ind. 524 (obstruction of view of farm from house); *Fox v. South Norwalk*, 85 Conn. 237; *Kayser v. Chicago, etc. R. Co.*, 88 Neb. 343; *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478; *Western Pennsylvania R. Co. v. Hill*, 56 Pa. 460; *Patterson v. Boom Co.*, 3 Dill. 465; *St. Louis, etc. R. Co. v. Teters*, 68 Ill. 144; *Jones v. Chicago, etc. R. Co.*, 68 Ill. 380; *Keithsbury, etc. R. Co. v. Henry*, 79 Ill. 290; *Somerville, etc. R. Co. v. Doughty*, 22 N. J. L. 495; *Platt v. Milford*, 66 Conn. 320; *Metropolitan, etc. R. Co. v. Springer*, 171 Ill. 170; *Omaha v. Flood*, 57 Neb. 124; *McMillan v. Philadelphia Co.*, 1 Pa. Super. Ct. 648; *Schuler v. Board of Supervisors*, 12 S. D. 460, citing the text.

¹⁴ *Chicago, etc. R. Co. v. Palmer*,

44 Kan. 110; *Kay v. Glade Creek & R. R. Co.*, 47 W. Va. 467, 8 Am. Neg. Rep. 636; *St. Louis, etc. R. Co. v. Continental B. Co.*, 198 Mo. 698; *Commercial Tel. C. Co. v. Prevost*, 133 La. 47.

¹⁵ *Wichita Falls, etc. R. Co. v. Munsell*, 38 Okla. 253; *Wichita Falls & W. R. Co. v. Wyrick (Tex. Civ. App.)*, 147 S. W. 730; *Idaho & W. R. Co. v. Coey*, 73 Wash. 291; *Keil v. Grays Harbor, etc. R. Co.*, 71 Wash. 163; *G., C. & S. F. R. Co. v. Bock*, 63 Tex. 245; *St. Louis, etc. R. Co. v. Continental B. Co.*, 198 Mo. 698 (if there is a present depreciation in the value of the property on that account); *Same v. Pfau*, 212 Mo. 398; *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282; *Cincinnati G. T. Co. v. Cartee*, 149 Ky. 89 (danger of explosion of gas pipe); *American B. Co. v. Regents of University*, 11 Idaho 163; *St. Louis, etc. R. Co. v. Guswelle*, 236 Ill. 214; *Chicago S. R. Co. v. Nowlin*, 221 Ill. 367; *Chicago & M. E. R. Co. v. Diver*, 213 Ill. 26; *Illinois, etc. R. Co. v. Ring*, 219 Ill. 91; *New Jersey, etc. R. Co. v. Tutt*, 168 Ind. 205; *Indianapolis & C. T. Co. v. Larrabee*, 168 Ind. 237, 10 L.R.A.(N.S.) 1003; *St. Louis B. & T. R. Co. v. Mendonsa*, 193 Mo. 518; *Beckman v. Lincoln & N. R. Co.*, 85 Neb. 228, 133 Am. St. 655; *St. Louis, etc. R. Co. v. Oliver*, 17 Okla. 589; *Hayes v. Toledo R. & T. Co.*, 26 Ohio C. C. 395; *Cleveland, etc. R. Co. v. Smith*, 177 Ind. 524; *Hatch v.*

lawful operation of a road, there are two theories upon which the claimant for damages can properly argue that such risk is material evidence in his favor. 1. He can claim that the danger is so imminent that no man of common prudence would maintain his building in such proximity to the railroad. In that case he is entitled to the cost of removal of his building and its reconstruction in a safe place. 2. If the danger be not great, either from the fire-proof character of the structure or its distance from the railroad, yet if it can still be said there is some risk from fire by reason of the lawful operation of the road, he can claim that that fact depreciates the market value of the land entered upon." In neither case is evidence of the contents of a building so situated admissible, because the owner is bound to remove them in the first case, and, in the second, their value is not material because it is wholly speculative. "What quantity of material will be stored when a possible future accidental fire occurs cannot be foreseen; therefore, its present value on the happening of a problematical event in the future is a mere conjecture or guess." ¹⁶

Cincinnati, etc. R. Co., 18 Ohio St. 92; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Colvill v. St. Paul, etc. R. Co., 19 Minn. 283; Curtis v. Same, 20 Minn. 28; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Somerville, etc. R. Co. v. Doughty, 22 N. J. L. 495; Pierce v. Worcester, etc. R. Co., 105 Mass. 199; Adden v. White Mts. N. H. R., 55 N. H. 413, 20 Am. Rep. 220; Little Rock, etc. R. Co. v. Allen, 41 Ark. 431; Chicago, etc. R. Co. v. Bowman, 122 Ill. 595; Same v. Aldrich, 134 Ill. 9; Centralia & C. R. Co. v. Brake, 125 Ill. 393; Dudley v. Minnesota & N. R. Co., 77 Iowa 408; Pingrey v. Cherokee & D. R. Co., 78 Iowa 438; Kansas City & E. R. Co. v. Kregelo, 32 Kan. 608; Johnson v. Chicago, etc. R. Co., 37 Minn. 519; Pittsburgh, etc. R. Co. v. McCloskey, 110 Pa. 436; Setzler v. Pennsylvania, etc. R. Co., 112 Pa.

56; Chicago, etc. R. Co. v. Patterson, 26 Ind. App. 295; Chicago, etc. R. Co. v. Hunter, 128 Ind. 213; Mobile & O. R. Co. v. Hester, 122 Ala. 249; Hercules I. Works v. Elgin, etc. R. Co., 141 Ill. 491; Chicago, etc. R. Co. v. Nix, 137 Ill. 141; Same v. Atterbury, 156 Ill. 281; Rock Island, etc. R. Co. v. Gordon, 184 Ill. 456; Indiana, etc. R. Co. v. Stauber, 185 Ill. 9; Chicago, etc. R. Co. v. Moore, 63 Ill. App. 163; Omaha Southern R. Co. v. Todd, 39 Neb. 818; Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509. See § 1080 as to abutting owners in New York. *Contra*, Fremont, etc. R. Co. v. Whalen, 11 Neb. 585; In re Union Village & J. R. Co., 53 Barb. 457.

¹⁶ Hamilton v. Pittsburg, etc. R. Co., 190 Pa. 51.

In Lehigh Valley R. Co. v. Lazarus, 28 Pa. 203, it was held that the

In some states the danger to which the owner, his family¹⁷ and stock¹⁸ are exposed in crossing the track from one part of a

risk of fire being communicated from locomotives to buildings cannot be taken into consideration in estimating the damages sustained by the owner of land arising from the construction of a railroad over it, because of the uncertain and contingent nature of such damages. *Sunbury & E. R. Co. v. Hummell*, 27 Pa. 99; *Indiana N. G. Co. v. Jones*, 14 Ind. App. 55; *Manufacturers' N. G. Co. v. Leslie*, 22 Ind. App. 677.

In *Wilmingon, etc. R. Co. v. Stauffer*, 60 Pa. 374, 100 Am. Dec. 574, it was held that if the railroad were laid near a barn, and the danger of fire was necessarily so imminent that no man of common prudence would use the barn as such, then the premises would be depreciated by its being rendered useless.

In *Patten v. Northern Cent. R. Co.*, 33 Pa. 426, 75 Am. Dec. 612, it was held that increased cost of insurance could not be considered. This is held in Iowa on the ground that the property owner is not bound to insure. *Pingery v. Cherokee & D. R. Co.*, 78 Iowa 438. And inasmuch as the liability of the railroad company would not be affected by any insurance there might be on the property, this position seems tenable. But it is held otherwise in Minnesota. *Cedar Rapids, etc. R. Co. v. Raymond*, 37 Minn. 204.

In Illinois, Massachusetts and Utah the increased cost of insuring buildings near a railroad right of way may be proved. *Indiana, etc. R. Co. v. Stauber*, 185 Ill. 9; *Weber v. Eastern R. Co.*, 2 Mete. (Mass.), 147; *O'Neill v. San Pedro, etc. R. Co.*, 38 Utah 475.

Evidence concerning the experience another land-owner has had with fires caused on his land by the same railroad company is inadmissible. *Pittsburgh, etc. R. Co. v. McCloskey*, 110 Pa. 436.

This element of depreciation in value is not eliminated by proof that the precautions taken by the company are such as to render it probable or even certain that no fires will be caused by it, because there is no assurance that the precautions will always be observed. *Pingery v. Cherokee & D. R. Co.*, 78 Iowa 438.

If by statute absolute liability is imposed for fires caused by railroad companies the danger therefrom must not be considered. *St. Louis, etc. R. Co. v. North*, 31 Mo. App. 345.

But in New Hampshire it is held that such a statute does not necessarily preclude a recovery, the question is, how much will the property be diminished in value by reason of the exposure considering the statutory indemnity. *Adden v. White Mts. N. H. R.*, 55 N. H. 413, 28 Am. Rep. 220.

¹⁷ *Weyer v. Chicago, etc. R. Co.*, 68 Wis. 180; *Laflin v. Chicago, etc. R. Co.*, 33 Fed. 415; *Chicago, etc. R. Co. v. Aldrich*, 134 Ill. 9; *Chicago, etc. R. Co. v. Shafer*, 49 Neb. 25. Compare *McReynolds v. Burlington, etc. R. Co.*, 106 Ill. 152. *Contra*, Illinois, etc. R. Co. v. Freeman, 210 Ill. 270; *Chicago & M. E. R. Co. v. Mawman*, 206 Ill. 182.

Damages may not be allowed for apprehension of danger. *Cincinnati G. T. Co. v. Cartee*, 149 Ky. 89.

¹⁸ *Id.*; *Chicago, etc. R. Co. v.*

farm to another or, as to stock by being frightened by trains, is provable for the same purpose. In one case the danger to which the employees of the plaintiff were exposed because of the proximity of the railroad to the place where their duties required them to be was regarded as material, such danger being one for the consequences of which the railroad company would not be liable.¹⁹ The preceding notes disclose that the cases are in marked conflict as to the admissibility of such evidence, with a marked tendency in the later ones to exclude it.

Bowman, 122 Ill. 595; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Omaha Southern R. Co. v. Todd, 39 Neb. 818; Wichita Falls, etc. R. Co. v. Munsell, 38 Okla. 253; Wichita Falls & W. R. Co. v. Wyrick (Tex. Civ. App.), 147 S. W. 730; G., C. & S. F. R. Co. v. Bock, 63 Tex. 245; Railway v. Combs, 51 Ark. 324; Indianapolis Northern T. Co. v. Ramer, 37 Ind. App. 264 (both stock and family); Beckman v. Lincoln & N. W. R. Co., 85 Neb. 228, 133 Am. St. 655; St. Louis, etc. R. Co., v. Oliver, 17 Okla. 589. *Contra*, Yazoo, etc. R. Co. v. Jennings, 90 Miss. 93, 122 Am. St. 312; Louisville & N. R. Co. v. Hall, 143 Ky. 497; Chicago S. R. Co. v. Nolin, 221 Ill. 367 (and so of damage which may be caused by fire); Chicago & A. R. Co. v. Staley, 221 Ill. 405. Compare McReynolds v. Burlington, etc. R. Co., 106 Ill. 152.

Later Illinois cases hold that probable damage to stock is too remote and speculative to be considered in estimating damages. Centralia & C. R. Co. v. Brake, 125 Ill. 393; Chicago, etc. R. Co. v. Eaton, 136 Ill. 9, and cases cited *supra*. And so of danger to persons or buildings if the latter are not near enough to be likely to be burned. Conness v. Indiana, etc. R. Co., 193 Ill. 464.

The fact that horses may be frightened by locomotives cannot be considered in estimating damages. Chicago, etc. R. Co. v. Mason, 26 Ind. App. 395; Atchison, etc. R. Co. v. Lyon, 24 Kan. 745; Florence, etc. R. Co. v. Pember, 45 id. 625; Simons v. Mason City, etc. R. Co., 128 Iowa 139; St. Louis, etc. R. Co. v. Hammers, 51 Kan. 127; Larsen v. Oregon R. & N. Co., 19 Ore. 240 (it seems).

¹⁹ It was said: "It is clear that persons exposed to danger, as defendant's employees would necessarily be, could not perform their labors with the same degree of efficiency, and, at the same time, exercise the care to avoid danger which the law imposes on them as they could if not so exposed. The extra risk might also cause a demand for higher wages." Chicago, etc. R. Co. v. McGrew, 104 Mo. 282.

But compare Raleigh, C. & S. R. Co. v. Mecklenburg Mfg. Co., 166 N. C. 168, where, after a careful consideration of similar evidence, the court declined to allow such facts to be proved, both on the ground that the damages claimed were too speculative, and because if such damages were allowed, the construction of railroads would be rendered well-nigh impossible.

Under ordinary circumstances there is very grave reason to doubt its admissibility. If, however, there should be disclosed any peculiar danger of the kind referred to such evidence should be received.²⁰

If the remainder of a lot is rendered less valuable by reason of being severed or disfigured by the taking and proposed use of a part such damage may be allowed as shall be found to have resulted therefrom. In determining the consequent depreciation the jury may consider the use to which the part taken is appropriated, the character, situation, present and probable use of the remainder, the distance of the owner's buildings from the public use, and any facts which they, from a view of the testimony, shall find injure the value of the premises by the proper and legal use of the appropriated part.²¹ If taking part

²⁰ See *Cape Girardeau & C. R. Co. v. Blechle*, 234 Mo. 471.

So where the condemning railroad was one used merely to haul coal from condemnor's mine, not being a common carrier, and not running its trains on schedule time of any sort, the fact that such a taking cut a farm into two parts, on one of which were the farm buildings and on the other the water supply, the owner was allowed to prove as affecting the value of his property the fact that there was danger to persons and stock in crossing the tracks, and frequent necessity for such crossing. *West Kentucky Coal Co. v. Dyer*, 161 Ky. 407.

²¹ *Byrd I. Co. v. Smyth* (Tex. Civ. App.), 157 S. W. 260; *Seattle v. Board of Home Missions, etc.*, 70 C. C. A. 597, 138 Fed. 307; *Denver, etc. R. Co. v. Hannegan*, 43 Colo. 122, 16 L.R.A.(N.S.) 874, 127 Am. St. 100; *Prather v. Chicago S. R. Co.*, 221 Ill. 190; *New Jersey, etc. R. Co. v. Tutt*, 168 Ind. 205; *Klopp v. Chicago, etc. R. Co.*, 142 Iowa 474; *Blunk v. Chicago & N. R. Co.*, 142 Iowa 146; *Louisiana R. & N.*

Co. v. Sarpy, 125 La. 388; *St. Louis, etc. R. Co. v. Continental B. Co.*, 198 Mo. 698; *Shepp v. Reading B. R.*, 211 Pa. 425; *Peoria, etc. R. Co. v. Sawyer*, 71 Ill. 361; *Hannibal B. Co. v. Schaubacher*, 57 Mo. 582; *Bangor, etc. R. Co. v. McComb*, 60 Me. 290; *Tucker v. Massachusetts Cent. R.*, 118 Mass. 546; *Watson v. Pittsburgh, etc. R. Co.*, 37 Pa. 469; *Cleveland, etc. R. Co. v. Ball*, 5 Ohio St. 569; *Wilson v. Rockford, etc. R. Co.*, 59 Ill. 273; *Little Rock, etc. R. Co. v. Allen*, 41 Ark. 431; *Commissioners v. Hogan*, 39 Kan. 606; *Grand Rapids, etc. R. Co. v. Chesebro*, 74 Mich. 466; *Missouri Pac. R. Co. v. Hays*, 15 Neb. 224; *St. Louis, etc. R. v. Anderson*, 39 Ark. 167; *McReynolds v. Burlington, etc. R. Co.*, 106 Ill. 159; *Chicago, etc. R. Co. v. Bowman*, 122 id. 595; *St. Louis, etc. R. Co. v. McAuliff*, 43 Kan. 185; *Commissioners v. Harkleroads*, 62 Miss. 807; *Pittsburgh, etc. R. Co. v. McCloskey*, 110 Pa. 436; *Same v. Bentley*, 88 Pa. 178; *Louisville, etc. R. Co. v. Barrett*, 91 Ky. 487; *Churchill v. Beethe*, 48 Neb. 87, 35 L.R.A. 442; *Chicago,*

of a tract increases the expense of moving freight to and from the remainder or causes other interference with the use of property which affects a business conducted thereon or which it may be necessary to establish these facts are to be regarded.²² In connection with them it is proper to consider also the availability of other means of ingress and egress to the property affected.²³ There can be no question that interference with a land-owner's right of ingress and egress are matters which may materially affect his damage;²⁴ and in order that there may be a recovery it is not necessary that the right of access be cut off; it is

etc. *R. Co. v. O'Connor*, 42 Neb. 90; *Hercules I. Works v. Elgin, etc. R. Co.*, 141 Ill. 491; *Springfield v. Dalby*, 139 Ill. 34; *Chicago, etc. R. Co. v. Nix*, 137 Ill. 141; *Chicago, etc. R. Co. v. Greiney*, 137 Ill. 628; *Chicago T. T. R. Co. v. Bugbee*, 184 Ill. 353; *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557; *Abbott v. Southern Pac. R. Co.*, 109 Cal. 282; *Chicago, etc. R. Co. v. O'Connor*, 42 Neb. 90; *Mangles v. Chosen Freeholders*, 55 N. J. L. 88; *Omaha Southern R. Co. v. Todd*, 39 Neb. 818; *Fremont, etc. R. Co. v. Bates*, 40 Neb. 381; *Shano v. Fifth Ave., etc. B. Co.*, 189 Pa. 245, 69 Am. St. 808, and local cases cited.

So where a street widening improvement had left a valuable lot in such shape that its form was irregular so that it was especially difficult to improve it, that fact was proper to be considered by the jury in assessing consequential damages by reason of the taking. *Baltimore City v. Megary*, 122 Md. 20.

²² *Patterson v. Jaeger & S. R. Co.*, 102 C. C. A. 95, 178 Fed. 649; *Bailey v. Boston & P. R. Co.*, 182 Mass. 537; *Cornell-A. S. Co. v. Same*, 202 Mass. 585; *Richmond, etc. R. Co. v. Chamblin*, 100 Va. 401; *Chicago, etc. R. Co. v. Thayer*, 65 Wash. 402; *In re Grade Cross-*

ing Com'rs, 152 App. Div. (N. Y.) 853.

But where a statute requires a railroad company to furnish all necessary track connections at reasonable rates and without discrimination it was held proper to instruct the jury to consider this fact in assessing damages for a taking whereby an owner's present track connections were shut off. *Kansas City Southern R. Co. v. Second Street Imp. Co.*, 256 Mo. 386. In Illinois it has been held that an owner cannot recover where an improvement cuts off his track connections, unless he can show a right at common law to the continued existence of the tracks. *Otis Elevator Co. v. City of Chicago*, 263 Ill. 419.

Where by the construction of a viaduct a change in the location of street cars lines was caused, so that a line which formerly ran by an owner's property was removed, the fact was not competent on the question of depreciation caused by the improvement. *Texas & P. Ry. Co. v. Hardin*, — Tex. Civ. App. —, 168 S. W. 1017.

²³ *Cornell-A. S. Co. v. Boston & P. R. Co.*, 202 Mass. 585.

²⁴ *Idaho, etc. R. Co. v. Nagle*, 184 Fed. 598; *Lund v. Idaho, etc. R. Co.*, 50 Wash. 574, 126 Am. St. 916;

enough that it is rendered dangerous.²⁵ Whether the existence of the right of access from another street than that occupied by the defendant bars a recovery is a question upon which the authorities are in conflict;²⁶ but it seems to the writer that such fact is material only upon the question of the extent of depreciation in the value of the property. If the obstruction cutting off ingress and egress is caused by the track of a railroad fully completed the owner of an abutting lot may regard the situation as a permanent appropriation of his right of access and recover the resulting depreciation in its value.²⁷ But several cases deny recovery to the land-owner when his right of access is not wholly shut off but merely rendered less convenient or less direct.²⁸

Illinois Cent. R. Co. v. Elliott, 33 Ky. L. Rep. 537; United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135; Chesapeake & O. R. Co. v. Gross, 19 Ky. L. Rep. 1926; McQuaid v. Portland & V.R. Co., 18 Ore. 237; Hamilton County v. Rape, 101 Tenn. 222; Hot Springs R. Co. v. Williamson, 45 Ark. 429; Štehr v. Mason City, etc. R. Co., 77 Neb. 641, 124 Am. St. 872; Foster L. Co. v. Arkansas Valley & W. R. Co., 20 Okla. 583, 30 L.R.A.(N.S.) 231; Atlanta v. Nelson, 142 Ga. 324; Baltimore & O. R. Co. v. Kahl, 124 Md. 299; Baltimore & O. R. Co. v. Kane, 124 Md. 231; Jones v. City of Aurora, 97 Neb. 825; Ward v. Georgia Terminal Co., 143 Ga. 80; Baltimore & O. R. Co. v. Kane, 124 Md. 231; Morgan v. City of Albert Lea, 129 Minn. 59; Melvin v. Mound City, 185 Mo. App. 522; Dickinson v. Delaware, L. & W. R. Co., — N. J. L. —, 93 Atl. 703; People v. Zucca, 160 App. Div. (N. Y.) 578, 145 N. Y. Supp. 754; Sandstrom v. Oregon, Washington R. & Nav. Co., 75 Ore. 159; City of Texarkana v. Lawson, — Tex. Civ. App. —, 168 S. W. 867; Birmingham R., L. & P. Co. v. Long, 5 Ala. App. 510.

²⁵ Penn. Schuyl. V. R. Co. v. Walsh, 124 Pa. 544, 10 Am. St. 611.

²⁶ See Kansas, etc. R. Co. v. Cuykendall, 42 Kan. 234, 16 Am. St. 479, denying the right, and Ft. Scott, etc. R. Co. v. Fox, 42 Kan. 490, taking the other view, in harmony with the latter is Foster L. Co. v. Arkansas Valley & W. R. Co., 20 Okla. 583, 30 L.R.A.(N.S.) 231.

²⁷ Central Branch U. P. R. Co. v. Twine, 23 Kan. 585, 33 Am. Rep. 203.

²⁸ Ward v. Georgia Terminal Co., 143 Ga. 80; Sioux City Seed & Nursery Co. v. Detroit & M. R. Co., 184 Mich. 181; Gorman v. Chicago, B. & Q. R. Co., 255 Mo. 483.

Likewise an owner cannot recover where though the street vacated was not abutted by plaintiff's land, the direct approach to the land was shut off. The plaintiff in this case was a church. German, etc. Congregation v. Baltimore, 123 Md. 142, 52 L.R.A.(N.S.) 889. So also plaintiff could not recover where the access to plaintiff's property was shut off by a wall built by a town to correct the defective construction of a highway by the state. The reason given for the de-

The existing physical condition of land over which a railroad is to be laid, whether affected by another railroad, a water-course or other natural or artificial object may be considered in ascertaining the damage that will result to it.²⁹ If a proper construction of the proposed road will necessitate making a cut through a portion of the land taken that fact may be considered in awarding compensation for that not appropriated.³⁰ Where a part has been taken for a railroad it is proper to consider all inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, from smoke, invasion of privacy, the deprivation of light, means of access and like matters, so far as they severally arise from the use of the strip taken and upon it, excluding all common and indirect damages, that is, such as affect the owner in common with all other members of the community.³¹ This qualification

cision was that the construction of the wall was an incident to the construction of the highway by the state, and as the state would not have been liable for damages caused by the change of grade, the town was similarly not liable. *McMullen v. Marlborough*, 163 App. Div. (N. Y.) 73.

Inconvenience has been held not to be a ground of damage. *Opelousas, etc. R. Co. v. St. Landry C. O. Co.*, 121 La. 796. As where it was caused by closing a street to the public during the change of its grade. *Detroit v. Detroit United R.*, 156 Mich. 106.

But compare *Sandstrom v. Oregon-Washington R. & Nav. Co.*, 75 Ore. 159 (holding that an abutter is entitled to access from both ends of a street, and that the theory stated in the text would allow an abutter to be deprived of access from both ends without redress).

²⁹ *Chicago, etc. R. Co. v. Bowman*, 122 Ill. 595.

³⁰ *Idaho & W. R. Co. v. Coey*, 73 Wash. 291; *Consolidated T. Co. v.*

Jordan, 36 Ind. App. 156; *Arkansas Valley & W. R. Co. v. Witt*, 19 Okla. 262, 13 L.R.A.(N.S.) 237; *Ralston v. Sharon Hill*, 43 Pa. Super. Ct. 280; *Cummins v. Des Moines, etc. R. Co.*, 63 Iowa 397; *Pinkstaff v. Allison D. Dist.*, 213 Ill. 186 (inconvenience of cultivating land by reason of difficulty of access in consequence of its severance by the improvement).

³¹ *Blue Earth County v. St. Paul, etc. R. Co.*, 28 Minn. 503; *Ft. Collins D. R. Co. v. France*, 41 Colo. 512; *Savannah, etc. R. Co. v. Williams*, 133 Ga. 679; *Mallory v. Morgan County*, 131 Ga. 271 (abandonment of old road and the result thereof upon ingress and egress); *Atlantic & B. R. Co. v. McKnight*, 125 Ga. 328; *Chattahoochee Val. R. Co. v. Bass*, 9 Ga. App. 83; *Shrader v. Cleveland, etc. R. Co.*, 242 Ill. 227, 26 L.R.A.(N.S.) 226; *Sheehan v. Fall River*, 187 Mass. 356; *Boyne City, etc. R. Co. v. Anderson*, 146 Mich. 328, 8 L.R.A.(N.S.) 306, 117 Am. St. 642 (sounds may be reproduced by a phonograph); *Kayser v.*

of the rule, it has been said, is too difficult of application to be of any particular value. Evidence was properly received to show the inconvenience resulting from the proximity of a school-house to the residence of the plaintiff, notwithstanding that inconvenience was not peculiar to him.³² The right to interfere with property by jarring and shaking a dwelling, causing smoke to penetrate the rooms occupied by the family and casting dust, ashes and cinders upon the furniture therein is in the nature of an easement and must be paid for.³³ Unless the smoke or

Chicago, etc. R. Co., 88 Neb. 343; Rasch v. Nassau E. R. Co., 198 N. Y. 385, 36 L.R.A.(N.S.) 645; Ham v. Wisconsin, etc. R. Co., 61 Iowa 716; Dudley v. Minnesota & N. R. Co., 77 Iowa 408; Kansas City & E. R. Co. v. Kregelo, 32 Kan. 608; Leroy & W. R. Co. v. Ross, 40 Kan. 598, 2 L.R.A. 217; Blue Earth County v. St. Paul, etc. R. Co., 28 Minn. 503; Bowen v. Atlantic, etc. R. Co., 17 S. C. 574; Shaw v. Philadelphia, 169 Pa. 506; Chicago, etc. R. Co. v. Moore, 63 Ill. App. 163; Chicago Office Building v. Lake St. E. R., 87 id. 594; Illinois Cent. R. Co. v. Schmidgall, 91 id. 23; Lincoln v. Commonwealth, 164 Mass. 368, and cases cited; Chicago, etc. R. Co. v. Nix, 137 Ill. 141; Omaha, etc. R. Co. v. Doney, 3 Kan. App. 515; Omaha Southern R. Co. v. Beeson, 36 Neb. 361.

"One of the valuable incidents of the ownership of land is the right and power of exclusion. So far as the value of the property, depending on this right and power, is affected by its abridgment compensation therefor should be included in the damages. * * * By taking a part of the petitioner's land the corporation is enabled to exercise its franchise so much nearer to his house, and, it may be, much more injuriously. So far as it is more in-

jurious, to that extent the damages for taking the land should be increased. The increase is not additional damages for the probable results of the exercise of the franchise, but compensation for the greater injury to the whole premises involved in the character of the purpose for which a part is taken. Walker v. Old Colony & N. R. Co., 103 Mass. 10.

³² Haggard v. Independent School Dist. 113 Iowa 486. Compare Simons v. Mason City, etc. R. Co., 128 Iowa 139.

³³ Long Island R. Co. v. Garvey, 159 N. Y. 334; Idaho, etc. R. Co. v. Nagle, 184 Fed. 598; Mason City, etc. R. Co. v. Wolf, 78 C. C. A. 589, 148 Fed. 961; Smith v. St. Paul, etc. R. Co., 39 Wash. 355, 70 L.R.A. 1018; Chicago v. Puleyn, 129 Ill. App. 179; O'Neill v. San Pedro, etc. R. Co., 38 Utah 475; South Bound R. v. Burton, 67 S. C. 515; Syracuse S. S. Co. v. Rome, etc. R. Co., 43 App. Div. (N. Y.) 203, affirmed, without opinion, 168 N. Y. 650; Gainesville, etc. R. Co. v. Hall, 78 Tex. 169, 9 L.R.A. 298, 22 Am. St. 42.

A tenant may recover special and peculiar damages sustained during the making of the improvement, including injury done machinery by the dust caused by the work done.

cinders were carried by unusual currents of wind.³⁴ In Pennsylvania if nothing but an easement is taken smoke, noise, ashes and vibration are not elements of compensation,³⁵ and so of the bringing of a cheaper class of houses into the vicinity of the plaintiff's property.³⁶ The damages caused by cinders, soot, smoke or the temporary interference with the right of egress or ingress are determinable by the difference in the value of the property as affected thereby and its value free therefrom.³⁷ The personal inconvenience of the family of the owner of the property affected or his own loss of business are not elements of the damages.³⁸ In Louisiana the damages recoverable for the lessened value of property affected by noise, smoke, etc., are governed by the general rule—the difference in its market value before the road was built and afterwards.³⁹ This is in accord with the rule applied in one of the federal courts to a case which arose in Nebraska.⁴⁰ A distinction must be made between noise made pursuant to statutory regulations and other noises made in the operation of trains. It has been ruled that the noise which results from the observance of such regulations where one railroad crosses another is not an element of the recovery against the company which condemns the abutting owner's rights in land on which there is an existing road, the tracks of which are crossed by the condemnor's road.⁴¹ It has been denied that noise is an element of damage in favor of abutting owners.⁴²

Cornell-A. S. Co. v. Boston & P. R. Co., 202 Mass. 585.

³⁴ Illinois Cent. R. Co. v. Elliott, 33 Ky. L. Rep. 537. Willis v. Kentucky & I. B. Co., 104 Ky. 186 (though the road is on the company's property); Covington & C. E. R., etc. Co. v. Kleimeier, 105 Ky. 609.

³⁵ Philips v. Philadelphia & R. T. R. Co., 184 Pa. 537; Wunderlich v. Pennsylvania R. Co., 223 Pa. 114; Baker v. Pennsylvania R. Co., 236 Pa. 479. See matter of Seaside & B. Bridge E. R. Co., 83 Hun 143.

³⁶ Willock v. Beaver Valley R. Co., 229 Pa. 526.

³⁷ Illinois Cent. R. Co. v. Elliott, 33 Ky. L. Rep. 537.

³⁸ Covington & C. E. R., etc. Co. v. Kleimeier, 105 Ky. 609; Helmer v. Colorado Southern, etc. R. Co. 122 La. 141.

³⁹ Helmer v. R. Co., *supra*.

⁴⁰ Mason City, etc. R. Co. v. Wolf, 148 Fed. 961.

⁴¹ Bracey v. St. Louis, etc. R. Co., 79 Ark. 124.

⁴² Cosby v. Owensboro R. Co., 10 Bush 294; Chesapeake & O. R. Co.

The extent of the use which will be made of the land taken, as its proximity to the depot and the number of tracks laid, is a proper subject of proof.⁴³ On the other hand, it is competent for a railroad company to bind itself by a stipulation to lessen the resulting damage to the land-owner if the stipulation is not contrary to public policy by way of rendering the land condemned unsafe to the public or otherwise in derogation of the rights of the public. Such a stipulation is admissible on the question of the compensation and the damages to be awarded.⁴⁴ In an action to recover damages caused by changing the grade of a street it is competent to receive in evidence contracts made

v. Gross, 19 Ky. L. Rep. 1926; Covington & C. E. R. Co. v. Klei-meier, 105 Ky. 609.

⁴³ Cedar Rapids, etc. R. Co. v. Raymond, 37 Minn. 204; Idaho-W. R. Co. v. Columbia Conference, etc., 20 Idaho 568; Union T. Co. v. Pfeil, 39 Ind. App. 51; Cleveland, etc. R. Co. v. Gorsuch, 28 Ohio C. C. 468; Baker v. Pennsylvania R. Co., 236 Pa. 479; State v. Superior Court, *infra*. *Contra*, Klopp v. Chicago, etc. R. Co., 142 Iowa 474.

When land is condemned for railway purposes it is taken, not with reference alone to the present needs of the company, but for all needs which the future may develop. Louisville & N. R. Co. v. Scomp, 124 Ky. 330.

The jury must be confined to the consideration of such damages as might reasonably be expected to occur in the intended use of the property. Chicago, etc. R. Co. v. Kline, 220 Ill. 334.

If a railroad has been operated by electricity and may substitute steam the existence of such right is to be regarded in view of all the circumstances connected with its construction, operation, location, connections and purpose. But the award of compensation must be

made in view of the fact that it is being so operated, and not on the basis that the larger measure of compensation is due the owner, as would be the case if the right to use steam were exercised. Griesemer v. Oley Valley R. Co., 13 Pa. Dist. 225.

And the court may, in the first instance, determine whether the use for which the land is sought is a public use and limit the ascertainment of damages to the right condemned and the manner in which it is sought to be exercised. State v. Superior Court, 70 Wash. 540.

⁴⁴ Lieberman v. Chicago & S. S. R. T. Co., 141 Ill. 140. Smith v. Claussen Park D. & L. Dist., 229 Ill. 155; Eldorado, etc. R. Co. v. Sims, 228 Ill. 9; Prather v. Chicago S. R. Co., 221 Ill. 190; Butte E. R. Co. v. Mathews, 34 Mont. 487; Olympia L. & P. Co. v. Harris, 58 Wash. 410; Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445; Manitowoc C. P. Co. v. Manitowoc, etc. R. Co., 135 Wis. 94; Highway Com'rs v. Chambers, 265 Ill. 113. See Pacific R. & N. Co. v. Elmore P. Co., 60 Ore. 534.

But though a statute authorized such stipulations, a condemnor cannot mitigate his damages by a

by the city at the time the suit was begun the execution of which would reduce the damages to the plaintiff.⁴⁵ After the damages awarded have been paid into court and the moving party has taken possession of the property condemned, it may, on the subsequent trial of the question of damages on appeal from the award, in reduction of the damages offer to build and maintain for the land-owner open crossings to facilitate the use of his land as one tract.⁴⁶ Stipulations to lessen the damage or to employ means to prevent damage which would ordinarily result must be specific,⁴⁷ and if they are conditioned by the law the latter is to be regarded as embodied therein.⁴⁸ The powers and privileges the condemnor enjoys respecting the motive power to be employed are material in determining the damage which may result to the land-owner,⁴⁹ and so of the use to be made of the land, and its availability to the owner after the exercise of the rights of the condemnor.⁵⁰ In the absence of a stipulation or anything to the contrary in the pleadings the land-owner may recover on the theory that the condemnor will exercise all its charter powers.⁵¹ It has been said that, independently of evidence, the jury may assess the incidental damages as if the entire strip of land condemned was occupied by as many railroad tracks as practicable, regardless of the present intention of the company,⁵² and that in the absence of

stipulation that it will secure the release of an easement held by a third person over the land, part of which is sought to be taken for a highway, and the admission of such evidence was held reversible error. *Highway Com'rs v. Chambers*, 265 Ill. 113.

⁴⁵ *Joliet v. Blower*, 155 Ill. 414, rev'g 49 Ill. App. 464.

⁴⁶ *St. Louis, etc. R. Co. v. Clark*, 121 Mo. 169, 906, 26 L.R.A. 751; to the same effect, *Chicago & A. R. Co. v. Joliet, etc. R. Co.*, 105 Ill. 388, 44 Am. Rep. 799; *Elgin, etc. R. Co. v. Fletcher*, 128 Ill. 619; *McGregor v. Equitable G. Co.*, 139 Pa. 230; *Lyons v. Hammond, etc. R. Co.*,

167 Ill. 527; *Tyler v. Hudson*, 147 Mass. 609. But see *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282.

⁴⁷ *Aledo T. R. Co. v. Butler*, 246 Ill. 406.

⁴⁸ *St. Louis, etc. R. Co. v. Continental B. Co.*, 198 Mo. 698.

⁴⁹ *Pierce v. Chicago & M. E. R. Co.*, 137 Wis. 550.

⁵⁰ *New York Cent., etc. R. Co. v. Untermeyer*, 133 App. Div. (N. Y.) 146.

⁵¹ *St. Louis & S. R. Co. v. Smith*, 216 Ill. 339; *Chicago & M. E. R. Co. v. Diver*, 213 Ill. 26.

⁵² *Union R. Co. v. Raine*, 114 Tenn. 569.

proof it will be presumed that the improvement will be of such a character as to do the most injury to the property not taken.⁵³ Except where entry is made upon a street⁵⁴ and nothing has been done to indicate a contrary purpose, it is presumed that a railroad company has appropriated the full width of the strip of land allowed by law. If it fixes the width of it it cannot thereafter lessen its liability by refusing to take any part of it.⁵⁵ The moving party may limit its liability for a particular part of the desired property by specifying the quantity desired.⁵⁶ But after exclusive use and possession have been obtained it cannot mitigate its liability by a tender of rights, easements, uses or conveniences in lieu of damages or value except farm crossings, because that would be making payment otherwise than in money.⁵⁷

Evidence that the location of a railroad across a farm made it more difficult to rent it has been received.⁵⁸ The increased expense of operating a quarry because of the location of a railroad is to be considered.⁵⁹ Depreciation in rental value may be shown as tending to prove depreciation in market value,⁶⁰ and it is immaterial whether the rent is payable in

⁵³ *Hadley v. Freeholders*, 73 N. J. L. 197.

⁵⁴ *Jones v. Erie, etc. R. Co.*, 169 Pa. 333, 47 Am. St. 916.

⁵⁵ *Dilts v. Plumville R. Co.*, 222 Pa. 516.

⁵⁶ *James v. West Chester*, 220 Pa. 490.

⁵⁷ *Jeffery v. Chicago & M. E. R. Co.*, 138 Wis. 1.

⁵⁸ *Pittsburgh, etc. R. Co. v. Rose*, 74 Pa. 363; *Streyer v. Georgia S. & F. R. Co.*, 90 Ga. 56.

Where a statute prohibited the erection of new buildings within five feet of the existing street line and the owner built that distance back therefrom and in a recess between two buildings standing evenly with the former line of the street, the inconvenience to occupants of the new building caused by its situ-

ation and the difficulty of procuring tenants for it were held to be facts affecting the value of the land at the time it was injured. But the assessment was to be made in view of the requirement of the statute as to the erection of other buildings and on the assumption that at some indefinite future time there will be an appreciation in the value of the property by reason of the removal of the projecting portions of the adjoining buildings. *Philadelphia v. Linnard*, 97 Pa. 242.

⁵⁹ *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 94 Am. St. 864.

⁶⁰ *Tuskegee L. & S. Co. v. Birmingham R. Co.*, 5 Ala. App. 499; *Chiles v. Alton, etc. T. Co.*, 158 Ill. App. 508; *Acker v. Knoxville*, 117 Tenn. 224; *Rock Island, etc. R. Co. v. Gordon*, 184 Ill. 456; *Omaha v.*

money or in a share of the crops.⁶¹ But depreciation in the rental value is not necessarily the measure of recovery,⁶² and need not be shown to recover the diminished market value.⁶³ Lessened value for use is the measure of recovery where a street is obstructed for a time and the obstruction has been removed.⁶⁴ Proof may be made of the rents received for property while a change of grade was being made in a street, the owner being entitled to recover for diminished rental value while the improvement was being made and for damages to the fee, the proceedings for condemnation being instituted after the change was made. "The amount of rents received is not the measure of damages, but the difference in the rental value of the property is, and the actual effect of the improvement upon the property may be shown as bearing upon this question."⁶⁵ A land-owner is entitled to compensation for the taking of his property; hence he is not injured by the laying out

Hansen, 36 Neb. 135; Gallagher v. Kingston W. Co., 25 App. Div. (N. Y.) 82, affirmed without opinion, 164 N. Y. 602.

But where the buildings were in poor repair at the time of the injury, a part of the depreciation in value must be charged to such disrepair. Keteltas v. Interborough Rapid Transit Co., 164 App. Div. (N. Y.) 870.

⁶¹ Fremont, etc. R. Co. v. Bates, 40 Neb. 381, citing the text.

⁶² New Milford W. Co. v. Watson, 75 Conn. 237. Detroit v. Detroit United R., 156 Mich. 106.

Where property was seized for use as a pesthouse, the building thereon being burned without the fault of either party, and the value of the use was assumed by the owner, no tenant would occupy it there-er to be its whole value, because after, the recovery was measured by the reasonable rental value of it for the purpose for which it was

taken. Brown v. Pierce County, 28 Wash. 345.

⁶³ Webb v. Baltimore & O. R. Co., 114 Md. 216.

⁶⁴ Illinois Cent. R. Co. v. Elliott, 33 Ky. L. Rep. 537.

⁶⁵ Chicago v. Puleyn, 129 Ill. App. 179; Matter of Grade Crossing Com'rs, 17 App. Div. (N. Y.) 54, 154 N. Y. 550; Birch v. Lake Roland E. R. Co., 83 Md. 362.

Where the amount of depreciation in value due to an improvement has been fixed, in part at least, by a consideration of the rental value as a basis, this comprises the whole damage, and lost rents cannot be added. Baltimore & O. R. Co. v. Kahl, 124 Md. 299.

In fixing the amount of depreciation caused by an improvement evidence that part of the damage claimed to be due to loss of rents was really caused by bad management is incompetent as being too remote. Geohegan v. Union El. R. Co., 266 Ill. 482.

of streets or highways upon it; his cause of complaint has its foundation in the opening of them,⁶⁶ unless a highway by dedication or user existed, in which case there would not be liability for any or more than nominal damages.⁶⁷ Where a street is opened through land the injury to the latter is to be estimated without reference to the fact that an unopened street is laid out over the same land. If the latter street shall be opened the damages resulting will be ascertained with regard to the physical condition of the land as it may then be.⁶⁸

If liability to make compensation for property damaged exists and the grade of a street has been raised so as to leave abutting property below its level the cost of filling in the lot and raising the buildings thereon may be proven to show the diminution in the value of the property,⁶⁹ as may the value of the trees and sidewalks destroyed and the cost of relaying pipes.⁷⁰ The right to recover for the value of shade trees (and their value though growing on a sidewalk may be shown as bearing on the value of the land) is not affected because, after the improvement is made, they will be in the street and may be removed under the police power.⁷¹ The condemnor is entitled to the benefit of the least expensive manner of remedying the damage done. Hence there cannot be recovered the cost of shifting a building from one side of the property to the

⁶⁶ *People v. Dickey*, 206 N. Y. 581; *Eachus v. Los Angeles, etc. R. Co.*, 103 Cal. 614, 42 Am. St. 149; *Dickerman v. New York, etc. R. Co.*, 72 Conn. 271. Compare *Harlan County v. Hogsett*, 60 Neb. 362.

⁶⁷ *Potter v. Putnam*, 74 Conn. 189; *Stetson v. Bangor*, 73 Me. 357. See *Miller v. Newark*, 35 N. J. L. 460.

⁶⁸ *Opening of Negley Ave.*, 146 Pa. 456; *Grugan v. Philadelphia*, 158 Pa. 337.

⁶⁹ *Richardson v. Sioux City*, 136 Iowa 436; *Green v. Irvington*, 76 N. J. L. 5; *Augusta v. Schrameek*, 96 Ga. 426, 51 Am. St. 146; *Mead v. Pittsburg*, 194 Pa. 392; *Cook v. Ansonia*, 66 Conn. 413; *Farwell v.*

Chicago, etc. R. Co., 52 Neb. 614; *Patton v. Philadelphia*, 175 Pa. 88.

⁷⁰ *Hoyle v. City of Hickory*, 167 N. C. 619; *Richardson v. Sioux City*; *Cook v. Ansonia, supra*.

It has been ruled that the value of timber cut and used by the condemnor may not be shown as a distinct element of value apart from the land, but merely as confirmatory of testimony concerning the value of the land. *Savings & T. Co. v. Pennsylvania R. Co.*, 229 Pa. 484.

⁷¹ *Southwestern Tel. & T. Co. v. Smithdeal*, 103 Tex. 128; *Green v. Irvington*, 76 N. J. L. 5.

other if that exceeds the cost of lowering it.⁷² The authorities are not agreed whether a city may show, to lessen damages, that the execution of a general plan of street improvements it has adopted will lessen the cost of restoring the property to the condition it was in before the improvement was made.⁷³ If the power to make changes in such plan existed the admissibility of such evidence might work gross injustice. In Pennsylvania such fact cannot be shown to establish the measure of recovery, but only to prove the lessened value of the property.⁷⁴ Where there has been a recovery for decrease in value by reason of the change of the grade of a street there is no liability for the cost of protecting the property; such cost was a part of the diminution in value.⁷⁵ The same rule has been favored where wires heavily charged with electricity were to be carried on poles erected on the land.⁷⁶ Where land was below the street before the improvement was made and the effect of the improvement only increased the difference between its relative location with regard thereto it was not competent to show either what it would cost to make its surface correspond with the grade⁷⁷ or to bring it as near to the level of the street as it was before the change was made.⁷⁸ The consequence of the tendency of the improvement to propagate gophers or squirrels may be regarded to the extent that the value of the land may be thereby affected.⁷⁹ The destruction of trees growing upon a part of the street the grade of which has been changed and contiguous

⁷² Richardson v. Sioux City, 136 Iowa 436.

The removal of trees from land not owned by the abutter may be shown though his right of ingress or egress was not affected. McEachin v. Tuscaloosa, 164 Ala. 263. As where they were planted in the parking in conformity with the original street grade, though the fee to the parking was in the city. Richardson v. Sioux City, *supra*.

⁷³ The affirmative is held in Bond v. Philadelphia, *infra*; Robbins v.

Seranton, 217 Pa. 577, and the negative in Garvey v. Revere, 187 Mass. 545; Estes v. Macon, 103 Ga. 780.

⁷⁴ McCombs v. Pittsburg, 194 Pa. 348; Mead v. Pittsburg, 194 Pa. 392.

⁷⁵ Covington v. Taffee, 24 Ky. L. Rep. 373.

⁷⁶ Telluride P. Co. v. Bruneau, 41 Utah 4.

⁷⁷ Mead v. Pittsburg, *supra*.

⁷⁸ Bond v. Philadelphia, 218 Pa. 475.

⁷⁹ Idaho & W. R. Co. v. Coey, 73 Wash 291.

to the lot is a proper element of compensation so far as the value of the property is thereby affected.⁸⁰

§ 1067. **Same subject.** Compensation may be awarded for future damage which the jury believe will accrue from the work done even though they believe such damage can be prevented by the proper construction, extension or maintenance of the work, the present value of the property being impaired by reason of the probability of such damage.⁸¹ Where the improvement is not properly constructed, and the owner suffers additional damage as a consequence, there is a new taking, for which the owner may receive compensation.⁸² Where a part of the owner's land was liable to be washed and to cave off where there was a bank and sand drifted from the road to the injury of the adjoining land, and these facts resulted unavoidably from the building of a railroad in a suitable and proper manner, the resulting loss was considered in estimating the depreciation from building the road.⁸³ So where the right of way for a railroad ran through a farm so as to sever a strip of about two acres from the body of the farm, thus rendering the

⁸⁰ *Stocking v. Lincoln*, 93 Neb. 798, 46 L.R.A.(N.S.) 107.

⁸¹ *Russell v. St. Louis S. R. Co.*, 71 Ark. 451. See also *Houston Belt & Terminal Ry. Co. v. Wilson*, — Tex. Civ. App. —, 165 S. W. 560 (holding an instruction properly given which was in effect that the jury might take into consideration not only the uses presently contemplated, in laying the track and operating the trains thereon, but such uses as, in reasonable contemplation, are likely to be made in the future, in so far as such uses cause a present depreciation in value).

In fixing the amount of depreciation of property damaged by the construction of a railroad, every element arising from its construction and operation which in an appreciable degree capable of ascertainment in money enters into the en-

hancement of depreciation of the property must be considered. *Geohagan v. Union El. R. Co.*, 266 Ill. 482.

⁸² *Atchison, T. & S. F. R. Co. v. Eldridge*, 41 Okla. 463.

So where the negligent construction of a railroad caused a stream to be dammed by the manner in which the embankments of the track were constructed, so as to cause water to be backed up and to overflow an owner's land, he can recover therefor, but his damages will be strictly limited to those caused by the negligent construction. *Atchison, T. & S. F. R. Co. v. Eldridge*, *supra*.

⁸³ *Dearborn v. Boston, etc. R. Co.*, 24 N. H. 179; *Colvill v. St. Paul, etc. R. Co.*, 19 Minn. 282; *Wray v. Knoxville, etc. R. Co.*, 113 Tenn. 544.

strip useless for farming purposes, it was held that while compensation could not be demanded for such strip, it not being taken, yet it would form an element in estimating the damages the owner would sustain by the construction and operation of the road.⁸⁴ There may be a recovery for injury to land not taken if it results from the use of land appropriated, as where the owner of both that taken and that injured is deprived of access to the latter because the former was flooded.⁸⁵ The owner of land over which a railroad sought to condemn a right of way may recover for loss of the beneficial use of a spring of water from which he is thus cut off,⁸⁶ and for injury to riparian rights generally;⁸⁷ but not for the loss of a mere privilege which he enjoys in common with the public,⁸⁸ nor for a facility to violate the law, as by taking cattle upon the bank of a canal to water

⁸⁴ *Wilson v. Rockford, etc. R. Co.*, 59 Ill. 273; *Springfield & M. R. v. Rhea*, 44 Ark. 258; *Commissioners v. Harkleroads*, 62 Miss. 807.

⁸⁵ *United States v. Grizzard*, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A. (N.S.) 1135.

⁸⁶ *Byrd I. Co. v. Smyth* (Tex. Civ. App.), 157 S. W. 260; *Piercy v. Johnson City*, 130 Tenn. 231; *Redmond v. Perrigo*, 84 Wash. 407; *Winnetka v. Clifford*, 201 Ill. 475; *Bost v. Cabarrus County*, 152 N. C. 531; *Re Armstrong & James Bay R. Co.*, 12 Ont. L. R. 137; *Peoria, etc. R. Co. v. Bryant*, 57 Ill. 473; *Winklemans v. Des Moines N. W. R. Co.*, 62 Iowa 11; *Chicago, etc. R. Co. v. Greiney*, 137 Ill. 628.

⁸⁷ *Dolbeer v. Suncook W. W. Co.*, 72 N. H. 562; *Organ v. Memphis, etc. R. Co.*, 51 Ark. 235; *Drury v. Midland R.*, 127 Mass. 571; *Trowbridge v. Brookline*, 144 id. 139; *Washburn & M. Mfg. Co. v. Worcester*, 153 Mass. 494; *Pilegar v. Hastings & D. R. Co.*, 28 Minn. 510 (interference with flow of surface water from one part of the farm to another); *Walk-*

er v. Old Colony & N. R. Co., 103 Mass. 10, 4 Am. Rep. 509 (turning surface water upon land); *Arkansas Valley & W. R. Co. v. Witt*, 19 Okla. 262, 13 L.R.A. (N.S.) 237; *Sanitary Dist. of Chicago v. Boenig*, 267 Ill. 118 (riparian rights).

Trowbridge v. Brookline, *supra*, was ruled under a statute imposing liability for damages caused by laying and maintaining a sewer. Many of the cases cited in this chapter as being decisions of the court of that state have been ruled under statutes imposing upon the condemnor a larger measure of liability than is imposed by the constitution.

The owner's right to recover the difference between the value of his premises with a stream of water undisturbed and partially diverted is not affected because enough water is left to supply his needs. *Gray v. Ft. Plain*, 105 App. Div. (N. Y.) 215.

⁸⁸ *Gorgas v. Philadelphia, etc. R. Co.*, 144 Pa. 1; *Lakeside Mfg. Co. v. Worcester*, 186 Mass. 552; *State v. Foster*, 84 Wash. 75.

them.⁸⁹ There may be a recovery for the loss of a spring though it was on the land condemned,⁹⁰ and regardless of the need of the condemnor for the use of the water by the public.⁹¹ The loss of the right of drainage is also a material fact, it resulting from the severance of the land,⁹² and so of the loss of a private right of way,⁹³ if it was a means of ingress and egress and an incident of the ownership of the premises.⁹⁴ Interference with the use of a highway must be compensated for though none of the plaintiff's land was taken,⁹⁵ as the mere accessibility to

⁸⁹ Philadelphia & R. R. Co. v. Reading & P. R. Co., 2 Pa. Dist. 557.

⁹⁰ Dilts v. Plumville R. Co., 222 Pa. 516.

So where pumping for defendant's water works caused the exhaustion of the subterranean water courses which supplied the water in plaintiff's ponds, there was a taking which entitled plaintiff to compensation. Lowndes v. Huntington Water Works Co., 163 App. Div. (N. Y.) 37. And also where a public improvement shut off the water in a brook which flowed by plaintiff's land. Stevens v. City of Worcester, 219 Mass. 128.

⁹¹ Conan v. Ely, 91 Minn. 127.

Where the construction of a railroad side track shut off a ditch which formerly conveyed away surface waters, and caused such waters to accumulate on the land of an abutter, the fact is competent on the question of the depreciation in the market value of land due to such construction. Chesapeake & O. R. Co. v. Blankenship, 158 Ky. 270.

⁹² Union T. Co. v. Pfeil, 39 Ind. App. 51; Matter of Rochester, 24 App. Div. (N. Y.) 383.

⁹³ United States v. Welch, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A. (N.S.) 385.

⁹⁴ Cincinnati, R. & M. R. Co. v. Miller, 36 Ind. App. 26.

Although the right of way which is shut off be the only means of access to the owner's property, yet if it be merely permissive and has never ripened by prescription into an easement, the fact is not competent on the question of depreciation. Illinois Cent. R. Co. v. Stewart, 265 Ill. 35.

Where the private easement destroyed by the taking is replaced by a public easement in the same land, the owner is entitled to no compensation. In re Hamburger, 165 App. Div. (N. Y.) 526.

⁹⁵ Mason City, etc. R. Co. v. Wolf, 78 C. C. A. 589, 148 Fed. 961; Matter of Rochester, *supra*. Thus, the owner of a farm can recover damages caused to his farm by the vacation of a highway near it. Highway Com'rs of Saline Tp. v. Klaus, 186 Ill. App. 431.

Where a railroad cut into a county road running in front of an owner's land at such an acute angle that the owner was deprived of access to the highway for a distance of 300 feet, it was held that the fact was properly considered by the jury in fixing the value of the remaining land of the owner. The reason given is that the owner was entitled to access to the highway

tide water is an element of the value of land not shared in by land not so accessible, the fact is competent in estimating the value of the land where such accessibility is shut off by a taking.⁹⁶ The deprivation of a deposit which greatly enriched land, in consequence of the building of an embankment is an element of damage.⁹⁷ The revocation of a license granted by the condemnor does not affect his liability,⁹⁸ nor the loss of any advantage which does not rest on legal right.⁹⁹ The right of a lessee to purchase the premises during the term of his lease does not affect his recovery.¹ Where a riparian owner has the right to remove and sell sand deposited as an alluvium between high and low water mark on the bank of a navigable stream he may recover from a railroad company which erects a structure on the opposite bank in a way which changes the flow and the direction of the current so as to sweep away the sand and prevent future alluvium, notwithstanding the damages for its loss may be conjectural.²

throughout its entire length in front of his land. *State v. Foster*, 84 Wash. 75. To a similar effect is *Norwalk v. Podmore*, 86 Conn. 658 (holding that an owner is entitled to access to a highway along the entire front of the premises abutting it, regardless of the title to the fee of the highway, and that any interference with such access is an element of damage).

⁹⁶ *Harrison v. Pacific Ry. & Nav. Co.*, 72 Ore. 553; *Bray v. Tardy*, 182 Ind. 98 (land fronting on fresh water harbor).

Where the main element of value in plaintiff's land is the timber growing thereon, and where the only convenient means of getting the timber to market is to haul the logs to tide water and float them at high tide, the interruption of this means of getting the lumber to market is proper to be considered by the jury in fixing the value of the land.

Harrison v. Pacific Ry. & Nav. Co., *supra*. But where only part of the access to a waterfront is cut off, the jury should take the fact into consideration in determining value, as where part of land abutting the lake front was taken, leaving other land also suitable for wharfage. *Potts v. Minneapolis, St. P. & S. S. M. R. Co.*, 124 Minn. 413.

⁹⁷ *Concord R. v. Greely*, 23 N. H. 237.

⁹⁸ *In re New York*, 56 N. Y. Misc. 306.

⁹⁹ *Calor O. & G. Co. v. Franzell*, 128 Ky. 715, 36 L.R.A.(N.S.) 456; *Tri-State Tel. & T. Co. v. Cosgriff*, 19 N. D. 771, 26 L.R.A.(N.S.) 1171 (the use of highway for agricultural purposes).

¹ *Cornell-A. S. Co. v. Boston & P. R. Co.*, 202 Mass. 585.

² *Freeland v. Pennsylvania R. Co.*, 197 Pa. 529, 58 L.R.A. 206, 80 Am. St. 850.

Whatever would be fixtures between a vendor and vendee must be paid for, notwithstanding they might be removed without injury to themselves.³ A party who had procured fixtures for an establishment, which were rendered useless in consequence of taking a part of his premises was entitled, in addition to other damages, to recover his loss thereon.⁴ In estimating the value of fixtures in a building which has been appropriated they are considered only so far as they enhance the value of the estate for any purpose for which it might be used.⁵ This rule applies to improvements placed on premises by a lessee and to articles purchased to enable him to conduct his business, these being removable by him and the proceeding being by the owner of the property.⁶ There cannot be a recovery for fixtures placed on the land by the condemnor with the intention to take and use it, though the taking was postponed for some years.⁷

Unless property is taken as material to be used in the improvement there cannot be a recovery for taking it or for any injury

³ *Kansas City S. R. Co. v. Anderson*, 88 Ark. 129; *White v. Cincinnati, etc. R. Co.*, 34 Ind. App. 287; *Matter of the Mayor*, 39 App. Div. (N. Y.) 589; *Diamond Mills E. Co. v. Philadelphia*, 8 Pa. Dist. 30.

⁴ *Price v. Milwaukee, etc. R. Co.*, 27 Wis. 98; *Chicago, etc. R. Co. v. Ward*, 128 Ill. 349.

⁵ *Allen v. Boston*, 137 Mass. 319; *Finn v. Providence G. & W. Co.*, 99 Pa. 631.

Appropriation of land for a public use is an appropriation of all which is annexed to land, whether buildings or fixtures, in so far as the value of the land, as a unit, is enhanced thereby. Consequently where a land is taken on which is a building containing the machinery of a going concern, the owner may recover the value of the land so enhanced. The reason given is that in such case the condemnor occupies the position of a buyer at

a forced sale. *Jackson v. State*, 213 N. Y. 34, L.R.A. 1915D 492 (reversing 160 App. Div. (N. Y.) 110). To the same effect is *In re Post Office Site*, 127 C. C. A. 382, 210 Fed. 832. Thus the value of improvements and growing crops on land taken is an element of its value. *School Dist. of Ogden v. Smith*, 113 Ark. 530. Fixtures of little value when disconnected from the property of which they are part are to be valued in accordance with the use made of them in connection with the property; those which may be easily removed without materially affecting their value are not to be considered as taken. *In re Acquiring Property on North River*, 118 App. Div. (N. Y.) 865.

⁶ *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. 290.

⁷ *In re Ruttan & D. & C. N. R. Co.*, 12 Ont. L. R. 187.

done; the remedy is by an action for trespass.⁸ If chattels are not condemned and could have been removed their value cannot be recovered.⁹ Where coal had been mined and placed upon the surface, mixed with dirt and slate, it was considered to be personal property, and for entirely depriving the plaintiff of it the party who did so was liable for its market value at the breaker when the taking occurred, less the estimated cost of removing, cleaning, screening and preparing it for market. In estimating its value after it was ready for market the advantage of getting a present lump sum, instead of instalments, from time to time by sales of the coal, and also a just allowance for wear and tear of machinery, interest on capital invested, etc., were proper subjects for consideration.¹⁰ The expense of removing personalty from the land condemned may not be recovered for in several states unless the damage sustained by the land affected, but not taken, is thereby lessened.¹¹

Under a statute requiring the commissioners to consider the injury which a land-owner may sustain by the construction of a railroad and the assessment of the damages he will sustain by the appropriation of his land, there may be a recovery of the expense of removing personal property from land con-

⁸ Gile v. Stevens, 13 Gray 146; Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 106 Am. St. 36, 70 L.R.A. 221; Eldorado, etc. R. Co. v. Everett, 225 Ill. 529; Beeker v. Philadelphia & R. R. Co., 177 Pa. 252, 35 L.R.A. 583.

⁹ Missouri Pac. R. Co. v. Porter, 112 Mo. 361; Kansas City S. R. Co. v. Anderson, 88 Ark. 129.

The decreased value of movable tools and appliances used in business may not be shown in connection with the value of fixtures. Cornell-A. S. Co. v. Boston & P. R. Co., 202 Mass. 585.

¹⁰ Lehigh C. Co. v. Wilkes Barre & E. R. Co., 187 Pa. 145. See Cole v. Ellwood P. Co., 216 Pa. 283.

Suth. Dam, Vol. IV.—22.

¹¹ Springfield S. R. Co. v. Schweitzer, 173 Mo. App. 650, citing, *inter alia*. Williams v. Commonwealth, 168 Mass. 364; Ranlet v. Concord R. Co., 62 N. H. 561; New York Cent. R. Co. v. Pierce, 35 Hun 306; Beeker v. Philadelphia, etc. R. Co., 177 Pa. 252, 35 L.R.A. 583, and referring to these cases as holding otherwise; Blineoe v. Choctaw, etc. R. Co., 16 Okla. 286, 4 L.R.A. (N.S.) 890; Atchison, etc. R. Co. v. Schneider, 127 Ill. 144, 2 L.R.A. 422.

If it becomes the duty of the owner to remove chattels in order that the liability of the condemnor may be lessened any necessary injury done by removing them may be recovered for. Springfield S. R. Co. v. Schweitzer, *supra*.

demned.¹² But other cases deny the right to recover for such expense: "As the title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense incident to the surrender of the possession are not elements to be considered in determining the damages to which the owner is entitled. A land-owner is not entitled to the expense of removing personal property from the land taken."¹³ If the connections of a mine have been rendered valueless for the purpose for which they have been used their value for other purposes may be regarded.¹⁴ The loss resulting from the inability to mine coal the removal of which will interfere with the rights of the condemnor to the use of the surface of the soil must be compensated for.¹⁵ If mineral or stone has not been removed from the soil its value in place measures the damage.¹⁶ The value of whatever is a component part of land must be shown in connection with the value of the land.¹⁷

If taking a part of a tract of land destroys a water power on the residue damages therefor may be assessed.¹⁸ If water which would otherwise come to a mill is diverted therefrom the mill-owner's damages are measured by the difference between the fair market value of his mill with all the water rights appurtenant thereto and its value as diminished by the decrease in the quantity received, with interest from the time of the first diversion.¹⁹ The means available for running a mill from which water has been diverted and the cost of using them are

¹² *Blincoe v. Choctaw, etc. R. Co.*, 16 Okla. 286, 4 L.R.A.(N.S.) 890. *Arkansas Valley & W. R. Co. v. Witt*, 19 Okla. 262, 13 L.R.A.(N.S.) 237, is to the same effect. See § 1069.

¹³ *Ranlet v. Concord R. Co.*, 62 N. H. 561; *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *Kansas City S. R. Co. v. Anderson*, 88 Ark. 129.

¹⁴ *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282.

¹⁵ *Dilts v. Plumville R. Co.*, 222 Pa. 516.

¹⁶ *Cole v. Ellwood P. Co.*, 216 Pa. 283, and local cases cited.

¹⁷ *St. Louis B. & T. R. Co. v. Cartan R. E. Co.*, 204 Mo. 565.

¹⁸ *Lake Superior, etc. R. Co. v. Greve*, 17 Minn. 323; *Barclay R. etc. Co. v. Ingham*, 36 Pa. 194.

¹⁹ *Cowdery v. Woburn*, 136 Mass. 409.

The same rule applies where an improvement cuts off the water from a stream which, though not navigable generally, is navigable in the sense of being a practical means

relevant to show the depreciation in the value of the land.²⁰ Such evidence alone does not show the measure of damages because the financial results might not be equal and the necessary expenditure would not represent the value of the power taken.²¹ Where three tracts of land in a body were owned in severalty by three persons and, pursuant to a contract between them, the whole was used in common, and such tract was more valuable because it was so used, the owners were entitled to damages resulting from the separation of the land with water on it from the land used as pasture.²² The party who has exercised the right of eminent domain and has thereby cut off

of floating logs to market. The owner can recover for the depreciation in value occasioned thereby. *State v. Superior Court*, 84 Wash. 252. But the same court has held that the owner of land abutting a strictly navigable stream cannot recover for damages caused by a public improvement which entirely shuts off the water which formerly flowed past his land, and which he uses in his business, for the reason that the owner of land abutting a navigable stream can have no rights therein which he can enforce against the state or its authorized agents, so that evidence of the expense of getting water elsewhere and of securing rights of way therefor is incompetent. *Newell v. Loeb*, 77 Wash. 182.

²⁰ *Brubaker v. Lebanon*, 14 Pa. Dist. 585.

²¹ *Lakeside Mfg. Co. v. Worcester*, 186 Mass. 552.

²² *Commissioners v. Labore*, 37 Kan. 480. See *Gorgas v. Philadelphia, etc. R. Co.*, 144 Pa. 1.

Consequential damages to land not taken by a railroad may include damages to a tract not contiguous to that from which the land is taken, if the non-contiguous tract is so located with reference to

the other as to be workable with it, as for instance, for mining. *Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.*, — W. Va., 83 S. E. 1031.

Evidence of consequential damages from the establishment of a railroad roundhouse near an owner's property is not competent as to another tract owned by the same owner, and situated three-quarters of a mile away, in the absence of evidence tending to show that the two tracts were specially adapted to one use, and had a special value on that account apart from the separate market value of each. *Chicago Great Western R. Co. v. Kemper*, 256 Mo. 279.

Where a railroad took a strip of land for a right of way, which strip was on one side of a square parcel of land used as a country estate, the tract is to be regarded as a unit and evidence is competent of the cost of reconstruction of buildings on the tract, as affecting depreciation in value of the whole tract, though only one of the buildings was on the land taken, and its value was small. *New York Cent. & H. River R. Co. v. Newbold*, 166 App. Div. (N. Y.) 193.

access to timber or a water supply may show that other sources of supply are open to the person who claims damages and the expense at which they can be utilized,²³ or that the water diverted was practically worthless.²⁴ On the other hand, the person deprived of a spring may show how and where he was obliged to obtain water for the purposes for which he had used the waters of the spring.²⁵ If a brook is converted into a sewer a mill-owner upon a river into which the brook empties and who has used its water for power may recover for the loss sustained by the depreciation in the quality of the water.²⁶ If sickness results in the family of the plaintiff from pools of stagnant water left or caused to accumulate near his residence by the condemnor such facts may be shown as bearing upon the extent of the damage to the property.²⁷ A railroad company which appropriates the bed of a stream and pollutes the water thereof by the ordinary operation of its road must compensate the owner, and the jury may consider the depreciation in the value of the land caused by the pollution.²⁸ The damages resulting from the diversion of water are not affected

²³ *Illinois, etc. R. & C. Co. v. Switzer*, 117 Ill. 399, 57 Am. Rep. 875; *Gulf, etc. R. Co. v. Brugger*, 24 Tex. Civ. App. 367. Compare *Miller v. Windsor W. Co.*, 148 Pa. 429.

²⁴ *Kiernan v. Chicago, etc. R. Co.*, 123 Ill. 188.

²⁵ *Weinschenk v. Western Allegheny R. Co.*, 233 Pa. 442.

²⁶ *Washburn & M. Mfg. Co. v. Worcester*, 153 Mass. 494.

²⁷ *Gulf, etc. R. Co. v. Richards*, 11 Tex. Civ. App. 95.

²⁸ *Rudolph v. Pennsylvania, etc. R. Co.*, 186 Pa. 541, 47 L.R.A. 782.

The rule was also applied in a case where a sewage plant erected by a city causes sewage to be discharged into a river on which plaintiff has riparian rights, such discharge being held to be a direct invasion of plaintiff's rights, and

therefore a taking. *Donnell v. City of Greensboro*, 164 N. C. 330.

The rule was also applied in a later case in the same state, where the property damaged was fifty feet away from the water polluted, and where it was also held that so far as assessing permanent damages was concerned, it was immaterial that the improvement causing the damage was established by competent authority, or that the conditions causing damage might be changed in the future so as to prevent further damage. *Rhodes v. City of Dunham*, 165 N. C. 679.

So where a sewerage district caused sewage to be discharged into a stream which ran by the land damaged, with an excess amount of water, causing an overflow on the land, and the deposit thereon of a noxious substance, and creating

because the water is returned to the stream in the form of sewage at a point above a water power affected by the diversion, the disposition of the sewage being wholly within the control of the party who did the taking.²⁹ Where water is diverted from a mill the damages are assessable upon the assumption that the party who has diverted the water will draw all it can through the pipe as laid although such was not the case when the proceedings for condemnation were had and probably would not be so for many years.³⁰ If properly constructed sewers will affect the atmosphere or otherwise interfere with the use and enjoyment of premises the jury may consider the fact.³¹ The location of a water reservoir at a place which will render the residence of the owner of the land, part of which has been taken, unhealthy as a residence may be shown as bearing upon its value.³² The unsightliness of telegraph poles placed in a highway near the residence of the owner of adjoining land is a proper matter for proof, but not the liability of animals to injury by crowding between the poles and fence.³³ But it has been held as to poles erected in the streets of cities and boroughs under charter rights and with municipal consent and conform-

foul odors, the owner was entitled to recover. *El Dorado v. Scruggs*, 113 Ark. 239.

The odor caused by flowing land as a result of the decay of vegetable matter may be considered. *Wright v. Penigewasset P. Co.*, 75 N. H. 3.

²⁹ *In re Barre W. Co.*, 72 Vt. 413; *Fisk v. Hartford*, 69 Conn. 375, 38 L.R.A. 474.

³⁰ *Leonard v. Rutland*, 66 Vt. 105; *In re Barre W. Co.*, *supra*.

³¹ *Joplin Con. M. Co. v. Joplin*, 124 Mo. 129; *Bennett v. Marion*, 106 Iowa 628; *Pasadena v. Stimson*, 91 Cal. 238. See *Taft v. Commonwealth*, 158 Mass. 526; *Lincoln v. Commonwealth*, 164 Mass. 368.

³² *Johnson v. Boston*, 130 Mass. 452.

Mere unfounded beliefs of the

public generally that an accumulation of water on land will cause sickness are too remote to be an element of damage. *Alabama Power Co. v. Carden*, — Ala. —, 66 So. 596; *In re City of Meriden*, 88 Conn. 427. But a well grounded belief of that sort may so directly affect market value as to be an element proper to be considered by the jury in fixing the value. *In re City of Meriden*, *supra*.

³³ *Board of Trade Tel. Co. v. Darst*, 192 Ill. 47, 85 Am. St. 288.

The unsightliness of cuts and fills may also be considered. *Idaho & W. R. Co. v. Coey*, *infra*.

But the unsightliness of the improvement is not material unless it affects the plaintiff's property specially. *Baker v. Pennsylvania R. Co.*, 236 Pa. 479.

ably with municipal regulations, that neither their unsightliness nor the noises made as the ordinary incident of conducting the business are a special injury to an individual.³⁴ The value or extent of the improvements upon land not taken and which was not affected by the taking of part of it are not material.³⁵

§ 1068. **Same subject.** The commissioners or jury in determining what constitutes just compensation for taking land for a railroad may always take into consideration all incidental loss, inconvenience and damage, present and prospective, which will, or may be reasonably expected to, result from the construction and operation of the road in a legal manner, so far as they are special to the owner of the land not taken.³⁶ Accordingly they may always regard the exact condition in which the road may be when they make the assessment,³⁷ except so far as it is the result of an unauthorized or negligent act, when it must

³⁴ *Shinzel v. Bell Tel. Co.*, 31 Pa. Super. Ct. 221.

³⁵ *United States v. Honolulu P. Co.*, 58 C. C. A. 279, 122 Fed. 581.

³⁶ *Arkansas Valley & W. R. Co. v. Witt*, 19 Okla. 262, 13 L.R.A.(N.S.) 237; *Yazoo & M. V. R. Co. v. Davis*, 73 Miss. 678, 55 Am. St. 562, 32 L.R.A. 262; *Idaho & W. R. Co. v. Coey*, 73 Wash. 291; *Indianapolis Northern T. Co. v. Ramer*, 37 Ind. App. 264; *Kansas City N. R. Co. v. Schwake*, 70 Kan. 141, 68 L.R.A. 673; *Rasch v. Nassau E. R. Co.*, 198 N. Y. 385, 36 L.R.A.(N.S.) 645; *New York Cent., etc. R. Co. v. Marshall*, 120 App. Div. (N. Y.) 742; *Tidewater R. Co. v. Cowan*, 106 Va. 817; *Grays Harbor B. Co. v. Lownsdale*, 54 Wash. 83; *Ohio & M. R. Co. v. Wachter*, 123 Ill. 440; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. 273. Compare *Tri-State Tel. & T. Co. v. Cosgriff*, 19 N. D. 771, 26 L.R.A.(N.S.) 1171.

It is not otherwise because some of the improvements are not on the land affected, they all being a single

construction for a particular use. *Baker v. Pennsylvania R. Co.*, 236 Pa. 479.

³⁷ *Alloway v. Nashville*, 88 Tenn. 510, 8 L.R.A. 123; *Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 672; *Missouri, etc. R. Co. v. Haines*, 10 Kan. 439; *Hayes v. Ottawa, etc. R. Co.*, 54 Ill. 373; *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104; *Chicago, etc. R. Co. v. Bowman*, 122 Ill. 595.

So where damages were assessed on this theory before construction was commenced, and afterwards changes were made in the plans of construction, causing additional damage, plaintiff can recover for the additional damage done. *Otis Elevator Co. v. City of Chicago*, 263 Ill. 419.

The actual results of the improvement may be shown as bearing upon present and prospective damages. It will be presumed it was made as was intended when the proceedings were instituted. *New Jersey, etc. R. Co. v. Tutt*, 168 Ind. 205.

be recovered for in an independent proceeding or action.³⁸ Such a proceeding or action may also be brought when the condemning party makes such use of the land as was not within the contemplation of the parties when the damages were assessed in the condemnation proceeding.³⁹ Because it is impossible to draw a sharp line between the present and anticipations of the future, the harm anticipated from the future use of a sewer may be recovered for as damages caused by the taking. "It is true that a jury ought not to speculate on the mere possibility that land may be put to disagreeable uses. But when land is taken and must be used for a particular purpose, the reasonably probable consequences of a lawful use for that purpose must be taken into consideration."⁴⁰ If a railroad company does not provide farm crossings under the statute the damages to the land-owner are to be assessed in view of that fact, and are not to be reduced because they have been furnished at his request. In such a case his right to use them depends upon the will of the company.⁴¹ An agreement made between the owner of land and a railroad company as a part of the consideration for a right of way over his land is to be read in

³⁸ *Sanitary Dist. v. Ray*, 199 Ill. 63, 93 Am. St. 102; *Sinai v. Louisville, etc. R. Co.*, 71 Miss. 547; *Fremont, etc. R. Co. v. Harlin*, 50 Neb. 698, 36 L.R.A. 417, 61 Am. St. 578; *Nashville v. Sutherland*, 94 Tenn. 356; *Marshall v. American Tel. & T. Co.*, 16 Pa. Super. Ct. 615; *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282; *Muncie N. G. Co. v. Allison*, 31 Ind. App. 50; *Ralston v. Sharon Hill*, 43 Pa. Super. Ct. 280; *Kirby v. Panhandle & G. R. Co.*, 39 Tex. Civ. App. 252; *Cleveland, C., C. & St. L. R. Co. v. Smith*, 177 Ind. 524; *Guinn v. Iowa, etc. R. Co.*, 125 Iowa 301; *Sultan W. & P. Co. v. Weyerhaeuser T. Co.*, 31 Wash. 558; *Neilson v. Chicago, etc. R. Co.*, 58 Wis. 516; *Lyon v. Green Bay, etc. R. Co.*, 42 Wis. 538; *Alloway v. Nashville*, 88 Tenn. 510, 8 L.R.A. 123; *Den-*

niston v. Philadelphia Co., 1 Pa. Super. Ct. 599. See § 1072.

Damage to adjacent land because of the improper construction of the improvement cannot be recovered for. *Montana R. Co. v. Freeser*, 29 Mont. 210.

³⁹ *Chicago, etc. R. Co. v. O'Connor*, 42 Neb. 90.

⁴⁰ *Richardson v. Centerville*, 137 Iowa 253; *Lincoln v. Commonwealth*, 164 Mass. 368, 378; *In re London, etc. R.*, 24 Q. B. Div. 326; *Cowper Essex v. Local Board for Acton*, 14 App. Cas. 153; *Newgass v. Railway Co.*, 54 Ark. 140.

⁴¹ *Shepp v. Reading B. R.*, 211 Pa. 425; *Cedar Rapids, etc. R. Co. v. Raymond*, 37 Minn. 204; *Drury v. Midland R.*, 127 Mass. 571; *Sanitary Dist. v. Loughran*, 160 Ill. 362.

connection with the deed conveying the right, and is not a mere privilege. On the loss of such right by the erection of a dam the company must make compensation.⁴² The owner of flats crossed by a railroad bridge having raised the flats around and under the bridge within the location of the road, but without the consent of the proprietor thereof, was entitled to recover by way of damages against such proprietor for so much of the expense of such raising and filling up as was necessary to enable him to enjoy his other lands, provided such necessity was caused by the location and construction of the railway.⁴³ Land was taken by a city to widen a highway after it had been previously filled in by the owner in pursuance of an order of the municipal authorities to abate a public nuisance; the measure of damages was held to be the value of the land as it stood at the time of the taking; the expense incurred in filling it entering into the measure only so far as it had effect in increasing the value of the land.⁴⁴ If cultivated land will be unfenced for a time the fact may be shown.⁴⁵

If property has been put to a particular use or business and its productive value is chiefly therefor, and the taking or damaging of part of it impairs that use, it is sometimes an important fact and may be proved to enhance damages according to the depreciation caused by destroying or impairing such business or use,⁴⁶ except in so far as the conditions pertain solely to the owner, of the property.⁴⁷ Thus, where the construction and use of a railroad over plaintiff's land had the effect of destroy-

⁴² Chicago, etc. R. Co. v. Miller, 106 Mo. 458.

⁴³ Commonwealth v. Boston, etc. R. Co., 3 Cush. 25; Paine L. Co. v. United States, 55 Fed. 854.

⁴⁴ Squire v. Somerville, 120 Mass. 579. See Beale v. Boston, 166 Mass. 53.

⁴⁵ Herrin & S. R. Co. v. Nolte, 243 Ill. 594.

⁴⁶ Gillespie v. South Omaha, 79 Neb. 441; Brainerd v. State, 74 N. Y. Misc. 100; Hunter v. Chesapeake & O. R. Co., 107 Va. 158, 17 L.R.A.

(N.S.) 124; Portland & S. R. Co. v. Clarke County, 48 Wash. 509; Idaho-W. R. Co. v. Columbia Conference, etc., 20 Idaho 568, 38 L.R.A. (N.S.) 497 (effect of noise on educational institution); Preston v. Cedar Rapids, 95 Iowa 71; Marshall v. American Tel. & T. Co., 16 Pa. Super. Ct. 615 (effect of cutting trees on property used for a special purpose).

⁴⁷ Boston B. Co. v. Boston, 183 Mass. 254.

ing the business of a mill thereon by driving away custom, it was a ground of damage. It appeared that, after the road was built and operated, customers ceased to carry grain there to be ground, and at least one-half of the custom had fallen off. The reason given was simply the danger in going to the mill with horses and teams, owing to the location of the road with reference to the mill.⁴⁸ In a proceeding by the lessee of premises to recover for injury it appeared that the plaintiff was under a contract to remove daily for the gas works of a city a large quantity of tar, and that the use of the premises in question enabled him to receive the tar without cost and to manufacture it without transporting it to and from distant points; that after the land was taken it became necessary to carry the tar to a place of distillation by a boat specially constructed, and that it was necessary to erect temporary works for the distillation of the tar when received and to transport over inaccessible roads the barrels required in the business. Evidence of these facts was admissible to show the value of the lease.⁴⁹ A lessee whose term expired before the trial has been allowed to show the profits made on the premises.⁵⁰

The Pennsylvania court has recently emphasized the rule that loss of custom resulting from the location of a road with reference to the place of business affected and other like circumstances are relevant only for the purpose of showing that the loss of custom detracted from the value of the land, and to what extent. There cannot be a recovery for the loss of custom as a specific item of claim, because the logical application of such a rule might enlarge the recovery beyond the value of the land.⁵¹

⁴⁸ *Western Pennsylvania R. Co. v. Hill*, 56 Pa. 460; *Dupuis v. Chicago, etc. R. Co.*, 115 Ill. 97; *Jacksonville & S. R. Co. v. Walsh*, 106 Ill. 253.

Similarly, though loss of trade due to the diversion of traffic over a highway in front of plaintiff's premises to another route over a viaduct is not of itself an element of damage, yet where it is shown to

have caused a diminution of the market value of the property so that a buyer would pay less for it, the evidence is competent on the question of market value. *Voigt v. Milwaukee County*, 158 Wis. 666.

⁴⁹ *Ehret v. Schuylkill River East-side R. Co.*, 151 Pa. 158.

⁵⁰ *Hayes v. Atlanta*, 1 Ga. App. 25.

⁵¹ *Cox v. Philadelphia, etc. R. Co.*,

The same rule has been recognized in other states.⁵² Where the part of the land not taken was used by the owner as a ferry landing and its usefulness for that purpose was not lessened, evidence as to the difference in value of the ferry before and after the taking was inadmissible. The increased inconvenience and danger to the public could not be regarded in estimating the damages done the land by reason of the proximity of the railroad tracks unless the public were thereby deterred from using the ferry; neither was it an element of the damages that the railroad diverted custom from the ferry either as a common carrier or because its operation changed the route of public travel.⁵³ If by the appropriation by a bridge company of the landing of a ferry company the business of the latter is suspended during the building of the bridge and it is shown that the ferry would have had an earning capacity but for such act, the ferry company may recover damages for the destruction of its business during that interval. Such damages were not the result of competition.⁵⁴ This doctrine is in line with the view

215 Pa. 506, 114 Am. St. 979; Pittsburgh, etc. R. Co. v. Vance, 115 Pa. 325; Miller v. Windsor W. Co., 148 Pa. 429; Shaw v. Philadelphia, 169 Pa. 506; Hamilton v. Pittsburgh, etc. R. Co., 190 Pa. 51, 51 L.R.A. 319. See § 1071.

⁵² Henderson v. Lexington, 132 Ky. 390, 22 L.R.A.(N.S.) 20; Warner v. Ford L. & Mfg. Co., 123 Ky. 103, 12 L.R.A.(N.S.) 667; Opelousas, etc. R. Co. v. St. Landry C. O. Co., 121 La. 796; Boston B. Co. v. Boston, 183 Mass. 254; Bailey v. Boston & P. R. Co., 182 Mass. 537; Detroit v. Detroit United R., 156 Mich. 106; Gillespie v. South Omaha, 79 Neb. 441; Hunter v. Chesapeake & O. R. Co., 107 Va. 158, 17 L.R.A.(N.S.) 124; Matter of Grade Crossing Com'rs, 17 App. Div. (N.Y.) 54, aff'd 154 N. Y. 550, 58 Am. St. 290; Syracuse v. Stacey, 45 App. Div. (N. Y.) 249; Pause v.

Atlanta, 98 Ga. 92, 28 Am. St. 290; Pegler v. Hyde Park, 176 Mass. 101.

Under a statute providing for compensation for damage to business in reference to conditions existing at a given time the value of the goodwill may be shown by the net profits for several years prior to the taking; but such evidence is not conclusive. The income of the business after the enactment of the statute may be material. The compensation of partners for services rendered in the business is to be deducted in ascertaining its value and the damages caused by interference with it. Sawyer v. Commonwealth, 185 Mass. 356.

⁵³ Missouri Pac. R. Co. v. Porter, 112 Mo. 361.

⁵⁴ Riverton F. Co. v. McKeesport & D. B. Co., 179 Pa. 466, distinguishing Bridgewater F. Co. v. Sharon B. Co., 145 Pa. 404.

taken in Michigan. Judge Campbell, writing for the court, said: "Both of the appellants were using their property in lucrative business, in which the locality and its surroundings have some bearing on its value. Apart from the money value of the property itself they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether for want of access to another that is suitable for it. Whatever damage is suffered must be compensated. Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possession by making up to them the whole of their losses."⁵⁵ In a recent case in New York, after a review of several local cases, the court said: While the claimants are not entitled to have the amount of business done by them taken as the measure of the value of their premises, they are, however, entitled to have the facts in relation to their business shown as bearing upon their market value. The cases are not harmonious upon the rule as to whether or not gross income may be shown as bearing upon the value of property for the reason that the cases range from those where profits clearly have no bearing to those where they are the best evidence of such value. Whether or not profits should be considered depends upon the nature of the premises taken. Where the personal skill, experience and efforts of the owner plays too prominent a part the profits realized from the business conducted upon land constitute but little aid in determining its

Where the effect of an improvement is to destroy a ferry which rendered an owner's land accessible to a particular market, and where as a result of being deprived of the use of the ferry the owner's access to the market is rendered much more difficult, the fact is competent

on the question of depreciation in the market value of plaintiff's land. *Central Georgia Power Co. v. Cornwell*, 141 Ga. 643.

⁵⁵ *Grand Rapids & I. R. Co. v. Weiden*, 70 Mich. 390; *Commissioners v. Moesta*, 91 Mich. 149. See *Detroit v. Beecher*, 75 Mich. 454, 4

value, but where the earnings depend chiefly upon the location, soil or character of the property itself, the profits derived from it may furnish reliable evidence of its value.⁵⁶ In Ontario there may be a recovery for interference with business and for anticipated profits though the condemnor might have rendered the property valueless for the purposes for which it was used. In estimating the value of a business a hotel and bar license is to be considered notwithstanding the possibility it might not be renewed.⁵⁷ A recovery for the loss of or injury to a business covers the equipment used therein if it was valuable only in connection with the business.⁵⁸ Where injury results to a business from the laying of tracks for a railroad in a street the recovery of lost profits cannot extend beyond the time when the person injured might, in the use of reasonable diligence, have procured another place of business equally eligible, including a reasonable time for removal.⁵⁹

§ 1069. Same subject. Where a strip of land appropriated by the defendant for the purpose of its railway was part of a larger tract used and occupied as an entirety as a site for a brick yard, it was ruled that evidence was admissible to show that, by the appropriation, the plaintiffs were prevented from enlarging their works and that, in consequence, the value of the brick yard as it was became depreciated; that it was proper to consider as an element of damage the effect upon the value of the premises and upon the convenience of conducting the plaintiffs' business thereon the circumstance that, in consequence of the railway, the plaintiffs were put to the necessity of frequently,

L.R.A. 813, and Kentucky cases cited in § 1064, also *Patterson v. Boston*, 23 Pick. 425, and § 1069.

⁵⁶ *Brainerd v. State*, 74 N. Y. Misc. 100.

Profits cannot be recovered where the property taken is vacant. *Bagmell v. City of Milwaukee*, 156 Wis. 642.

⁵⁷ *In re Cavanagh & Canada Atlantic R. Co.*, 14 Ont. L. R. 523.

The value of a turnpike road may be shown by proof of its physical

condition, the net amount of tolls received, or that would be received under better management, the market value of the stock and the availability of the road for railroad uses if there is a reasonable prospect of a demand therefor. *Harrisburg, etc. T. R. Co. v. Cumberland County*, 225 Pa. 467.

⁵⁸ *In re Bense*, 140 App. Div. (N. Y.) 806.

⁵⁹ *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. 273.

for instance, one hundred times a day, crossing the track in hauling clay to their pits.⁶⁰ So it has been held in Wisconsin that evidence of the business to which the plaintiff's adjoining property was devoted and of the effect upon such business of the taking of the property in question was properly admitted as bearing upon the question of damages, the court having instructed the jury that the proper measure thereof was the value of the land condemned and the diminution in market value of the other property.⁶¹ It has also been held in that state where the opportunity for the expansion of a manufacturing plant had much bearing on the compensation due for taking a part of the land used by it, that the fact that other lands could be purchased for the use of the plant could not be shown in mitigation, but might probably bear on the value of the land taken and affected.⁶² Expenses which must necessarily be incurred in order to carry on a coal mine may be recovered, notwithstanding the appliances which may be procured may be more valuable and serviceable than those which must be discarded because of the taking and damaging of the property.⁶³ Where part of a lot was condemned and there was annexed to it as appurtenances a right of way over the other part, a coal office and scales and a side track in an adjacent alley, these con-

⁶⁰ *Sherwood v. St. Paul, etc. R. Co.*, 21 Minn. 127.

⁶¹ *Driver v. Western Union R. Co.*, 32 Wis. 569, 13 Am. Rep. 726; *King v. Minneapolis Union R. Co.*, 32 Minn. 224.

It is said in *Chicago, etc. R. Co. v. McGrew*,* 104 Mo. 282: If the business of the defendant was necessarily interrupted by reason of the appropriation of a portion of the land compensation should have been allowed for the reasonable value of the use of the mine during the period of such necessary interruption. In estimating the damage for this cause it would have been proper to consider the probable length of time the business would necessarily

have been suspended, the season of the year and all the circumstances that would tend to increase or diminish the value of the business interrupted and the consequent loss therefrom.

⁶² *Jeffery v. Osborne*, 145 Wis. 351 following *Jeffery v. Chicago, etc. R. Co.*, 138 Wis. 14. In the latter case it is intimated that if lack of opportunity for expansion may be considered the availability and cost of other property might be relevant on the issue of mitigation; but the question was foreclosed by the decision in the former case.

⁶³ *Chicago, etc. R. Co. v. Wolf*, 137 Ill. 360.

stifuting the principal elements of value of the condemned part, the value of the appurtenances was properly regarded.⁶⁴ A railroad company built its road along the street of a town under an ordinance granting the right of way upon condition that the company should pay all damages that might accrue to property owners on such street by reason of the construction of the road. And it was held that the company was liable to a property owner for whatever deterioration in value his real estate may have undergone in consequence of laying its track, and for damages for interruption of his business during such time as it would necessarily require to provide another equally eligible place to remove to, and that the damages to his business during such time should be ascertained by proof of the probable reasonable profits which might have been made had there been no interruption of it. In that case, if he chose to remain and submit to the interruption and loss of profits, he would, nevertheless, be entitled to recover as damages the necessary cost to avoid such loss by a removal.⁶⁵ This doctrine is said, in a subsequent case, to be contrary to the general rule, and the cases cited in its support are criticised: It is a general rule that damages to personal property or the expense of removing it from the premises cannot be considered in estimating the compensation to be paid.⁶⁶ In *Chicago, etc. R. Co. v. Hock*,⁶⁷ the circuit judge before whom the trial was had allowed the owner \$5,500 for several items of damages without stating how much was allowed for each, and among which was "the inconvenience and cost of the removal of his business from said premises." Upon what evidence the item was allowed, or how much was allowed for that particular item, did not appear. The allowance was held not reversible error on the authority of *St. Louis, etc. R. Co. v. Capps*.⁶⁸ That was an action on the case, and the defend-

⁶⁴ *Chicago, etc. R. Co. v. Ward*, 128 Ill. 349.

⁶⁵ *St. Louis, etc. R. Co. v. Capps*, 72 Ill. 188, 67 Ill. 607; *Chicago, etc. R. Co. v. Hock*, 118 id. 587 (cost and inconvenience of removal). See

Virginia, etc. R. Co. v. Henry, 8 Nev. 165.

⁶⁶ *Lewis on Eminent Domain*, 3rd ed. § 728, and authorities cited in n. 30. See § 1067, herein.

⁶⁷ 118 Ill. 587.

⁶⁸ 67 Ill. 607.

ant was held liable under the provisions of a city ordinance, and not under the eminent domain law of the state. The Hock case does recognize the rule that loss of profits sustained by the interruption of business is not a proper element of damage. In *Atchison, etc. R. Co. v. Schneider* ⁶⁹ the question of compensation being between the petitioner and holders of leases on the condemned property, both parties proceeded upon the theory that the tenants were entitled to receive the reasonable cost of removing and re-establishing their business, loss of business, etc., and hence the measure of compensation was not in controversy or decided. The effect of the holding in the decision in *Metropolitan, etc. R. Co. v. Siegel* ⁷⁰ is that, in exceptional cases, the cost of removal from the premises, interruption in business, etc., may properly be considered in estimating the fair cash value to the owner, and the allowance of such items in that case was sustained solely on the ground that the petitioner had, as in the *Schneider* case, conceded upon the trial that that might properly be considered. All the cases recognize the general rule as stated, and it is certainly true that when the owner has been allowed the full cash market price of his property, taking into consideration the use to which he has devoted it, he has received just compensation therefor; and whenever a consideration of matters of personal inconvenience to the owner, loss of profits, damage to personal property and cost of removal is permissible it must be when a sufficient foundation therefor has been laid, so that their consideration simply aids the jury and court in determining the fair cash value of the property in view of its present use.⁷¹ An exception is made to the rule excluding proof of lost profits where the estate taken is without market value, as a tenancy at will. In such a case the estate, upon termination, will be fixed as if the term were originally certain. The lessee may show that he conducted a profitable business on the premises, and the amount of profits he realized.⁷² And where the lease is for a term the net value of the term is

⁶⁹ 127 Ill. 144, 2 L.R.A. 422.

⁷⁰ 161 Ill. 638.

⁷¹ *Braun v. Metropolitan, etc. R. Co.*, 166 Ill. 434; *Kansas City S. R.*

Co. v. Anderson, 88 Ark. 129; *Ranlet v. Concord R. Co.*, 62 N. H. 561.

⁷² *Hayes v. Atlanta*, 1 Ga. App. 25.

not the limit of the tenant's recovery; he is entitled to compensation for the interruption of his business and losses incident to the change of location, including the expense of removal.⁷³

If recovery may be had for property injured as well as that taken the owner and lessee may join in an action to recover for the injury and the taking. The latter need not show that he holds under a written lease; his right is established by proof of a tenancy from year to year at a fixed annual rent. In estimating his damages it is proper to consider the facts that the removal of the business was made necessary, the depreciation in the value of the leasehold and of the machinery and personal property used in the business as affected by the removal. The difference between the value of the machinery in connection with the business conducted where it was and its value after removal for the same or other use is an element of damage.⁷⁴ The fact that the tenancy would have terminated at the end of the year and the tenant's removal from the premises been thereby necessitated will not be assumed.⁷⁵ If the tenant's estate is limited to a particular use and the appliances used by him in conducting business are rendered useless by an entry thereon and it becomes necessary to reconstruct them, and thereby the expense of doing business is increased and the profits are diminished by waste, all these matters may be proven as descriptive of the injury sustained and as affecting the market value of the lease, but not as specific items of damage.⁷⁶ The extension of a lease prior to valid action for the condemnation of the property must be compensated for.⁷⁷ The right of

⁷³ *Detroit v. Little*, 146 Mich. 373.

⁷⁴ *Getz v. Philadelphia & R. R. Co.*, 105 Pa. 547; *Philadelphia & R. R. Co. v. Getz*, 113 id. 214; *McMillin P. Co. v. Pittsburg, etc. R. Co.*, 216 Pa. 504.

Where heavy machinery was used in a building on the land taken, which was fastened and held in place by heavy serews, and could be moved without injury to the building, it was properly held by the trial court to be assessable as

personal property for the purpose of fixing the amount of compensation for the taking. *New York Cent. & H. River R. Co. v. Albany Steam Trap Co.*, 161 App. Div. (N. Y.) 329.

⁷⁵ *Philadelphia & R. R. Co. v. Getz*, 113 Pa. 547.

⁷⁶ *Shipley v. Pittsburg, etc. R. Co.*, 216 Pa. 512; *Kersey v. Railroad Co.*, 133 Pa. 234, 19 Am. St. 632, 7 L.R.A. 409.

⁷⁷ *McMillin P. Co. v. R. Co.*, *supra*.

the lessor to terminate a lease by giving a stipulated notice is not available to the party seeking to condemn.⁷⁸

§ 1070. Same subject. If a building is an obstruction to a road and it is necessary to destroy it, its value must be paid, estimating it as a building, and not the materials composing it;⁷⁹ but should the owner appropriate any of the debris remaining after its removal his recovery will be lessened *pro tanto*.⁸⁰ The value of a structure erected as an appurtenance to other property is to be ascertained in connection with it.⁸¹ Where part of a lot upon which the owner had commenced to excavate, preparatory to erecting a large mercantile building which had been contracted in advance to tenants, was taken for the purpose of widening a street and he moved the site of the building back, thereby taking one-half of another lot, was proper to award as damages, in addition to the value of the land taken, the expense of moving the site, the loss occasioned by the delay in completing the building and the impairment in value of the adjoining lot in consequence of the use of part of it.⁸²

Among the inconveniences resulting to a farmer from a railroad crossing his farm may be considered the fact that he is deprived of access to a river and excluded from its bank for

⁷⁸ Shipley v. R. Co., *supra*.

⁷⁹ Finn v. Providence G. & W. Co., 99 Pa. 631.

It is competent for the legislature to provide that the public, in taking land for highways, may take the buildings thereon absolutely or may take no interest whatever in them. In such a case the owners have no right to compensation for the buildings beyond the expense of their removal. *Mangles v. Chosen Freeholders*, 55 N. J. L. 88, 17 L.R.A. 785.

Where the effect of a taking is to compel the removal of part of a building and the reconstruction of the remainder, the cost of so doing is competent on the question of the

depreciation in value caused by the improvement. *People v. Nelson*, 162 App. Div. (N. Y.) 34.

⁸⁰ *Lafayette, etc. R. Co. v. Winslow*, 66 Ill. 219.

⁸¹ *In re Piers*, 117 App. Div. (N. Y.) 553.

But where an award had been made for the value of a building destroyed by a proposed improvement, and between the time the award was made and its confirmation the building was destroyed by fire, the award was set aside, and a new award ordered, which should not make allowance for the value of the building. *In re Harmon and Himrod Streets*, 146 N. Y. Supp. 297.

⁸² *St. Louis v. Brown*, 155 Mo. 545.

the purpose of fishing and from a fishing ground.⁸³ Under a statute providing that in estimating damages sustained "regard should be had to all the damages done to the party, whether in taking his property or in injuring it in any manner," the owner of part of a building recovered for the loss of support and of shelter caused by removing from his part the portion he did not own.⁸⁴ Where the erection of a railroad bridge across a river in a city causes permanent injury or depreciation in the value of a lot in the immediate vicinity which is used for dock purposes such injury is an element of damages in a suit by the owner, and he may show such damages by proving the value of his property before the erection of the bridge and its value afterwards; or, in other words, to prove how much less the property would sell for in consequence of building the bridge.⁸⁵ Interference with transportation facilities essential to the conducting of a business is a ground for damages to the extent that they add to the value of the property condemned.⁸⁶ Where the taking is for a canal or reservoir leakage may be considered on the question of damages,⁸⁷ and also the increased danger of overflowing lands not taken.⁸⁸ Obstructing drainage on land is an element of damage.⁸⁹ Where liability exists for damages caused by a change of grade in a street, the fact that such change causes surface waters to flow upon plaintiff's land in unusual volume is a fact which should be considered in fixing the amount of depreciation caused thereby.⁹⁰ The effect of cutting off light,

⁸³ *Boston & M. R. v. Montgomery*, 119 Mass. 114.

⁸⁴ *Marsden v. Cambridge*, 114 Mass. 490.

⁸⁵ *Chicago, etc. R. Co. v. Stein*, 75 Ill. 41; *Durham & N. R. v. Trustees of Bullock Church*, 104 N. C. 525, applying the rule to depreciation of church property for religious uses.

⁸⁶ *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282, citing this section.

⁸⁷ *James River & K. Co. v. Turner*, 9 Leigh 313; *Van Schoick v. Delaware & R. C. Co.*, 20 N. J. L. 249; *Denver City I. & W. Co. v.*

Middaugh, 12 Colo. 434, 13 Am. St. 234.

⁸⁸ *Chesapeake & O. C. Co. v. Grove*, 11 Gill & J. 398; *Chicago, etc. R. Co. v. Eaton*, 136 Ill. 9.

⁸⁹ *Board of Levee Dist. v. Webb*, 188 Fed. 67; *Montana R. Co. v. Freeser*, 29 Mont. 210; *New Jersey, etc. R. Co. v. Tutt*, 168 Ind. 205; *Plymouth & S. T. Co. v. Dempsey*, 9 Ohio N. P. (N.S.) 65; *Duncan v. Board of Levee Com'rs*, 74 Miss. 125; *Indiana, etc. R. Co. v. Rinehart*, 14 Ind. App. 588; *Chicago, etc. R. Co. v. Moore*, 63 Ill. App. 163.

⁹⁰ *Brown v. City of Sigourney*,

air and access to premises upon their rentable and salable value may be shown,⁹¹ as may the increased cost of irrigating land.⁹² The value of trees cut or destroyed may be shown, not as a distinct and independent injury to the land, but to show the amount of injury done them.⁹³ If the trees destroyed were on residence property the value of the land as affected by their loss measures the recovery.⁹⁴ The inconvenience of having a farm thrown open during the six months in which a railroad company is not required to fence its track is a material element of

164 Iowa 184; *Sherburne v. Sanford*, 113 Me. 66; *White v. City of Springfield*, 189 Mo. App. 228; *Naysmith v. City of Auburn*, 95 Neb. 582; *Todd v. St. Louis S. W. R. Co.*, — Tex. Civ. App. —, 173 S. W. 617; *Thorpe v. City of Spokane*, 78 Wash. 488.

Where the arrangement of a city for disposition of surface waters is defective and causes water to be discharged on the land of an abutter in excess of the natural flow, there is a direct invasion of private property and the owner can recover, for the reason that neither city or other owner of land has a right to cause water to be discharged on the lands of another in excess of its natural flow. *Naysmith v. Auburn*, *supra*. But it is otherwise where the damage is caused not primarily by the grading, but by the act of other abutters in filling in channels on their own land, whereby the water is prevented from flowing in the channels and culverts provided therefor by the city. *Thorpe v. City of Spokane*, *supra*.

⁹¹ *Bost v. Cabarrus County*, 152 N. C. 531; *Haggerty v. Seranton*, 23 Pa. Super. Ct. 279; *Shinzel v. Bell Tel. Co.*, 31 id. 221; *Cleveland, etc. R. Co. v. Smith*, 177 Ind. 524; *Chicago Office Building v. Lake St. E. R.*, 87 Ill. App. 594. See § 1080.

⁹² *San Bernardino & E. R. Co. v. Haven*, 94 Cal. 489.

⁹³ *Long Distance Tel. & T. Co. v. Schmidt*, 157 Ala. 391; *Stoops v. Kittanning Tel. Co.*, 242 Pa. 556; *Hoyle v. City of Hickory*, 167 N. C. 619; *Worth v. Town of Westfield*, — N. J. L. —, 90 Atl. 727.

Such damage can be recovered in no other way where the entry on the land is lawful. *Stoops v. Kittanning Tel. Co.*, *supra*.

Where shade trees are destroyed as a result of the construction of an improvement, it is immaterial whether such destruction was necessarily the effect of the improvement, or if unnecessary, whether such removal was an unlawful act, so far as its effect as evidence of value is concerned. *Worth v. Town of Westfield*, *supra*.

But where trees were cut outside the right of way taken, and where the cutting was done by the contractor who is building the railroad, there is no exercise of the right of eminent domain, but a mere trespass by the contractor, for which he alone is liable, for which reason evidence of such cutting is incompetent on the question of the market value of the remaining land of the owner after taking. *Stephens v. Cambria & I. R. Co.*, 242 Pa. 606.

⁹⁴ *Marshall v. American Tel. & T. Co.*, 16 Pa. Super. Ct. 615.

damages, as well as the diminished use of the farm resulting therefrom.⁹⁵ If but a strip of the plaintiff's land is condemned, though that is much less than a railroad company requires, the cuts, embankments, tracks, ditches and right of way are to be regarded as one entire thing in awarding him damages.⁹⁶ If a piece of land taken be treated as part of a gas plant and its value fixed upon that basis evidence of the amount of the capital stock and of the net earnings is admissible to show the value of the property before and after the taking.⁹⁷ In a recent case in New Jersey a city proposed to take a certain quantity of water from premises consisting of a factory with machinery driven by the waters of a stream, part of which it was proposed to take. The damages were assessed on the basis of the quantity of water proposed to be taken, regardless of the quantity actually used at the time the proceedings were instituted. If, in the judgment of the jury, it would be proper and judicious for the owner of the premises to install a separate plant of steam-power to supply the power lost by the diversion of the water the expense of that method of reconstruction might be considered in ascertaining what was just compensation; but the owner was not entitled to any sum other than that which would reimburse his actual loss.⁹⁸

In arriving at the damage caused by taking land for highway purposes the diversion of travel from a former highway with reference to which the plaintiff's buildings were located, increased taxes, the expenses of building additional fences and other like circumstances may be proven.⁹⁹ Where one end of a

⁹⁵ *Chicago, etc. R. Co. v. Eaton*, 136 Ill. 9.

⁹⁶ *Chicago, etc. R. Co. v. Van Cleave*, 52 Kan. 665, approving *Blesch v. Chicago, etc. R. Co.*, 48 Wis. 168, and disapproving *Kucheman v. C. & D. R. Co.*, 46 Iowa 366.

⁹⁷ *Spring City G. L. Co. v. Pennsylvania, etc. R. Co.*, 167 Pa. 6.

⁹⁸ *Butler H. R. Co. v. Newark*, 61 N. J. L. 32; *Baird v. Schuylkill River East Side R. Co.*, 154 Pa. 463; *Howe v. Weymouth*, 155 Mass. 439.

Where a town acquired the right to take water from a pond for the purpose of water supply, and its only act of taking was the insertion into the pond of an intake pipe at a depth of 10 feet, the taking was treated as a reduction of the water level to the depth of the intake pipe, and damages to abutters were assessed on that basis. *Lynnfield v. Peabody*, 219 Mass. 322.

⁹⁹ *Schuler v. Board of Supervisors*, 12 S. D. 460. See *Parry v. Cambria & I. R. Co.*, 247 Pa. 169 (where

street was permanently closed the owner of premises on the street was not limited to the recovery of merely nominal damages, but was entitled to recover the sum by which the value of the estate was diminished. Evidence as to the business done on it was admissible to show for what purpose it was adapted, though not as a basis upon which to estimate the damage to the business. Evidence as to the amount of travel on the street before and after the condemnation was admissible for the purpose of showing the extent to which the property was isolated by closing up the street.¹ If liability exists for damage the destruction of shade trees along a sidewalk is an element of the damage done in changing the grade of a street.² But where a second change of grade is made the expenses of the land-owner in connection with the original change cannot be proven.³ On the abandonment of the easement acquired by a natural-gas company to bury its line in the soil and the exercise of the statutory right to remove the pipe the land-owner can recover only to the extent that he was injured by what was otherwise done to that end than was strictly necessary to the prudent and careful removal of the pipes.⁴ Aggravations connected with the entry and use of land for public purposes are not to be considered with a view to damages beyond just compensation.⁵

evidence was held competent of amount of fencing necessary when a railroad right of way taken cut part of plaintiff's farm off from the remainder, not as an independent element of value, however, but as affecting market value).

¹ *Gillespie v. South Omaha*, 79 Neb. 441; *Johnston v. Old Colony R. Co.*, 18 R. I. 642, 49 Am. St. 800. See *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385, which, seemingly, favors a lesser measure of liability than the Rhode Island court.

The consequence of the change of the grade of a street upon access to a piece of property may not be arrived at by considering only the

street immediately in front of it; the entire street is to be regarded in so far as it bears upon the special injury to the owner. *Spokane v. Thompson*, 69 Wash. 650.

² *Walker v. Sedalia*, 74 Mo. App. 70.

³ *Watson v. Columbia*, 77 Mo. App. 267.

⁴ *Clements v. Philadelphia Co.*, 184 Pa. 28, 39 L.R.A. 532.

⁵ *Lafayette, etc. R. Co. v. Winslow*, 69 Ill. 219; *King v. Iowa, etc. R. Co.*, 34 Iowa 458; *Cummins v. Des Moines, etc. R. Co.*, 63 id. 397; *Fremont, etc. R. Co. v. Whalen*, 11 Neb. 585; *Pittsburgh, etc. R. Co. v. McCloskey*, 110 Pa. 436; *Wabash*,

Where a road was constructed over land which was a stone quarry, the rock of which extended beyond the limits of the location and that so situated was injured in the construction of the way, the owner was entitled to recover for such injury, regardless of whether the injury was done by the defendant or by its contractor.⁶ If the condemning party has changed its plan of constructing its works in accordance with the request of the property owner he cannot recover for such damage as is sustained in consequence of the change over that which would have accrued but for it.⁷ Any use the owner may make of condemned land, not inconsistent with the interest taken, may be considered in fixing the damages.⁸ It will not be assumed that the property will revert to the owner because the existence of the condemnor is limited.⁹ No deduction is to be made for any reversionary interest remaining in the owner of land all of which has been condemned for railroad uses.¹⁰

§ 1071. **Same subject; remote damages.** The law does not afford indemnity for all losses occasioned by the laying and use of a railroad or the making of any public improvement, especially for such as are remote and consequential, or imaginary or fanciful.¹¹ They are damages not caused by the taking

etc. *R. Co. v. McDougall*, 126 Ill. 111, 9 Am. St. 539, 1 L.R.A. 207.

⁶ *White v. Medford*, 163 Mass. 164.

⁷ *Kansas City, etc. R. Co. v. Farrell*, 76 Mo. 183.

⁸ *Atlanta v. Hunniutt*, 95 Ga. 138.

⁹ *Miner v. New York Cent., etc. R. Co.*, 123 N. Y. 242; *Leffman v. Long Island R. Co.*, 120 App. Div. (N. Y.) 528.

¹⁰ *Dethampl v. Lake Koen N., R. & I. Co.*, 73 Kan. 54; *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *Brown v. Title G. & S. Co.*, 232 Pa. 337, 38 L.R.A. (N.S.) 698.

The complete possession and control of land acquired by the condemnor exclude from consideration any reversionary right in the owner

of the fee. *Boston & M. R. v. Hunt*, 210 Mass. 128.

¹¹ *Montgomery v. Townsend*, 80 Ala. 489; *In re Avenue C.*, 151 App. Div. (N. Y.) 83; *Kansas Postal Tel. C. Co. v. Leavenworth T. R. & B. Co.*, 89 Kan. 418; *Jones v. Sanitary Dist. of Chicago*, 265 Ill. 98; *Illinois Cent. R. Co. v. Roskemmer*, 264 Ill. 103; *In re Board of Water Supply*, 211 N. Y. 174; *Carolina & Y. R. R. Co. v. Armfield*, 167 N. C. 464; *Raleigh, C. & S. R. Co. v. Mecklenburg Mfg. Co.*, 166 N. C. 168; *Atlanta v. Nelson*, 142 Ga. 324; *Sanitary Dist. v. Chicago & A. R. Co.*, 267 Ill. 252; *Bales v. Wichita Midland Val. R. Co.*, 92 Kan. 771; *Peaks v. Piscataquis Co. Com'rs*, 112 Me. 318; *Marine Coal Co. v. Pittsburgh, M. & Y. R. Co.*, 246 Pa. 478; *Seattle*,

of land, but by the change which the improvement introduces into the course of business. The law affords no protection

P. A. & L. O. R. Co. v. Land, 81 Wash. 206; Meskill & Columbia River R. Co. v. Luedinghaus, 78 Wash. 366, 51 L.R.A.(N.S.) 1090; Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co., — W. Va. —, 83 S. E. 1031; Indianapolis & W. R. Co. v. Branson, 172 Ind. 383; Same v. Hill, 172 Ind. 402; Yazoo, etc. R. Co. v. Jennings, 90 Miss. 93, 122 Am. St. 312; Elbert County v. Swift, 2 Ga. App. 47; Robbins v. Scranton, 217 Pa. 577; Atlantic C. L. R. Co. v. Postal Tel.-C. Co., 120 Ga. 268; St. Louis, etc. R. Co. v. Barnsback, 234 Ill. 344; Shuster v. Central Dist. & P. T. Co., 34 Pa. Super. Ct. 513; Shinzel v. Bell Tel. Co., 31 id. 221; Chicago, etc. R. Co. v. Alexander, 47 Wash. 131; Lawton R. T. R. Co. v. Lawton, 31 Okla. 458; Minnesota, etc. R. Co. v. Doran, 17 Minn. 188; First Parish v. Middlesex, 7 Gray 106; Green v. State, 73 Cal. 29; Detroit v. Beecher, 75 Mich. 454, 4 L.R.A. 813; Commissioners v. Harkleroads, 62 Miss. 807; San Diego L. & T. Co. v. Neale, 78 Cal. 63, 3 L.R.A. 83; United States v. Taffe, 86 Fed. 830; Metropolitan, etc. R. Co. v. Stickney, 150 Ill. 362, 26 L.R.A. 773; Manufacturers' N. G. Co. v. Leslie, 22 Ind. App. 677; Chicago & P. R. Co. v. Hildebrand, 136 Ill. 467; Braun v. Metropolitan, etc. R. Co., 166 Ill. 434; Cook & R. Co. v. Sanitary Dist. of Chicago, 177 Ill. 599; Spring City G. L. Co. v. Pennsylvania, etc. R. Co., 167 Pa. 6; Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509; Wallace v. Jefferson G. Co., 147 Pa. 205; Illinois Cent. R. Co. v. Lostant, 167 Ill. 85.

Possible depreciation in the rental value of houses standing

upon a tract of land intersected by a right of way, which may be caused by the operation of a railroad, is not *per se* imaginary or speculative. Rock Island & E. R. Co. v. Gordon, 184 Ill. 456. Compare Bragan v. Birmingham R., L. & P. Co., 163 Ala. 93.

Where a city condemned a right of way across a railroad right of way whereon the railroad at the time of taking operated two tracks, and where the effect of the taking was to make it necessary for the railroad to carry its tracks over the improvement by raising its grade and constructing a bridge, damages to the railroad in case it then laid four tracks instead of two, on the theory that such was the highest and best use which could be made of the property, are too remote and speculative to be considered in estimating the amount of depreciation, in the absence of proof that the railroad company had plans for a four-track road. Sanitary Dist. v. Chicago & A. R. Co., 267 Ill. 252.

In case the interest taken is leasehold, although profits can be considered as an element of value if proved with reasonable certainty, yet where part of the profits proved are attributable to the continuance of the lease such part will be regarded as speculative. Bales v. Wichita Midland Val. R. Co., 92 Kan. 771.

The possibility that the land taken may in the future be used as a gravel pit does not render competent, as an element of value, evidence of the profits which may be derived from its use as such, as such profits depend on the varying cost of getting the gravel to market,

against or compensation for new competitions,¹² nor against changes introduced by time and the progress of the age,¹³ nor does it afford relief against such inconveniences as the whole community suffer alike, in a greater or less degree, and which are to be borne in consideration of the greater general good to be acquired.¹⁴ A party a part of whose lands has been taken

and the state of the market for gravel. Such profits were held speculative. *Seattle, P. A. & L. C. R. Co. v. Land*, 81 Wash. 206.

The chance that at some future time the land taken, lying in a canyon, might receive an enhancement of value due to the logging of other and higher lands, belonging to other owners, is remote and speculative, and cannot be considered by the jury in estimating the value of the lower lands at the time of taking. *Meskill & Columbia River R. Co. v. Luedinghaus*, 78 Wash. 366, 51 L.R.A.(N.S.) 1090.

Similarly the possibility that land abutting on a river may at some future time be sufficiently deepened as to enable the owner to establish and operate a steel plant there, is too remote for consideration in fixing its value when taken. *Lockport v. Tonawanda Iron & Steel Co.*, 166 App. Div. (N. Y.) 962.

It is presumed that a city has acquired land for a street in good faith with the intention to improve it and to use it for all time for public purposes. The possibility of its discontinuance is so remote and improbable that an award for more than nominal damages cannot be made for the loss of a private easement by abutting owners for which a public easement is substituted. *In re Avenue between Ft. Washington & H. Aves.*, 153 App. Div. (N. Y.) 164.

The injurious effect which might result to health from climbing a

flight of steps in order that the plaintiff's residence might be reached cannot be gone into. *Swope v. Seattle*, 36 Wash. 113.

¹² *Turnpike Co. v. Davidson County*, 91 Tenn. 291; *Northern Pac. R. Co. v. Union Lumber Co.*, 76 Wash. 563; *Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.*, — W. Va. —, 83 S. E. 1031; *Idaho, etc. R. Co. v. Nagle*, 184 Fed. 598; *Denver, etc. R. Co. v. Hannegan*, 43 Colo. 122, 16 L.R.A.(N.S.) 874, 127 Am. St. 100; *Newton's Appeal*, 84 Conn. 234; *Seufferle v. Macfarland*, 28 App. D. C. 94 (depreciation of land not touched by sewage by noxious gases and vapors coming from the river in which a sewer was located); *Willock v. Beaver Valley R. Co.*, 229 Pa. 526; *Fuller v. Edings*, 11 Rich. 239; *Cincinnati, etc. R. Co. v. Zinn*, 18 Ohio St. 417; *Adden v. White Mts. N. H. R.*, 55 N. H. 415, 20 Am. Rep. 220; *Petition of Mount Washington R. Co.*, 35 N. H. 146; *Edmands v. Boston*, 108 Mass. 535; *Schuykill N. Co. v. Freedley*, 6 Whart. 109; *Organ v. Memphis, etc. R. Co.*, 51 Ark. 235; *Moses v. Sanford*, 11 Lea 731; *Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 672; *Caledonian R. Co. v. Walker's Trustees*, 7 App. Cas. 259; *Missouri Pac. R. Co. v. Porter*, 112 Mo. 361, 370; *Bridgewater F. Co. v. Sharon B. Co.*, 179 Pa. 466. See *Patterson v. Boston*, 23 Pick. 425.

¹³ *Id.*; *Chicago v. Spoor*, 190 Ill. 340.

¹⁴ *Mahaffey v. Beech Creek R.*, 163

cannot have his damages increased on account of the loss of a gratuitous privilege he has been enjoying by the sufferance of another;¹⁵ nor for the anticipated benefit to property which must result from its improvement under a municipal license.¹⁶ Neither can he show as an element of damages an oral agreement of another than the condemning railroad company to build side tracks to connect with the land sought to be condemned, which cannot be carried out because of the appropriation of the land.¹⁷ It has been held in some states that the probability of damages from crossing a railroad, which runs through a farm, to teams and members of the owner's family is so uncertain as not to form a proper basis for consideration.¹⁸ There are, however, cases in other states which recognize such danger as an element of depreciation in the value of a farm.¹⁹ The expense and inconvenience of removing personal property from land taken are not to be considered if there is no interference with business,²⁰ neither is the increased exposure of property to injury from evil-disposed persons,²¹ nor the loss of a mere privilege not secured

Pa. 158. But see *Haggard v. Independent School Dist.*, 113 Iowa 486, stated in § 1066; *Schmidt v. Cleveland*, 15 Ohio C. C. (N.S.) 589.

¹⁵ *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 93; *Ranlet v. Concord R. Co.*, 62 N. H. 561; *Clapp v. Boston*, 133 Mass. 367; *Chesapeake & O. R. Co. v. Blankenship*, 158 Ky. 270.

Accordingly, where an owner had a permissive right to go on or across a railroad right of way near his land, and this right is shut off by the construction of a new embankment, the fact is not competent to enhance damages. *Chesapeake & O. R. Co. v. Blankenship*, *supra*.

¹⁶ *In re Piers*, 117 App. Div. (N. Y.) 553.

¹⁷ *St. Louis, etc. R. Co., v. Clark*, 121 Mo. 169.

¹⁸ *Indianapolis & W. R. Co. v. Branson*, 172 Ind. 383; *Toledo, etc. R. Co. v. Wagner*, 171 Ind. 185; *Indianapolis & C. T. Co. v. Larra-*

bee, 168 Ind. 237, 10 L.R.A. (N.S.) 1003; *McReynolds v. Burlington, etc. R. Co.*, 106 Ill. 152; *Conness v. Indiana, etc. R. Co.*, 193 id. 464; *Southwestern Mineral R. Co. v. Harvey*, 8 Kan. App. 489; *St. Louis, etc. R. Co. v. Hammers*, 51 Kan. 127.

¹⁹ § 1066 *et seq.*

²⁰ *Ranlet v. Concord R. Co.*, 62 N. H. 561; *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *In re New York, etc. R. Co.*, 35 Hun 306; *Edmands v. Boston*, 108 Mass. 535; *Toledo, etc. R. Co. v. Wagner*, *supra* (annoyances are not ground for damages). *Contra*, *Shinzel v. Bell Tel. Co.*, 31 Pa. Super. Ct. 221, and see *Cook & R. Co. v. Sanitary Dist. of Chicago*, 177 Ill. 599; *Becker v. Philadelphia & R. R.*, 177 Pa. 252, 35 L.R.A. 533.

²¹ *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 608; *Ohio S. R. Co. v. Snyder*, 5 Ohio Dec. 480;

by contract.²² In the absence of a statute giving littoral proprietors any rights in tide lands no allowance can be made therefor on the supposition that such rights may be granted.²³ The statutory right of a lower riparian owner to flow the lands above him is too remote to be an element of the recovery.²⁴

In an action to recover for damages sustained by changing the grade of a street it is not competent to show to what extent the traffic was thereby diverted from one side to the other, nor the number of trains which stopped at a station near the property in question before and after the change of grade.²⁵ Proof of the profits made in a business before it was affected by a public improvement and of the condition of the business thereafter is inadmissible as a ground for the recovery of damages.²⁶ It had been ruled in Massachusetts that there cannot be a recovery for temporary interruptions of business caused by the construction of a sewer in a highway, no new taking thereof being necessary.²⁷ This has been construed to mean such interruptions as would be incident to the construction of the sewer and common to all having occasion to use the street; in so ruling it was not intended to overrule cases holding that there may be

Louisville & N. R. Co. v. Hall, 143 Ky. 497.

²² *Cunard v. The King*, 43 Can. Sup. Ct. 88; *Wabash, etc. R. Co. v. McDougall*, 126 Ill. 111, 9 Am. St. 539, 1 L.R.A. 207.

²³ *Bellingham Bay, etc. R. Co. v. Strand*, 4 Wash. 311.

²⁴ *New Milford W. Co. v. Watson*, 75 Conn. 237.

²⁵ *Chicago v. Jackson*, 88 Ill. App. 130, aff'd 196 Ill. 496.

²⁶ *Cobb v. Boston*, 109 Mass. 309; *Edmonds v. Boston*, 108 id. 535; *Becker v. Philadelphia & R. R.*, *supra*; *Sauer v. Mayor*, 44 App. Div. (N.Y.) 305; *Philadelphia Ball Club v. Philadelphia*, 192 Pa. 632, 46 L.R.A. 724, 73 Am. St. 835; *Hunter v. Chesapeake & O. R. Co.*, 107 Va. 158, 17 L.R.A.(N.S.) 124. See § 1068.

So the fact that the plaintiff was prevented from making a profitable lease of the land was held remote. The reason given was that the negotiations for making the lease had not, at the time the improvement was proposed, reached a stage where either party was legally bound to make the lease. No binding contract had been signed. In *re City of Pittsburgh*, 243 Pa. 392, 52 L.R.A.(N.S.) 262.

²⁷ *Lincoln v. Commonwealth*, 164 Mass. 1.

A similar rule has been applied where the operations of a mine were interrupted during the construction of a railroad for which part of the mine owner's land was taken. *Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.*, — W. Va. —, 83 S. E. 1031.

a recovery for loss of business and earnings, and for rent which the petitioner was compelled to pay for other premises during or in consequence of the widening or alteration of a street,²⁸ and for damages occasioned to buildings by blasting.²⁹ "Such damages naturally would be quickly repaired, and therefore in a sense temporary, but no objection seems to have been made to their allowance on that ground. It would be going much further than any case has gone in this state to hold, where a statute provides, as is the case here, that all damages sustained by any person or corporation by the taking of his land shall be paid for, that damages to the remaining land from the destruction of crops and the drainage of wells in the construction of the work for which the land was taken cannot be recovered for because after the completion of the work the water returned to the soil and the wells as it was before, and the damage was therefore to be regarded as temporary. At common law it is no objection to recovery that the change may be temporary or quickly repaired, and we see nothing in the statute to prevent the petitioner from recovering for the loss of his crops and the damage caused by the draining of his wells and the diversion of the water. It is all special and peculiar to him, and the direct and natural result of the taking of his land and the construction of the sewer."³⁰ Business is not "property" within the meaning of a statute authorizing the recovery of compensation by any person whose property is taken under the right of eminent domain, or entered upon or injured.³¹ Under a

²⁸ *Patterson v. Boston*, 23 Pick. 425, 20 id. 159; *Brooks v. Boston*, 19 id. 174.

²⁹ *Brown v. Providence, etc. R.*, 5 Gray 35.

³⁰ *Pemney v. Commonwealth*, 173 Mass. 507; *Bickford v. Hyde Park*, 173 Mass. 552, 73 Am. St. 312. The last case was ruled under a statute allowing a recovery if the property should be injured in any manner.

In a Minnesota case recovery was allowed for a taking of the water in a river abutting an owner's stock

farm on the theory that the loss of the water destroyed the owner's grass roots. The owner claimed that the water percolated and sub-irrigated his land by a process of capillary attraction, and though the court admitted that such damages were difficult to estimate with certainty, it was said that there was substantial evidence to sustain the verdict. In *re Otter Tail Power Co.*, 128 Minn. 415.

³¹ *Sawyer v. Commonwealth*, 182

statute providing for the compensation of any one owning an established "business" which is injured in the exercise of the power of eminent domain a physician, though he does part of his professional business outside his office, may recover damages measured by the actual decrease in value of his practice by the exercise of such right, regard being had to what he earned after abandoning his general practice and becoming a specialist.³² The future profits of an interrupted business are too speculative and uncertain for consideration.³³ Whether a proposed use of property is too indefinite and speculative to be considered in estimating value rests largely in the discretion of the trial court.³⁴

§ 1072. **Same subject; expenditures to lessen loss.** Where part of a tract of land is taken or damaged and its severance and the public use of it necessitates any new expenditure to protect or maintain the ordinary use of the residue such expenditures or the necessity therefor is an element of damage. The owner has a right to recover the amount so expended or required to be expended on the ground that the value of his premises

Mass. 245, 59 L.R.A. 726; Whiting v. Commonwealth, 196 Mass. 468.

Compare in re Post Office Site, 127 C. C. A. 382, 210 Fed. 832, holding that there may be no recovery for the removal of a business, as distinguished from the machinery and other personal property.

³² Earle v. Commonwealth, 180 Mass. 579, 57 L.R.A. 292.

Under a similar statute an owner was allowed to recover damages to a livery business conducted on land taken, though the land was not owned by the owner of the business. Though it was said that it was not the purpose of the statute to make gifts or grant pensions, all damages direct and indirect, if limited to the business, and not speculative or fanciful, may be recovered, and its value may be shown by the profits received therefrom, if there be no

market value. The fact that the owner may establish as profitable a business elsewhere was held not competent in mitigation of damages, but the condemnor may show, in mitigation, the reasonable amount of depreciation of property purchased with capital invested and other expenses of conducting such a business. Reasonable value of labor required, though performed by members of the condemnnee's family, and the fact that produce of the farm on which the business was located was used in the business are also competent in mitigation. In re Board of Water Supply, 211 N. Y. 174.

³³ Chicago, etc. R. Co. v. McGrew, 104 Mo. 282.

³⁴ Wellington v. City of Cambridge, 220 Mass. 312.

is diminished accordingly.³⁵ Thus, the necessity of maintaining fences along the line of a railroad or highway is a recognized item of damage.³⁶ The recovery, however, will be limited to

³⁵ Chicago, etc. R. Co. v. McGrew, 104 Mo. 282; Brainard v. Missisquoi R. Co., 48 Vt. 107; State v. Beackmo, 6 Blackf. 488; Preston v. Newton, 213 Mass. 483; United States v. Nahant, 82 C. C. A. 470, 153 Fed. 520; New York, etc. R. Co. v. New Haven, 81 Conn. 581; West Chicago M. Ass'n v. Chicago, 215 Ill. 278; Pinkstaff v. Allison D. Dist., 213 Ill. 186; Louisiana R. & L. Co. v. Sarpy, 125 La. 388; Landry v. Lake Charles, 125 La. 210; Warren County v. Rand, 88 Miss. 395; Montana R. Co. v. Freeser, 29 Mont. 210; Commissioners v. Harkleroads, 62 Miss. 807; Fifty Associates v. Boston, 201 Mass. 585. See § 1077.

The expense of removing a house may be recovered if its removal is expedient though it might rightfully remain on the land condemned. *Brown v. Worcester*, 13 Gray 31.

The title to a spring of water on the right of way of a railroad remains in the owner of the fee and he may conduct the waters thereof wherever he likes if that can be done without any practical interference with the exclusive possession of the occupier of the way. If the waters are so diverted the damages in favor of the owner of the fee will be measured by the expenditure necessary to make them as useful to his land as they were before the appropriation, and if they cannot be made as useful as formerly there should be added a sum equal to the diminution in the value of their use; in either event the recovery must be limited by the value of the waters as they were before the land was

taken. *Cleveland, etc. R. Co. v. Smith*, 177 Ind. 524.

But an owner is not bound to minimize the damage, where it is permanent and not temporary, as where the construction of a railroad embankment shut off a ditch which formerly carried off surface waters, without which ditch such waters accumulated on an owner's land. He may treat it as an element proper to be considered by the jury as bearing on the depreciation in the market value of his land. *Chesapeake & O. R. Co. v. Blankenship*, 158 Ky. 270.

³⁶ *Bockoven v. Board of Supervisors*, 13 S. D. 317; *Barrall v. Quick*, 111 Ky. 22; *New Jersey, etc. R. Co. v. Tutt*, 168 Ind. 205; *Indianapolis & C. T. Co. v. Larrabee*, 168 Ind. 237, 10 L.R.A.(N.S.) 1003; *Big Sandy R. Co. v. Dils*, 120 Ky. 563; *Broadway C. M. Co. v. Smith*, 136 Ky. 725, 26 L.R.A.(N.S.) 565; *St. Louis, etc. R. Co. v. Anderson*, 39 Ark. 167; *Butte County v. Boydston*, 64 Cal. 110; *Stone v. Heath*, 135 Mass. 561; *White v. Foxborough*, 151 id. 28; *Board of Trade Tel. Co. v. Darst*, 192 Ill. 47; *Baltimore, etc. R. Co. v. Lansing*, 52 Ind. 229; *Montmorency Road v. Rock*, 41 Ind. 264; *White Valley, etc. R. Co. v. McClure*, 29 Ind. 536; *Tonica, etc. R. Co. v. Unsicker*, 22 Ill. 221; *Rock Island, etc. R. Co. v. Lynch*, 23 Ill. 645; *Bland v. Hixenbaugh*, 39 Iowa 532; *Jones v. Chicago, etc. R. Co.*, 68 Ill. 380; *Winona, etc. R. Co. v. Waldron*, 11 Minn. 515; *Zeibold v. Foster*, 118 Mo. 349; *Shano v. Fifth Ave. & High St. B. Co.*, 189 Pa. 245, 69 Am. St. 808;

such fences³⁷ and such amounts therefor as are reasonably necessary. The amount expended to erect them is not the measure of damages.³⁸ But where a railroad company taking lands for its road is required by law to fence it, or has already done

Louisville, etc. R. Co. v. Barrett, 91 Ky. 487, holding that the cost of fencing is a direct, and not a consequential damage, and overruling Louisville, etc. R. Co. v. Glazebrook, 1 Bush 325, on the latter point.

In Pennsylvania the cost of fencing is not recoverable as a distinct item, but it may be considered in so far as the necessity of it detracts from the value of the land. Curtin v. Nittany Valley R. Co., 135 Pa. 20; Pittsburgh, etc. R. Co. v. McCloskey, 110 Pa. 436; Pennsylvania R. Co. v. Bunnell, 81 Pa. 427. See § 1069, particularly the statement of Kersey v. R. Co.

This is the rule favored in Washington. Seattle & M. R. Co. v. Murphine, 4 Wash. 448; Same v. Gilchrist, 4 Wash. 509. The cost of maintaining fences after their erection cannot be recovered for in condemnation proceedings under the California code. Los Angeles, etc. R. Co. v. Rumpff, 104 Cal. 20.

Where land is taken for a highway, the expense of maintaining fences is an element of damages, as affecting the value of the remaining land, and it is not competent for the condemnor to show in mitigation that prior to the establishment of the highway school children were accustomed to trespass by crossing plaintiff's land to reach school, which trespass will be prevented by the highway. Fisher v. Groff, 182 Ind. 29.

³⁷ Detroit v. Beecher, 75 Mich. 454, 4 L.R.A. 813.

It is for the jury to say whether land is adapted to any purpose

which makes the fencing of it profitable. Colusa County v. Hudson, 85 Cal. 633.

³⁸ Morris v. Coleman County, (Tex. Civ. App.), 28 S. W. 380; Swift v. Newport News, 105 Va. 108, 3 L.R.A.(N.S.) 404; Newgass v. Railway Co., 54 Ark. 140; Bland v. Hixenbaugh, 39 Iowa 532; Milwaukee, etc. R. Co. v. Eble, 3 Pin. 334; Louisville, etc. R. Co. v. Glazebrook, 1 Bush 325; Commissioners' Court v. Street, 116 Ala. 28. But see North Eastern R. Co. v. Sineath, 8 Rich. 185, in which it appeared that a railroad had been laid through a large tract of land, to run partly through cultivated and partly through wood land; that on the latter cattle were kept. No allowance for fencing was made, though it was held that the company was not bound to fence its road and it was shown that its trains had been very destructive of cattle and it had refused to pay for them.

Where a railroad took a right of way through a sugar plantation the actual cost of bridges made necessary to pass from one part of the plantation to the other is not competent as bearing on the amount of depreciation in market value where it appears that the bridges were constructed of more than usually expensive material. Yazoo & M. Val. R. Co. v. Teissier, 134 La. 958. But the reasonable cost of building such bridges is competent. Yazoo & M. Val. R. Co. v. Longview Sugar Co., 135 La. 542.

so, nothing will be allowed as damages against it for building a fence,³⁹ for in the assessment of damages for property taken it is always assumed that the appropriation will be made according to law; that the property so appropriated will be used in a legal manner and that all legal obligations connected with such use will be fulfilled; and if the fact is or turns out otherwise another remedy is available and must be resorted to.⁴⁰ If, however, the fencing is not required to be done until a certain time after the road is completed a jury may consider the damage to a farm which will probably result from the absence of fences.⁴¹ Where the building of a telegraph line made the erection of a board fence necessary for the protection of animals it was error to permit proof of the cost of renewing the fence every decade for a century.⁴²

The probable injury to animals or damage which may otherwise result are not to be conjectured; but if as the result of the appropriation of land other land remains unfenced, and its value either in the market or for the use to which it is devoted by the owner or to which it is adapted is depreciated, such depreciation is an element of damage in determining the compensation to be paid for land not taken.⁴³ If farm crossings will be necessary and the law does not impose upon the company

³⁹ *Id.*; *March v. Portsmouth, etc. R. Co.*, 19 N. H. 372; *California Southern R. v. Southern Pac. R. Co.*, 67 Cal. 59; *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557; *Indianapolis & W. R. Co. v. Branson, infra*.

Where neglect to fence is attended with liability for animals killed and means of crossing railroad tracks must be provided on request of the landowner, there cannot be a recovery for watching animals to keep them out of the way of trains. *Fremont, etc. R. Co. v. Lamb*, 11 Neb. 592.

⁴⁰ *Kirby v. Panhandle & G. R. Co.*, 35 Tex. Civ. App. 252; *Central Georgia P. Co. v. Mays*, 137 Ga. 120; *Indianapolis & W. R. Co. v.*

Branson, 172 Ind. 383, citing the text; *Bangor, etc. R. Co. v. McComb*, 60 Me. 290; *Fleming v. Chicago, etc. R. Co.*, 34 Iowa 353; *Chicago, etc. R. Co. v. Springfield, etc. R. Co.*, 67 Ill. 142; *Colecough v. Nashville, etc. R. Co.*, 2 Head 171; *Lyon v. Green Bay, etc. R. Co.*, 42 Wis. 543; *Southside R. Co. v. Daniel*, 20 Gratt. 344; *St. Louis, etc. R. Co. v. North*, 31 Mo. App. 345. See § 1068.

⁴¹ *St. Louis, etc. R. Co. v. Kirby*, 104 Ill. 345; *Centralia & C. R. Co. v. Rixman*, 121 id. 214.

⁴² *Board of Trade Tel. Co. v. Darst, supra*.

⁴³ *Centralia & C. R. Co. v. Brake*, 125 Ill. 393.

the duty of their construction or maintenance, the want thereof, or any expense necessary to be incurred by the owner to secure such a convenience, or to lessen the injury from its absence may be considered on the question of damages.⁴⁴ The expense of erecting and maintaining a retaining wall for the protection of property affected by the change of the grade of a street or adjacent to railroad excavations may be allowed in addition to other damages; and it will not be prevented by tender of a stipulation of the condemning party to erect and keep up such a wall.⁴⁵ But if the liability of the property owner for subsequent expense is conditional, as where it depends upon the action of the public authorities in the exercise of their power to require sidewalks to be laid on a newly opened street, one-half of the cost of which he is chargeable with, such expense is not an element of damage.⁴⁶ It is all the owner has a right to do, to prove the cost of making the walk and "recover any damages for the diminished value of the remaining land which might have been shown to have been occasioned by the probability that a sidewalk would afterwards be built, involving expense to the owner in the erection or care of it. * * * If the liability thereafter to build and keep clean a sidewalk in the street as laid out did not depreciate the value of his remaining land there is no reason why he should recover, as an independent

⁴⁴ *Peoria, etc. R. Co. v. Sawyer*, 71 Ill. 361; *Atchison & N. R. Co. v. Gough*, 29 Kan. 94; *Heilman v. Lebanon & A. St. R. Co.*, 175 Pa. 188.

If such crossings are voluntarily constructed or are part of the plan of a railroad as shown on its map and profile and are considered by the commissioners in making their award the court and jury on appeal therefrom should assess the damages with reference to the plan because the company is bound by it to construct such crossings. *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 608.

⁴⁵ *Rutherford v. Williamson*, 70 W. Va. 402; *Harper v. Lenoir*, 152 N. C. 723; *Manson v. Boston*, 163

Mass. 479; *Pickles v. Ansonia*, 76 Conn. 278 (as special damages under the statute); *Acker v. Knoxville*, 117 Tenn. 224; *Thompson v. Milwaukee, etc. R. Co.*, 27 Wis. 93; *Commonwealth v. Boston, etc. R. Co.*, 3 Cush. 25. *Contra*, *Lallin v. Chicago, etc. R. Co.*, 33 Fed. 415.

But it has been held that such cost cannot be shown until the earth has subsided because prior thereto no cause of action existed. *Kansas City N. R. Co. v. Schwake*, 70 Kan. 141, 68 L.R.A. 673.

⁴⁶ *Cushing v. Boston*, 144 Mass. 317; *Detroit v. Beecher*, 75 Mich. 454, 4 L.R.A. 813.

element of damages when his land was taken, the amount subsequently assessed upon him for the cost of such sidewalk or the expense he might incur in its care.”⁴⁷ Because compensation is estimated by the standard of value for the purposes to which property has been put or for which it was adapted under existing circumstances, the possibility that a necessary expenditure to restore it may not be made to continue its availability for either such use is so remote that a recovery of the cost thereof will not be denied.⁴⁸ The cost of filling a lot and raising the buildings thereon to a level with the changed grade of the street may not be recovered unless so doing was necessary to preserve the property from additional injury or make it fit for use and enjoyment.⁴⁹ It is presumed that, as a general rule, the condemning party is not liable for the counsel fees of the other;⁵⁰ but on the reinstatement of abandoned proceedings such fees, incurred in the original proceeding, have been held an element of the damages.⁵¹ In Pennsylvania all such matters as the foregoing may be considered for the sole purpose of ascertaining the market value of the property before it was taken and unaffected by the taking and such value as affected by it.⁵²

§ 1073. *Same subject.* Where one railroad company acquired, by condemnation, the right to run its road through a high embankment of another, and on a grade twenty feet below its track, it was under no obligation to erect or maintain a bridge to support the track of such other company, and, therefore, proof of what it would cost to build such bridge and keep the same in repair was not deemed proper in the assessment of damages. The company whose property was thus invaded was entitled to have such sum for damages as would enable it to construct and keep in repair all such works as

⁴⁷ *Cushing v. Boston*, *supra*.

But where the expense of making a new walk is certain and immediate and results from the taking, it may be recovered. *Baltimore v. Garrett*, 120 Md. 608.

⁴⁸ *New York, etc. R. Co. v. New Haven*, 81 Conn. 581.

Suth. Dam. Vol. IV.—24.

⁴⁹ *Godby v. Bluefield*, 61 W. Va. 604.

⁵⁰ See § 1063.

⁵¹ *Gibbons v. Missouri Pac. R. Co.*, 40 Mo. App. 146. See *Minneapolis & N. R. Co. v. Woodworth*, 32 Minn. 452.

⁵² *Chambers v. South Chester*, 140 Pa. 510.

should be necessary to maintain its track in a safe and secure condition, and also for all resulting incidental loss and inconvenience.⁵³ If a building must be removed in consequence of the taking of the land on which it stands the expense of the removal will be included in the damages, and also the value of the right to have the house remain on the land until such right would expire.⁵⁴ Expenditures necessary to restore structures upon adjacent premises to their former condition, relatively, may also be considered,⁵⁵ as well as loss of time in such removal.⁵⁶ In the assessment of damages allowed for laying out or changing the grade of a highway at a grade below an adjoining house and land, the cost of cutting down the land and of building a basement under the house, with a door and interior ascent to the house, is an admissible element if such alterations are found to be the most reasonable and economical means of restoring the estate to its former value. The damages in such a case are not confined to the injury caused to the right of lateral support of the soil exclusive of the building, but include all the damage to the property.⁵⁷ Where a municipality lowers a street

⁵³ *Chicago, etc. R. Co. v. Springfield, etc. R. Co.*, 67 Ill. 142, 96 id. 274; *Lake Erie & W. R. Co. v. Commissioners*, 63 Ohio St. 23.

The cost of constructing a new bridge does not measure the compensation a railroad company is entitled to because of the enlargement of drainage facilities in a natural watercourse across which it had erected a bridge. *Chicago, etc. R. Co. v. Drainage Dist.*, 142 Iowa 607.

⁵⁴ *Tufts v. Charlestown*, 4 Gray 537; *White v. Foxborough*, 151 Mass. 28; *Benton v. Brookline*, 151 Mass. 250; *Mangles v. Chosen Freeholders*, 55 N. J. L. 88, 17 L.R.A. 785; *Grugan v. Philadelphia*, 158 Pa. 337; *White v. Cincinnati, etc. R. Co.*, 34 Ind. App. 287, citing *La Fayette, etc. R. Co. v. Winslow*, 66 Ill. 219; *Chicago, etc. R. Co. v. Knuffke*, 36 Kan. 367; *Mississippi*

River B. Co. v. Ring, 58 Mo. 491; *Finn v. Providence G., etc. Co.*, 99 Pa. 631; *Schuchardt v. Mayor*, 53 N. Y. 202.

⁵⁵ *City of Lexington v. Chenault*, 151 Ky. 774, 44 L.R.A.(N.S.) 301; *Murphy v. Meridian*, 103 Miss. 110; *Macon v. Daley*, 2 Ga. App. 355; *Chase v. Worcester*, 108 Mass. 60; *Hyde v. Middlesex*, 2 Gray 267; *White v. Foxborough, supra*; *Cummins v. Des Moines, etc. R. Co.*, 63 Iowa 397.

⁵⁶ *Hannibal B. Co. v. Schaubacher*, 57 Mo. 582.

⁵⁷ *Hartshorn v. Worcester*, 113 Mass. 111; *Manning v. Shreveport*, 119 La. 1044, 13 L.R.A.(N.S.) 452.

The cost of filling a lot to a level with an embankment in a street does not measure the recovery the owner is entitled to. *Birmingham R., L. & P. Co. v. Oden*, 146 Ala. 495.

below the established official grade contiguous property owners are not entitled to recover damages for the destruction of the old sidewalks so far as they do not conform to the official grade, but are entitled to such damages as result solely from lowering the sidewalks below the official grade.⁵⁸ It is said that if the cost of restoration is less than the difference in value such cost measures the recovery.⁵⁹ If only a part of a building is on the right of way sought to be taken, another part being on land previously condemned by another railroad company, the remainder of the building being on land owned by the defendant, the allowance of damages should be made without regard to the part previously condemned or for the injury done to the remainder by the first taking.⁶⁰ In a Massachusetts case involving the damages due a land-owner for taking an easement in his land for sewerage purposes, he being entitled to recover for the value of the land taken and the injury to the part not taken, it was ruled that it was competent for him to show the reasonable cost of any necessary adaptation of his land to the new state of things produced by the public work for which the land had been taken, the adaptation and cost being proper, having reference also to the market value of his estate; and that when such damages are to be assessed, if it is contended by the condemning party that they are offset in whole or in part by some special and peculiar benefit resulting to the property by the improvement, the fair and reasonable cost to the owner of making that benefit practically available is to be considered in ascertaining the amount of special and peculiar benefit to be offset.⁶¹ This basis of compensation is not applicable where property has

⁵⁸ *Ludwigs v. City of Walla Walla*, 83 Wash. 205.

⁵⁹ *Sallden v. Little Falls*, 102 Minn. 358, 13 L.R.A.(N.S.) 790; *Kansas City v. Morton*, 117 Mo. 446; *Smith v. Kansas City*, 123 Mo. 23; *St. Louis, etc. R. Co. v. Grayson County*, 31 Tex. Civ. App. 611.

⁶⁰ *Missouri Pac. R. Co. v. Porter*, 112 Mo. 361.

⁶¹ *Butchers' S. & M. Ass'n v. Com-*

monwealth, 163 Mass. 386; *Edwards v. City of Cheyenne*, 19 Wyo. 110.

Where a street railroad has a right of way in a street, and a city takes a joint right to use the right of way, and establishes a new grade, the measure of damages is such sum as will enable the street railroad to adjust itself to the new conditions, so as to occupy the same relative position as before. *Seattle v. Seattle, R. & S. R. Co.*, 83 Wash. 94.

been damaged only.⁶² It is open to the condemnor to show the expense of lessening the damages claimed.⁶³ If the abandonment of a mine is necessary its value is the measure of compensation; but in regarding a scheme for the readjustment of the appliances for working it, the cost of a new shaft may be shown, in arriving at which speculative and possible difficulties are not to be weighed.⁶⁴ The removal of fences and personal property from the condemned premises may be recovered for.⁶⁵ The evidence of the cost of restoring property to its former grade with reference to the street should be based on the facts as of the time at or about the date the damages were assessed.⁶⁶ In Pennsylvania when a lot is situated above or below the grade of an adjoining street the grade of which is lowered or raised, leaving the lot above or below the new grade, the cost of changing the whole surface of the lot to adapt it to the altered grade cannot be recovered; the facts can be shown as bearing upon the value of the lot.⁶⁷

§ 1074. **Basis for estimating value of land.** In ascertaining the damages to an owner for taking his land or a part of it, its value should not be limited by estimates exclusively for any particular purpose. The jury are to consider its market value before and after the alleged injury, and in doing this everything which gives it intrinsic value is to be taken into consideration and its capabilities for any particular use to which it may be put;⁶⁸ they may take into account all the uses and

⁶² *Beidler v. Sanitary Dist.*, 211 Ill. 628, 67 L.R.A. 820.

⁶³ *Cornell-A. S. Co. v. Boston & P. R. Co.*, 209 Mass. 298.

⁶⁴ *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282.

⁶⁵ *Richmond v. Williams*, 114 Va. 698.

⁶⁶ *Milwaukee T. Co. v. Milwaukee*, 151 Wis. 224.

⁶⁷ *Burns v. Reynoldsville*, 48 Pa. Super. Ct. 122, citing *Mead v. Pittsburg*, 194 Pa. 392; *Bond v. Philadelphia*, 218 Pa. 475; *Edsall v. Jersey Shore*, 220 Pa. 591.

⁶⁸ *Roberts v. Philadelphia*, 239

Pa. 339; *Nelson v. Atlanta*, 138 Ga. 252; *Wiegand v. Siddons*, 41 App. Cas. (D. C.) 130; *Bales v. Wichita Midland Val. R. Co.*, 92 Kan. 771; *Meskill & Columbia River R. Co. v. Luedinghaus*, 78 Wash. 366, 51 L.R.A.(N.S.) 1090; *El Dorado v. Scruggs*, 113 Ark. 239; *Seurvin Ditch Co. v. Roberts*, 58 Colo. 533; *Atlanta v. Nelson*, 142 Ga. 324; *Sanitary Dist. v. Chicago & A. R. Co.*, 267 Ill. 252; *Bray v. Tardy*, 182 Ind. 98; *Sandy Val. & E. R. Co. v. Bentley*, 161 Ky. 555; *Louisiana Ry. & Nav. Co. v. Baton Rouge Brickyard*, 136 La. 833; *Peck v.*

capabilities to which the property was adapted at the time it

City of Hampton, 115 Va. 855; Seattle, P. A. & L. C. R. Co. v. Land, 81 Wash. 206; Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co., — W. Va. —, 83 S. E. 1031; Baltimore & O. R. Co. v. Brown's Heirs, 74 W. Va. 149; In re Ashokan Dam, 190 Fed. 413; Long Distance Tel. & T. Co. v. Schmidt, 157 Ala. 391; Sacramento S. R. Co. Heilbron, 156 Cal. 408; Denver, etc. R. Co. v. Howe, 49 Colo. 256; Peoria, etc. T. Co. v. Vance, 234 Ill. 36; Hartshorn v. Illinois Valley R. Co., 216 Ill. 392; Henderson v. Lexington, 132 Ky. 390, 22 L.R.A.(N.S.) 20; Opelousas, etc. R. Co. v. Bradford, 118 La. 506; Minneapolis, etc. E. T. Co. v. Friendshub, 108 Minn. 492; In re Clinton St. (Misc.), 123 N. Y. Supp. 198; Chicago, etc. R. Co. v. Mason, 23 S. D. 564; Union R. Co. v. Raine, 114 Tenn. 569; Wray v. Knoxville, etc. R. Co., 113 Tenn. 544; Boyer v. St. Louis, etc. R. Co., 97 Tex. 107; Stuttgart & R. B. Co. v. Kocourek, 101 Ark. 47; Weinschenk v. Western Allegheny R. Co., 233 Pa. 442; Reiber v. Butler & P. R. Co., 201 Pa. 49; Lough v. Minneapolis, etc. R. Co., 116 Iowa 31; Young v. Harrison, 17 Ga. 30; Shenango, etc. R. Co. v. Braham, 79 Pa. 447; Dwight v. Hampden, 11 Cush. 201; Dickenson v. Fitchburg, 13 Gray 546; Colville v. St. Paul, etc. R. Co., 19 Minn. 283; Carter v. Same, 22 Minn. 342; White v. Charlotte, etc. R. Co., 6 Rich. 47; Mississippi River B. Co. v. Ring, 58 Mo. 491; Matter of Furman St., 17 Wend. 649; Burt v. Wigglesworth, 117 Mass. 302; Somerville, etc. R. Co. v. Doughty, 22 N. J. L. 495; Regina v. Brown, 30 L. J. (Q. B.) 322; Little Rock, etc. R. v. McGhee, 41 Ark. 202;

Little Rock Junction R. v. Woodruff, 49 id. 381, 4 Am. St. 51; Muller v. Southern Pac. Branch R. Co., 83 Cal. 240; Johnson v. Freeport, etc. R. Co., 111 Ill. 413; Chicago & E. R. Co. v. Blake, 116 id. 163; Hyde Park v. Washington I. Co., 117 Ill. 233; Calumet River R. Co. v. Moore, 124 Ill. 329; Moulton v. Newburyport W. Co., 137 Mass. 163; Cedar Rapids, etc. R. Co. v. Ryan, 37 Minn. 38; Montana R. Co. v. Warren, 6 Mont. 275, 12 Pac. 641; Pittsburgh & W. R. Co. v. Patterson, 107 Pa. 461; Alloway v. Nashville, 88 Tenn. 511, 8 L.R.A. 123; Stinson v. Chicago, etc. R. Co., 27 Minn. 284; Shenandoah Valley R. Co. v. Shepherd, 26 W. Va. 672; Watson v. Milwaukee & M. R. Co., 57 Wis. 332; Laffin v. Chicago, etc. R. Co., 33 Fed. 415; Great Falls Mfg. Co. v. United States, 18 Ct. of Cls. 160, 198; Harris v. Schuylkill, etc. R. Co., 141 Pa. 242, 23 Am. St. 278; West Chicago St. R. Co. v. Chicago, 172 Ill. 198; Ligare v. Chicago, etc. R. Co., 166 Ill. 249; Colorado M. R. Co. v. Brown, 15 Colo. 193; Hercules I. Works v. Elgin, etc. R. Co., 141 Ill. 491; Snouffer v. Chicago, etc. R. Co., 105 Iowa 681; Union T. R. Co. v. Peet Mfg. Co., 58 Kan. 197; Maynard v. Northampton, 157 Mass. 218; Fales v. Easthampton, 162 Mass. 422; Miller v. Windsor W. Co., 148 Pa. 429; McKinney v. Nashville, 102 Tenn. 131, 73 Am. St. 859; Harwood v. West Randolph, 64 Vt. 41; Trent-Stoughton v. Barbados W. S. Co., [1893] App. Cas. 502; Cochrane v. Commonwealth, 175 Mass. 299; Webster v. Kansas City, etc. R. Co., 116 Mo. 114; St. Louis T. R. Co. v. Heiger, 139 Mo. 315; Wilson v. Equitable G. Co., 152 Pa. 566.

was taken or to which it might be applied,⁶⁹ in the light of

Occasionally the present use of land in the condition it was immediately before condemnation is made the test of its value. *Kansas City & T. R. Co. v. Splitlog*, 45 Kan. 68.

In Texas it has been held that evidence of profits obtained from the use of a part of a farm from which land is taken is competent as tending to show the adaptability of the land for agricultural purposes. *City of Ft. Worth v. Charbonneau*, — Tex. Civ. App. —, 166 S. W. 387.

⁶⁹ *El Dorado v. Scruggs*, 113 Ark. 239; *Ft. Smith, etc. Dist. v. Scott*, 111 Ark. 449; *Scurvin Ditch Co. v. Roberts*, 58 Colo. 533; *Central Georgia Power R. Co. v. Cornwell*, 141 Ga. 643; *Sanitary Dist. v. Chicago & A. R. Co.*, 267 Ill. 252; *Tracy v. Mt. Pleasant*, 165 Iowa 435; *Sandy Val. & E. R. Co. v. Bentley*, 161 Ky. 555; *David v. Louisville & I. R. Co.*, 158 Ky. 721; *Louisiana Ry. & Nav. Co. v. Baton Rouge Brickyard*, 136 La. 833; *New York Cent. & H. River R. Co. v. Mills*, 160 App. Div. (N. Y.) 6; *Marine Coal Co. v. Pittsburgh, M. & Y. R. Co.*, 246 Pa. 478; *Southern R. Co. v. Memphis*, 126 Tenn. 267, 41 L.R.A.(N.S.) 828; *Payne v. Kansas & A. V. R. Co.*, 46 Fed. 546; *McKnight v. Wichita*, 83 Kan. 7; *Philbrook v. Berlin-S. P. Co.*, 75 N. H. 599; *King v. Minneapolis Union R. Co.*, 32 Minn. 224; *Five Tracts of Land in Cumberland Tp.*, 41 C. C. A. 580, 101 Fed. 661; *Wesser Valley L. & W. Co. v. Ryan*, 190 Fed. 417; *Seattle v. Board of Home Missions, etc.*, 70 C. C. A. 597, 138 Fed. 307; *Alabama Cent. R. Co. v. Musgrove*, 169 Ala. 424; *Kansas City S. R. Co. v. Boles*, 88 Ark. 533; *Los Angeles v. Kerckhoff-C. M. & L. Co.*, 15 Cal. App. 676; *Central*

Georgia P. Co. v. Mays, 137 Ga. 120; *Muncie & P. T. Co. v. Hall*, 173 Ind. 292; *Halstead v. Vandalia R. Co.*, 48 Ind. App. 96; *Kansas City, etc. R. Co. v. Weidenmann*, 77 Kan. 300; *Missouri, etc. R. Co. v. Roe*, 77 Kan. 224, 15 L.R.A.(N.S.) 679; *Lake Koen N., R. & I. Co. v. McLain L. & I. Co.*, 69 Kan. 334; *Porter v. Scranton City*, 36 Pa. Super. Ct. 218; *Board of Levee Com'rs v. Lee*, 85 Miss. 508; *Metropolitan St. R. Co. v. Walsh*, 197 Mo. 392; *In re Simmons*, 130 App. Div. (N. Y.) 356; *Brown v. Power Co.*, 140 N. C. 333, 3 L.R.A.(N.S.) 912; *Harrisburg, etc. T. R. Co. v. Cumberland County*, 225 Pa. 467; *Cox v. Philadelphia, etc. R. Co.*, 215 Pa. 506, 114 Am. St. 979; *Crystal City & U. R. Co. v. Boothe* (Tex. Civ. App.), 126 S. W. 700; *Hunter v. Chesapeake & O. R. Co.*, 107 Va. 158, 17 L.R.A.(N.S.) 124; *State v. Grays Harbor, etc. R. Co.*, 54 Wash. 530; *Edwards v. Cheyenne*, 19 Wyo. 900; *Boston & M. R. v. Hunt*, 210 Mass. 128; *Smith v. Commonwealth*, 210 Mass. 259; *Fosgate v. Hudson*, 178 Mass. 225.

Damages to a dairy business conducted on land damaged by an improvement, such as the damages caused by pollution of water into which sewage was discharged by a sewerage system, may not be considered by the jury in fixing the amount of depreciation caused by the improvement, but the special adaptability of the land for such a business may be considered. *El Dorado v. Scruggs*, 113 Ark. 239.

Where land taken had by its situation in a particular locality a special adaptability for manufacturing, such as a location in the Monongahela Valley, such adaptability may

existing business conditions and those that might be reasonably expected in the immediate or reasonably near future.⁷⁰ In a case where land was taken as a source of water supply an instruction to the effect that evidence of all the uses to which it was adapted might be considered if that would give an added value to it in the mind of any purchaser and seller in the open market; but such evidence could not be used to put the price beyond the fair market value of the land, was approved.⁷¹ In connection with the use made of property the intention of the owner is to be regarded.⁷² But no weight can be given testimony as to the profits anticipated from the intended enlarge-

be considered by the jury in estimating its value. *Marine Coal Co. v. Pittsburgh, M. & Y. R. Co.*, 246 Pa. 478.

Where the property damaged by the improvement was a church, its use for church purposes was held to be the test of its value, and evidence was held incompetent that the land had a larger value for commercial purposes, which would have been enhanced by the improvement. *Atlanta v. Nelson*, 142 Ga. 324.

A riparian owner's license to fill land or to erect a wharf to the harbor line is an element of value to his land. *Taber v. New York*, etc. R. Co., 28 R. I. 269.

⁷⁰ *Chicago, etc. R. Co. v. Mason*, 23 S. D. 564; *David v. Louisville & I. R. Co.*, 158 Ky. 721; *Marine Coal Co. v. Pittsburgh M. & Y. Co.*, 246 Pa. 478; *Peek v. City of Hampton*, 115 Va. 855; *Meskill & Columbia River R. Co. v. Luedinghaus*, 78 Wash. 366, 51 L.R.A.(N.S.) 1090.

Such damages as may reasonably be expected to result from an improvement must be compensated for; it is not necessary that they be reasonably sure to occur. *Kansas*

Postal Tel. C. Co. v. Leavenworth T. R. & B. Co., 89 Kan. 418.

Where the construction of the abutments of a bridge so restricted the use of a coal wharf as to cause loss of time in unloading coal vessels, so that the owner of the wharf was unable to earn premiums for the prompt discharge of such vessels, it was held that the fact was to be considered in estimating the diminution of value caused by the improvement. *Wellington v. City of Cambridge*, 220 Mass. 312.

Though in Kentucky it is proper to permit the jury to consider all uses to which the land taken will be suited in the reasonably near future in fixing its value, yet it is held that it is not proper to instruct on the subject, and such an instruction was held properly refused. *David v. Louisville & I. R. Co.*, 158 Ky. 721.

⁷¹ *Sargent v. Merrimac*, 196 Mass. 171, 11 L.R.A.(N.S.) 996.

⁷² *Jeffery v. Osborne*, 145 Wis. 351, citing local cases. *Contra*, *Goodwine v. Evans*, 134 Ind. 262 (conversion of part of farm into a stock or grazing farm); *Five Tracts of Land*, etc. *supra*. See § 1075.

ment of the plant affected.⁷³ If the condemnor by proceedings *in invitum* has affected the value of the land it cannot claim any advantage because of its wrongdoing when it seeks to acquire its actual use.⁷⁴ As has been shown, remote, uncertain or speculative uses are not to be regarded, including a use dependent upon the use of adjoining land of another,⁷⁵ and its value as it may be affected by future expenditures and improvements,⁷⁶ or legislation.⁷⁷ If land taken has a mine under its surface that fact may be considered if it adds to the market value of the land, even though the mine has never been worked; so of a water-power which is unutilized.⁷⁸ The owner may have damages for being prevented from removing minerals under the right of way.⁷⁹ The jury, however, is not at liberty to make a special allowance for any particular quality the land may possess, or for the value of mines, their existence being material

⁷³ *Hamilton v. Pittsburg, etc. R. Co.*, 190 Pa. 51, 51 L.R.A. 319.

⁷⁴ *In re South Twelfth St.*, 217 Pa. 362.

It is immaterial that the unlawful use of property has added to its value; no moral question is involved in arriving at its highest and best use. *Freiberg v. South Side E. R. Co.*, 221 Ill. 508.

⁷⁵ *Grays Harbor B. Co. v. Lownsdale*, 54 Wash. 83; *Seattle v. Byers*, 54 Wash. 518. See § 1071.

⁷⁶ *Richmond & P. E. R. Co. v. Seaboard A. L. R.*, 103 Va. 399.

⁷⁷ *Sargent v. Merrimac*, 196 Mass. 171, 11 L.R.A.(N.S.) 996.

⁷⁸ *Keim v. Reading*, 32 Pa. Super. Ct. 613 (quality of stone in quarry); *Haslam v. Galena R. Co.*, 64 Ill. 353; *Montana R. Co. v. Warren*, 6 Mont. 275; *Louisville, etc. R. Co. v. Ryan*, 64 Miss. 399; *Chicago, etc. R. Co. v. Catholic Bishop*, 119 Ill. 525; *Little Rock Junction R. v. Woodruff*, 49 Ark. 381, 4 Am. St. 51; *Frick C. Co. v. Painter*, 198 Pa. 468.

Where part of the water of a stream was taken and a mill owner on the stream below sought to recover damages, it was erroneous to award them on the basis of the use which might have been made of the water. Its actual value to him measured his right. *Lee v. Springfield W. Co.*, 176 Pa. 223.

If the proper exercise of the franchise of a water company which takes water from a stream requires the storing of the water during the day and its use during the night, and such storing is injurious to the plaintiff's property that fact may be considered in determining the actual difference in the value of the property caused by taking the water. *Lewis v. Springfield W. Co.*, 176 Pa. 230.

⁷⁹ *Barnsley C. Co. v. Turbill*, 13 L. J. (Ch.) 406; *Proud v. Bates*, 34 L. J. (Ch.) 406; *Fletcher v. Great Western R. Co.*, 29 L. J. (Ex.) 253; *Pittsburgh, etc. R. Co. v. Swinney*, 59 Ind. 100.

only so far as they affect the market price of the property,⁸⁰ and in so far as the owner of the fee may remove the minerals without interfering with the easement sought,⁸¹ no inquiry can be made as to the profits, the price or value of minerals taken out; it is otherwise as to the royalty paid the owner by a lessee; it may be assumed, nothing to the contrary appearing, that the rental being paid will be continued.⁸² The difference between the measure of damages in an action of trespass and in condemnation proceedings is pointed out in a late case, which denied the right of the owner to recover the value of stone after it had been quarried and sold, less the cost of preparation, transportation and royalty; the measure of his right was said to be the value of the stone in place. As to stone which had been severed, its value where it was appropriated measured the recovery.⁸³ A special allowance is not to be made because of the value of the land for any specific purpose as an independent fact.⁸⁴ In Illinois it is the rule that while witnesses may take into consideration any use to which they believe the property may be profitably put, "yet the jury are not bound to base their verdict upon the supposition that it would be appropriated to a use other than that to which it is now devoted."⁸⁵ Conced-

⁸⁰ *Atlanta T. C. Co. v. Georgia R. & E. Co.*, 132 Ga. 537; *Searle v. Lackawanna, etc. R. Co.*, 33 Pa. 57; *Daly v. Smith*, 18 App. Div. (N. Y.) 194; *Davis v. Jefferson G. Co.*, 147 Pa. 130; *Sanitary Dist. of Chicago v. Loughran*, 160 Ill. 362.

In *Twin Lakes H. G. Min. Synd. v. Colorado M. R. Co.*, 16 Colo. 1, an instruction to the effect that if the jury believed that the presence of gold enhanced either the market or intrinsic value of the land they should give due weight to that fact, was approved.

The value of undeveloped ore is not to be considered. *Edwards v. Cheyenne*, 19 Wyo. 110. The value given to land by the existence of an oil or salt water well is not to

be ascertained by proof of the profits which may be made from the product by the use of a refinery, but by its selling value as a well. *Kessler v. Pittsburg, etc. R. Co.*, 208 Pa. 50.

⁸¹ *Missouri, etc. R. Co. v. Schmuck*, 69 Ky. 272.

⁸² *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 94 Am. St. 864.

⁸³ *Cole v. Ellwood P. Co.*, 216 Pa. 283.

⁸⁴ *Sacramento S. R. Co. v. Heilbron*, 156 Cal. 408; *Weiser Valley L. & W. Co. v. Ryan*, 190 Fed. 417.

⁸⁵ *Phillips v. Scales Mound*, 195 Ill. 353; *Snodgrass v. Chicago*, 152 Ill. 600; *Booker v. Venice & C. R. Co.*, 101 Ill. 333.

ing that the condemning party may release its right to subjacent support and absolve itself from liability for the increased value of the land resulting from the mineral, it cannot thereby absolve itself from liability for the consequences of a subsidence of the soil, and these may be regarded in fixing the value of the land in a proper case.⁸⁶ If land is valuable both as a mine and as town lots the owner is not bound to elect whether he will prove its value for the one use or the other. Such uses do not interfere with each other, and together they go to show the market value of the land. In estimating the compensation due from a railroad company it must be borne in mind that it takes only the easement of the surface of the ground and does not take the owner's right to remove minerals, oil or water if he can remove them without interference with such easement.⁸⁷

The rule for estimating the value of the property taken or which is sought to be taken has been expressed in various ways. Thus, it has been said that any existing facts which enter into the value of land, in the public and general estimation, and tend to influence the minds of sellers and buyers, may be considered.⁸⁸ Compensation may be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the immediate future,⁸⁹ if the

⁸⁶ *Davis v. Jefferson G. Co.*, 147 Pa. 130. See *Wallace v. Same*, 147 Pa. 205.

⁸⁷ *Northern Pac. & M. R. Co. v. Forbis*, 15 Mont. 452, 48 Am. St. 692; *Eldorado, etc. R. Co. v. Sims*, 228 Ill. 9; *Southern Pac. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 106 Am. St. 36, 70 L.R.A. 221; *Cleveland, etc. R. Co. v. Smith*, 177 Ind. 524.

⁸⁸ *West Skokie D. Dist. v. Dawson*, 243 Ill. 175; *South Park Com'rs v. Ayer*, 237 Ill. 211; *Russell v. St. Paul, etc. R. Co.*, 33 Minn. 210; *Duluth & W. R. Co. v. West*, 51 Minn. 163; *Tracy v. City of Mt. Pleasant*, 165 Iowa 435.

⁸⁹ *Ft. Smith, etc. B. Co. v. Scott*, 103 Ark. 405; *Harrisburg, etc. T. Co. v. Cumberland County*, 225 Pa. 467; *Burger v. State Female Normal School*, 114 Va. 491; *Weiss v. Commissioners*, 152 Ky. 552; *Savings & T. Co. v. Pennsylvania R. Co.*, 229 Pa. 484; *Guyandot Valley R. Co. v. Buskirk*, 57 W. Va. 417, 110 Am. St. 785; *Lawton R. T. R. Co. v. Lawton*, 31 Okla. 458; *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784; *Ohio Valley R. & T. Co. v. Kerth*, 130 Ind. 314; *West Virginia, etc. R. Co. v. Gibson*, 94 Ky. 234;

present selling price has been affected thereby.⁹⁰ It is to be fixed upon a fair consideration of the land, the extent and condition of its improvements, its quantity and productive qualities and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood. The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve may be regarded as the market value of the land.⁹¹ If the owner has adopted a peculiar mode of using the land taken or injured by which he derives profit from it he must be compensated for its loss or damage on the basis of its value for such use. "It is the value which he has," said the court, where a training-track was crossed by a railroad, "and of which he is deprived, which must be made good by compensation."⁹² But the value

Richmond & M. R. Co. v. Humphreys, 90 Va. 425; Rock Island & P. R. Co. v. Leisy B. Co., 174 Ill. 547.

⁹⁰ Chicago & A. R. Co. v. Staley, 221 Ill. 405; Martin v. Chicago & M. E. R. Co., 220 Ill. 97.

⁹¹ Clark, J., in Pittsburgh, etc. R. Co. v. Vance, 115 Pa. 325; Hall v. State, 72 App. Div. (N. Y.) 360; Brainerd v. State, 74 N. Y. Misc. 100.

⁹² King v. Minneapolis Union R. Co., 32 Minn. 224; Harrison v. Young, 9 Ga. 359 (right of private ferry); Southern R. Co. v. Memphis, 126 Tenn. 267, 41 L.R.A.(N.S.) 828; St. Louis, etc. R. Co. v. Kirby, 104 Ill. 345.

In such a case it is erroneous to assess damages on the theory that the destruction of the track involves the loss of business of raising stock on the farm and of the stock already there. The correct basis is said to be the cost of making another track on the premises which are not affected by the road. In re New York, etc. R. Co., 29 Hun 1.

If land is damaged for church uses the compensation should be measured accordingly. Durham & N. R. v. Trustees of Bullock Church, 104 N. C. 525.

If the use of the condemned property for gambling inflated the rental value of it the rent paid cannot be considered as constituting a part of the rental value of the land so far as the rent was inflated by such use. Though it may be difficult to fix the rental value from a legitimate use, that is the misfortune of the owner. McKinney v. Nashville, 102 Tenn. 131.

The use made of property or for which it is suitable may be regarded. Seattle v. Board of Home Missions, etc., 70 C. C. A. 597, 138 Fed. 307.

But in Kentucky the peculiar value of the land to the owner is not to be regarded; he may not show how much he needed that taken in connection with his business, nor his plans for the extension of it. Weiss v. Com'rs of Sewerage, 152 Ky. 552.

of property to the owner for the use to which it was put is not the test where that use was abandoned before the taking.⁹³ Damages are not to be awarded on the expectation of future profits of an established business nor on the profits of a business which might be established on land adapted to a business use.⁹⁴ But "the probable returns from an investment in land because of the use which may be made of it is a consideration which enters into an intelligent estimate of its value, and is entirely distinct from an estimate based on the profits of a business which may be conducted on it."⁹⁵ Where land taken had been used for market gardening it was proper to show the value of the fertilizers put upon it.⁹⁶ If grading has been done on land which is desired by a railroad company and abandoned by the party who did it the land-owner may show its value.⁹⁷ But the cost of making such a grade or the benefit which it may be to the railroad company is not the proper measure of compensation. The consideration is the exact market value of the land upon which the grading has been done for whatever purpose the land might or could be used. If the grade can be used for railroad purposes and the land is more valuable for such purposes than for any other its enhanced value to a railroad company should be regarded.⁹⁸ If the owner is restricted to a particular use of his land the compensation due him will be measured by its value for any use to which he might apply it.⁹⁹ If a future possible use depends upon the volition of a third person over whose action the land-owner has no control, it must not enter into the estimate.¹ A tendency to limit this

⁹³ *Southern R. Co. v. Michaels*, 126 Tenn. 702.

⁹⁴ *Cox v. Philadelphia, etc. R. Co.*, 215 Pa. 506, 114 Am. St. 579; *Tacomoma v. Nisqually, P. Co.*, 57 Wash. 420; *Hamilton v. Pittsburgh, etc. R. Co.*, 190 Pa. 51, 51 L.R.A.(N.S.) 319.

⁹⁵ *Gearhart v. Clear Spring W. Co.*, 202 Pa. 292.

⁹⁶ *Chicago & E. R. Co. v. Jacobs*, 110 Ill. 414.

⁹⁷ *De Boul v. Freeport, etc. R. Co.*, 111 Ill. 499.

⁹⁸ *Cohen v. St. Louis, etc. R. Co.*, 34 Kan. 158, 55 Am. Rep. 242.

⁹⁹ *In re Albany St.*, 11 Wend. 149; *Stebbing v. Metropolitan Board*, 6 Q. B. 37; *Allen v. Boston*, 137 Mass. 319.

¹ *Munkwitz v. Chicago, etc. R. Co.*, 64 Wis. 403; *Portland & S. R. Co. v. Ladd*, 47 Wash. 88; *Grays Harbor B. Co. v. Lownsdale*, 54 Wash. 83; *Chicago, etc. R. Co. v. Alexander*, 47 Wash. 131.

rule is manifested in a late Massachusetts case. The action was to recover damages caused by taking the petitioner's flats, and he testified as to the best plan to develop and get the most out of them. There existed a restriction upon his right to use them, and for this reason the evidence was objected to. The court observed, by Holmes, J.: It is said that the flats in question were subject to an easement which prevented their being built upon, and that the petitioner had no license to build upon them as required by law apart from the alleged easement, and therefore that the question was misleading. Assuming the facts to be as supposed, still the propriety of allowing the question would depend upon the particular circumstances of the case. The test is whether the answer would be likely to help the jury to estimate the value of the land. The mere existence of an incumbrance is not technically and necessarily a bar. For instance, if it was manifestly the interest of the owners of the dock and of the public that the dock should be filled up, and therefore it was to be expected that when the time came the owners would release their mutual easement and the authorities would grant a license, the evidence would be very nearly as instructive as if the owner were free to build at once. Other cases could be imagined in which a jury could be trusted to allow for the restriction in considering such testimony as they would allow for it in rendering their verdict.² The question went to the verge, but we cannot say that it was wrong to admit it.³ If historical associations connected with land affect its value the fact may be shown.⁴ In a case in Ontario the action of the city seeking condemnation was set up as affecting the value of the land desired. It was proper to receive evidence to show that conditions may change and that the municipal by-law may be repealed, and to show that when it was passed it was intended to be only temporary or limited in its operation, if such evidence bears upon the potential use of the land.⁵ The condemnor may

² Citing *Allen v. Boston*, 137 Mass. 319.

³ *Blaney v. Salem*, 160 Mass. 303.

⁴ *Five Tracts of Land in Cumber-*

land Tp., 41 C. C. A. 580, 101 Fed. 661.

⁵ *Re Gibson v. City of Toronto*, 28 Ont. L. R. 20.

not depreciate the value of the land it desires to acquire and reap the benefit of its action at a later time, though such action may have been taken long prior to the condemnation proceedings and independently of them.⁶

It has been ruled in Iowa and Pennsylvania in cases in which evidence was offered to show how many residence lots are ordinarily contained in an acre of land and what such lots would probably sell for on the land in question, that such evidence was improper. "The question was what was" the land "worth in the condition it then was, and not what its prospective value was, or what it would be if it had been laid out into city lots."⁷ The weight of authority favors the opposing view,⁸ and in harmony therewith is a later case in Iowa. Witnesses who testified as to the value of a lot were permitted to take into consideration the prospective location of a depot thereon by the companies which were condemning the property. In sustaining the admission of such testimony the court said: Many of the considerations that tend to affect the value of town property are prospective only. Select a lot in any city, find a witness competent to express an opinion as to its value and ask him with relation thereto, and as to the basis of his judgment, and it will be found that the facts upon which his conclusions rest are anticipatory, largely. The business

⁶ *In re South Twelfth St.*, 217 Pa. 362.

⁷ *Everett v. Union Pac. R. Co.*, 59 Iowa 243; *Reiber v. Butler & P. R. Co.*, 201 Pa. 49. See *In re Simmons*, 66 N. Y. Misc. 204; *In re Westchester Ave.*, 126 App. Div. (N. Y.) 839; *Gorgas v. Philadelphia, etc. R. Co.*, 215 Pa. 501, 114 Am. St. 974; *Kansas City & T. R. Co. v. Splitlog*, 45 Kan. 68.

The owner may not show that prior to the appropriation he had contemplated dividing the land into lots and that leases of some of them had failed because of the condemnation. *Ogden v. Pennsylvania R. Co.*, 229 Pa. 378.

The rent received for improved property is too remote to show the value of unimproved property, and so of the income which might be made from other vacant local property if it was improved. *Pullman Co. v. Chicago*, 224 Ill. 248.

⁸ *Myers v. Bender*, 46 Mont. 497, and local cases cited; *St. Louis, etc. R. Co. v. Maxfield*, 94 Ark. 135, 26 L.R.A.(N.S.) 1111; *Wichita Falls, etc. R. Co. v. Holloman*, 28 Okla. 419; *Crystal City & U. R. Co. v. Isbell* (Tex. Civ. App.), 126 S. W. 47; *Omaha Southern R. Co. v. Beeson*, 36 Neb. 361; *Cahill v. Norwood Park*, 149 Ill. 156; *Chicago, etc. R. Co. v. Davidson*, 49 Kan. 589.

district is growing or extending towards it, or it is in a section that is rapidly improving. These are proper matters to consider and they all relate, in most part, to future prospects.⁹ A later Pennsylvania case makes it clear that if land has an immediate value as building lots the fact may be shown.¹⁰ In a Kansas case the plans of the land-owner for the future use of the land condemned were received in evidence without substantial error, the damages being measured by the effect of the improvement upon the value of the land.¹¹ The entire tract affected need not be valued on the basis of its availability for city lots.¹² But where the use to which land has been put and

⁹ *Snouffer v. Chicago, etc. R. Co.*, 105 Iowa 681; *Smith v. Commonwealth*, 210 Mass. 259. Compare *Ohio Southern R. Co. v. Snyder*, 5 Ohio Dec. 480, 486.

¹⁰ *Catlin v. Northern C. & I. Co.*, 225 Pa. 262 (distinguishing earlier cases because the value sought to be shown for such use was speculative); *Kleppner v. Pittsburgh, B. & L. E. R. Co.*, 247 Pa. 605.

Such fact is competent only in so far as it enhances the value of the whole tract. Evidence of its value if cut up into lots, with separate values for each lot, is not competent. *Kleppner v. Pittsburgh, B. & L. E. R. Co.*, *supra*; *Louisiana Ry. & Nav. Co. v. Baton Rouge Brickyard*, 136 La. 833. Evidence of the number of such lots which could be carved out of the tract of land is not competent. *Louisiana Ry. & Nav. Co. v. Baton Rouge Brickyard*, *supra*. See also *Trustees of Schools v. Kuhn*, 261 Ill. 190 (where the jury were allowed to take into consideration the special value of the land taken for cutting into lots).

¹¹ *Union T. R. Co. v. Peet Brothers Mfg. Co.*, 58 Kan. 197; *Contra*, *Wadsworth L. Co. v. Piedmont T. Co.*, 162 N. C. 503 (speculative uses).

The fact that provision has been made by law for bringing land within the limits of a city may be considered in fixing its value. *Duluth & W. R. Co. v. West*, 51 Minn. 163.

Where tenants in common made a plan of their land showing lots, streets and alleys and agreed to a partition among themselves, but before the deeds were executed and the plan was recorded an incline plane company entered upon the land to construct its works, the owners were entitled to claim damages for the land taken, and also for the appropriation of ways or easements appurtenant to the land; but the streets laid down on the plan, not opened or accepted by the public, could not be considered as actual streets. It was competent for the owners to offer the plan as evidence of the capacity of the land for improvement in a certain way; and for the company to give evidence of an equally advantageous use in a different way with which the incline would not interfere or which it might aid. *Phillips v. St. Clair I. P. Co.*, 166 Pa. 21.

¹² *McKnight v. Wichita*, 83 Kan. 7.

The question whether a tract

its value considering the most valuable use to which it is adapted have been shown it is not competent to show its greater value by proof that the owner has entertained plans for its improvement in a particular way.¹³ If the land taken is situated on the public street of a city the owner may prove its value if it should be laid out in lots in the near future.¹⁴ But if it were a piece of vacant land lying in the open country as part of a farm, with no indications of its being marketable as town lots, the objection to such proof would probably prevail.¹⁵ The owner of a farm adjacent to a village may recover as damages for the taking of the water of a brook running through it not merely what it is worth for farm purposes, but its value in view of the fact that the land is available for building lots and

which has been platted into lots is one or several tracts for the purpose of assessing value for a taking is for the jury, where there is evidence on which to base a finding, and where the finding is that the several lots are one whole tract, the condemnor cannot complain on appeal if evidence of the value of the several lots was considered by the jury in fixing the value of the whole tract, when no objection to such evidence was made in the trial court. *Pittsburg, C., C. & St. L. R. Co. v. Crockett*, 182 Ind. 490.

¹³ *Los Angeles v. Kerckhoff-C. M. & L. Co.*, 15 Cal. App. 676; *Halstead v. Vandalia R. Co.*, 48 Ind. App. 96.

Accordingly an owner cannot enhance the value of his land which abuts a river from which part of the water is taken for irrigating purposes, by showing that it was his intention to introduce an extended irrigation system in order to reclaim his waste lands, for which he proposed to use the water taken, and which the improvement prevented him from carrying into

effect. *San Joaquin, etc. Co. v. Stevenson*, 26 Cal. App. 274.

¹⁴ *In re Simmons*, 141 App. Div. (N. Y.) 120; *O'Brien v. Schenley Park & H. R. Co.*, 194 Pa. 336; *Alexian Brothers v. Oshkosh*, 95 Wis. 221; *Walker v. South Chester R. Co.*, 174 Pa. 288; *Blue Earth County v. St. Paul, etc. R. Co.*, 28 Minn. 503 (it is immaterial that the land is owned by a county which could only hold and use it for county purposes, and could not devote it to residence purposes).

¹⁵ *O'Brien v. Park & H. R. Co.*, *supra*.

The mere hopes of a land-owner that his field may one day be built upon as city lots are not to be considered unless the probability of such an event, in the public mind, has in fact affected the fair marketable value of the land at the time of the proceeding. *New York, etc. R. Co. v. Arnot*, 27 Hun 151; *Daly v. Smith*, 18 App. Div. (N.Y.) 194. See *Ohio Valley R. & T. Co. v. Kerth*, 130 Ind. 314.

the water for supplying buildings which may be erected thereon.¹⁶

Where a gas plant located upon the part of the land taken had not been used for several years before the taking, but was kept in condition to be used and the business of the owner required it, as a matter of business prudence, to maintain the plant as a reserve plant, he recovered damages for its taking as a going concern.¹⁷ In fixing the value of a toll bridge the superstructure, substructure, approaches and franchise are to be considered, as is the amount of the net earnings; but the fact that part of the net receipts were used for a special purpose is immaterial.¹⁸ Evidence of the original cost of a bridge, while admissible, is not controlling on the question of value. The life of the franchise is a proper subject of inquiry.¹⁹ It may be shown what materials were used in a building on the land condemned.²⁰ The good-will of a business cannot be considered in estimating the value of land.²¹ If riparian proprietors on the outlet of a lake, who have mills and factories thereon, have no title to the water therein or right to divert or sell it, their right being limited to the use of the water for mill purposes,

¹⁶ *Bridgeman v. Hardwick*, 67 Vt. 653.

¹⁷ *Matter of the Mayor*, 39 App. Div. (N. Y.) 589.

¹⁸ *Clarion T. & B. Co. v. Clarion County*, 172 Pa. 243; *West Chester & W. P. R. Co. v. Chester County*, 182 Pa. 40.

¹⁹ *West Chester & W. Co. v. Chester County*, *supra*.

Where between the time of confirmation of an award for a toll bridge taken and the passing of title the bridge was damaged by a flood the value of the bridge as repaired by the owner rather than the expense of repairs plus the value of the bridge after the flood and before the repairs were made is the measure of damages. *In re Toll Bridge*, 83 Misc. (N. Y.) 331.

Suth. Dam. Vol. IV.—25.

²⁰ *Kansas City S. R. Co. v. Boles*, 88 Ark. 533.

²¹ *Condemnation of Property on Race St.*, 9 Pa. Dist. 615; *Edmands v. Boston*, 108 Mass. 536; *In re New York, etc. R. Co.*, 35 Hun 633.

But the good will of a business has been held competent as showing the value of land for the uses to which it was put at the time of taking, and as affecting its value for future uses. The reason given for the decision was that it was one way of showing diminution in the value of the land due to the taking. In the instant case the construction of the abutments of a bridge over a navigable river interfered with the uses of a wharf where plaintiff conducted a coal business. *Wellington v. City of Cambridge*, 220 Mass. 312.

they cannot recover on the basis of the value of the water, but on the basis of the difference in value of their property with and without the rights condemned.²²

In Maine it is provided by statute that "when buildings or fences have existed more than twenty years fronting upon any way, street, lane or land appropriated for public use, the bounds of which cannot be made certain by any records or monuments, such buildings or fences shall be deemed the true bounds thereof." In ascertaining the quantity of land taken by a city when it orders such a building moved back from its location the measurement will be commenced on a line with the side of the main building, and not on a line with the cornice on its gable end.²³ But in Massachusetts it has been held where a deed described one of the boundaries of land as four feet from the side of a building the extremest part, the edge of the eaves, was meant.²⁴ Where both a lot fronting on a street and the street are condemned no part of the latter should be added to the area of the lot because the use of the street had increased the value of the lot, and the award therefor covered the owner's right in the abutting land in the street.²⁵

§ 1075. **Same subject; value for condemnor's purpose.** The general rule that the value of property taken is not to be based upon its adaptability for the purpose for which it is desired is not uniformly adhered to, and seems to have been departed from in California, notwithstanding earlier cases to the contrary.²⁶ The property in question had no general market value,—a ground upon which the case may, perhaps, be distinguished—but was valuable in connection with the adjoining land of the condemning party for reservoir purposes. Its worth for such purposes was held to be the measure of its value.²⁷ In a sub-

²² *Syracuse v. Stacey*, 169 N. Y. 231.

²³ *Farnsworth v. Rockland*, 83 Me. 508.

²⁴ *Millett v. Fowle*, 8 Cush. 150.

²⁵ *In re Condemnation of Land*, 19 R. I. 382.

²⁶ *Gilmer v. Lime Point*, 19 Cal. 47; *Central Pac. R. Co. v. Pearson*, 35 id. 247.

²⁷ *Roberts v. Scurvin D. Co.*, 22 Colo. App. 120; *San Diego L. & T. Co. v. Neale*, 78 Cal. 63, 3 L.R.A. 83, approved in *Seattle & M R. Co. v. Murphine*, 4 Wash. 448. See § 1077 and note; *Brown v. Power Co.*, 140 N. C. 333, 3 L.R.A.(N.S.) 912.

The extent of the defendant's ownership of local lands may be shown if it affects the value of the

sequent case a highway was laid through land on which the owner had constructed a private road. The trial court excluded all evidence concerning the value of such road, and directed the jury to appraise the land as though no road was upon it. This was properly enough held erroneous; but the appellate court went so far as to make the value of the road to the condemning party the measure of compensation. "If a man had constructed a bridge across a stream on his own land and for his private use, and if the county should lay out a highway to cross on that bridge it would scarcely be contended that the county could condemn the bridge for public use without paying its reasonable value. We do not see that there is any distinction in principle between the bridge in the case supposed and the defendant's graded road in this case. The grade is there. It must have cost something and is no doubt of some value. The county proposed to take it and use it as a part of the highway. If its existence will make the construction of the highway any less expensive the county will get the benefit and ought to pay the value. The fact that defendant will have a public way in place of his private road is no answer to this proposition. In so far as the highway is a benefit to him he is chargeable, and has been charged, with the value of the benefit. If he contributed to the construction of the road an improvement in the shape of a mile of more of grading he is entitled to the value of that improvement."²⁸ A more recent case recognizes the rule that the present market value of land—the price obtainable for it after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property—is the measure of damages, and not its value in use to the owner or to the party seeking to condemn it. "The peculiar fitness of land for particular purposes is an element in estimating its

land in question. *Pullman Co. v. Chicago*, 224 Ill. 248.

²⁸ *Colusa County v. Hudson*, 85 Cal. 633. Compare *Scurvin Ditch Co. v. Roberts*, 58 Colo. 533, holding that where an owner of land sought to be taken for irrigation purposes has constructed thereon a ditch for

such purposes, the measure of damages is the value of the land as enhanced by the presence of the ditch, but such enhancement is not to be measured by the cost of construction of the ditch or the reasonable cost of its reproduction.

value which may be shown, and, when it appears, forms a factor in solving the problem of market value.”²⁹ And in a later case it is said that there is nothing in the Neale case indicating a different rule.³⁰ In Massachusetts and Idaho if the general market value of land cannot be ascertained its value for the specific use for which it is desired may be shown.³¹ In Iowa, too, such value may be proved without regard to the absence of market value, and it may be shown what line of business had been conducted upon the land for a long time.³² A majority of the judges of the Pennsylvania superior court have ruled that on the taking of a private sewer damages may be awarded on the theory that the materials of which the sewer was composed were appropriated, and that the damages might be assessed on the basis of their cost less the benefits accruing to the property in which the sewer was laid by reason of the appropriation.³³ While the value of the property to the party who desires it is not the measure of the owner’s right,³⁴ the

²⁹ *Santa Ana v. Harlin*, 99 Cal 538, citing *San Diego L. & T. Co. v. Neale*, *supra*, and *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528. *Sacramento S. R. Co. v. Heilbron*, 156 Cal. 408, is to the same effect as the principal case.

The adaptability of the property for the uses for which it is taken may be considered only where such adaptability arises from some intrinsic quality of the land, but such adaptability is not shown by the mere fact that the land taken for a railroad station is within the lines of a railroad location. *New York Cent. & H. River R. Co. v. Mills*, 160 App. Div. (N. Y.) 6.

³⁰ *Kishlar v. Southern Pac. R. Co.*, 134 Cal. 636.

³¹ *Portneuf-M. Valley I. Co. v. Portneuf I. Co.*, 19 Idaho 483; *Idaho-W. R. Co. v. Columbia Conference, etc.*, 20 Idaho 568.

“It is only in those rare instances, when property is of such a nature

or so situated or improved that its real value for actual use cannot be ascertained by reference to market value, that the standard of special value may be resorted to.” *Smith v. Commonwealth*, 210 Mass. 259, and cases cited.

³² *Ranck v. Cedar Rapids*, 134 Iowa 563. See *Louisiana R. & N. Co. v. Sarpy*, 125 La. 388; *Orleans & J. R. Co. v. Jefferson, etc. R. Co.*, 51 La. Ann. 1605, and local cases cited.

³³ *Hays v. South Easton Borough*, 10 Pa. Super. Ct. 390.

³⁴ *Lambert v. Giffin*, 257 Ill. 152; *Atlantic C. L. R. Co. v. Postal Tel. C. Co.*, 120 Ga. 268; *Calor O. & G. Co. v. Franzell*, 128 Ky. 715, 36 L.R.A.(N.S.) 456; *Salt Lake City v. East Jordan I. Co.*, 40 Utah 126; *Tanner v. Provo Bench C. & I. Co.*, 40 Utah 105; *Lawton R. T. R. Co. v. Lawton*, 31 Okla. 458; *Lehigh C. Co. v. Wilkes-Barre & E. R. Co.*, 187 Pa. 145.

latter is entitled to recover the sum it would have brought him, though that was increased by any special value it had for any cause.³⁵ The view of the California court in the reservoir case is in direct issue with a recent Tennessee ruling,³⁶ cases in New York,³⁷ Pennsylvania,³⁸ Maine,³⁹ Kentucky,⁴⁰ Illinois and one of the federal courts.⁴¹ No account can be taken of the value of land with an improvement upon it if that cannot be made

³⁵ *Burger v. State Female Normal School*, 114 Va. 491; *Hercules I. Works v. Elgin, etc. R. Co.*, 141 Ill. 491; *Cahill v. Norwood Park*, 149 Ill. 156; *Snodgrass v. Chicago*, 152 Ill. 600; *In re New York, etc. R. Co.*, 27 Hun 116; *Matter of Gilroy*, 85 Hun 424; *Matter of Daly*, 72 App. Div. (N. Y.) 394. See *In re Boston, etc. R. Co.*, 22 Hun 176.

³⁶ *Alloway v. Nashville*, 88 Tenn. 510, 8 L.R.A. 123; *McKinney v. Nashville*, 102 Tenn. 131. See *Watson v. Milwaukee & M. R. Co.*, 57 Wis. 332; *Lallin v. Chicago, etc. R. Co.*, 33 Fed. 415; *Goodwine v. Evans*, 134 Ind. 262; *Siedler v. Seely*, 8 Colo. App. 499.

³⁷ *In re New York, etc. R. Co.*, 151 App. Div. (N. Y.) 50; *In re Boston, etc. R. Co.*, 22 Hun 176; *Matter of Daly, supra*; *Brainerd v. State*, 74 N. Y. Misc. 100; *Black River & M. R. Co. v. Barnard*, 9 Hun 104 (the purchaser of land from a railroad company which had done work upon it is not entitled to compensation for such work on its subsequent condemnation by another such company; the question was as to its value to him).

In re New York, etc. R. Co., 27 Hun 116, the land was of trivial value for agricultural purposes, and was not held or used therefor; by reason of its shape it was only valuable for a road or way, and was obtained and held for that purpose. It was proper to show the purpose

and use for which it was held and its market value therefor. It was conceded that its value to the petitioner by reason of the economy of its adaptation to its uses was not the measure of value.

"It is only when it is shown that the chances or probability of a sale for some special use has affected the price which the property would bring in the market that its availability can be considered in determining the market value." *In re Simmons*, 130 App. Div. (N. Y.) 356.

³⁸ *Chambersburg & B. T. Road*, 20 Pa. Super. Ct. 173; *Lehigh C. Co. v. Wilkes-Barre & E. R. Co.*, 187 Pa. 145 (the basis is what the property would have produced to the owner, not what it might be worth to the defendant taking it).

³⁹ *Kennebec W. Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856.

⁴⁰ *Weiss v. Commissioners*, 152 Ky. 552.

⁴¹ *Chicago, etc. R. Co. v. Reisch*, 247 Ill. 350; *United States v. Honolulu P. Co.*, 58 C. C. A. 279, 122 Fed. 581; *Five Tracts of Land in Cumberland Tp.*, 41 C. C. A. 580, 101 Fed. 661.

There cannot be a recovery on the basis of the value for the special use unless the right to make such use of the land is appurtenant to it and not subject to the control of the state. *Grays Harbor B. Co. v. Lownsdale*, 54 Wash. 83.

without damaging the land of others.⁴² In a few other cases than those referred to the value of land taken has been estimated with reference to the use for which it was condemned.⁴³ But there are cogent reasons in opposition to this theory. Bellinger, J., said, in considering such a claim: If, in condemning land for a bridge site its "availability" as such site is a measure of value to be paid the owner,⁴⁴ there is involved a consideration of the importance of the particular place to the intended use. In other words, the availability of the site is measured by the importance of the use, and in a matter of the greatest public concern a value so measured may be incalculable, and so the supreme necessity of the country to build defenses against its enemies becomes a measure of value to be paid the owner whose land is taken for that purpose. The claim that the extent of the private interest to be taken is to include, in addition to all the uses available to the owner, the value, if that is possible of ascertainment, of the public interest to be served, is, in my opinion, without equity and against public policy. * * *

The owner cannot avail himself of the adaptability of these lands to a boat-railway line to enhance his recovery. The character and magnitude of such an undertaking, as a practical matter, takes it out of the field of private enterprise, if it is one in which such enterprise is authorized by law to engage. It is necessarily, therefore, a great public work, and must, so far as the question under consideration is concerned, be assumed to be within the exclusive province of the government. The owner of the lands condemned is wholly precluded by these conditions from the use which the government seeks to make of

⁴² *Burke v. Sanitary Dist. of Chicago*, 152 Ill. 125; *In re Simmons*, *supra*.

Where the value of the land in question as a mill site depended largely upon whether it was practicable to flow the lands of others, it was proper to hear evidence as to their value. It was proper to tell the jury that such lands could not be flowed without paying damages.

Fales v. Easthampton, 162 Mass. 422.

⁴³ *Young v. Harrison*, 17 Ga. 30; *Snouffer v. Chicago, etc. R. Co.*, 105 Iowa 681; *Ranck v. Cedar Rapids*, 134 Iowa 563. See *Columbia & C. R. B. & R. Co. v. Hutchinson*, 56 Wash. 323.

⁴⁴ Referring to *Young v. Harrison*, *supra*.

them. That use is in no way available to him. It is not a property right in him, and adds nothing to the value of which his lands are possessed, or to the advantages of which he will be deprived by the proposed appropriation. He is entitled to the full value of his land considered with reference to all the uses, present and prospective, which he can or has the right to make of it; but the necessity of the government cannot be made a measure of his compensation.⁴⁵

If the owner of land taken seeks to recover its value for a special use he cannot also recover such sum as the testimony showed the taking had damaged the remainder of his land. By claiming compensation on the basis of the value of the land for the special use, the owner sets apart the tract as to which he makes such claim from the remainder of his land by devoting it to a purpose distinct from and foreign to that for which the remainder is used.⁴⁶ In England the adaptability of land for

⁴⁵ *United States v. Seufert Bros. Co.*, 78 Fed. 520; *United States v. Taffe*, id. 524; *Sargent v. Merrimac*, 196 Mass. 171, 11 L.R.A.(N.S.) 996. See *Burger v. State Female Normal School*, 114 Va. 491.

Such a value is termed a "strategic value" by Lurton, J. in *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 L. ed. 1063, and defined to be a value which "might be realized * * * by the necessities of one person buying from another free to sell or refuse, as the price suited." These remarks are quoted with approval in *Louisiana Ry. & Nav. Co. v. Baton Rouge Brickyard*, 136 La. 833; *Yazoo & M. Val. R. Co. v. Teissier*, 134 La. 958. All three cases exclude such a value in fixing the amount of compensation for the taking.

⁴⁶ *Cameron v. Chicago, etc. R. Co.*, 51 Minn. 153. It was said by Collins, J.: If the land under consideration was of greater value as a gravel pit, or, to illustrate, for an elevator or hotel site, than it was

for agricultural purposes, the owner could so insist when the railway company attempted its appropriation. But this increased value attached solely because the tract was adapted to and capable of separate and independent use, and this use contemplated and required its segregation from the balance of the farm—its appropriation to an extraneous, more desirable, and hence more valuable purpose. If by using the eight and a half acres as a gravel pit, or as a building site—other than for farm buildings—its value could be augmented, the respondent's compensation would be correspondingly increased, because it was his right to have his damages assessed on that basis; but he cannot be permitted to treat it as a separate and disconnected tract of land exclusively devoted to a special use and purpose distinct from farming, and at the same time regard it as part of his farm—as still connected with his adjacent farming lands.

the purpose for which it is taken may be considered though it could not be used therefor by others than the party seeking it without legislative sanction; in considering its value in consequence of its coming into the market on account of such adaptability the contingency of need for it is the basis for the estimation of damages, and not the value it has because of the realized possibility.⁴⁷

§ 1076. **Compensation for wrong-doer's improvements.** The numerous exceptions to the common-law rule that everything attached to the realty by one who had no right to the latter became part of it have been extended in recent times upon grounds of public policy so far as railroad companies are concerned. An entry by them in advance of the acquirement of the right to make it is not unlawful in the same sense as such an entry by an individual or a corporation which is not invested with the power of eminent domain.⁴⁸ Hence, if such a company enters upon land with the consent, express or implied from long acquiescence, of the life tenant or the person who appears to own it and erects a depot or other structure thereon without injuring the inheritance, the remainder-man or legal owner cannot, in a subsequently instituted proceeding for the condemnation of the property, recover the value of such improvements.⁴⁹ This is the rule in many states where the entry is made

Assessing the damages by taking the value of the entire tract as a gravel pit, which of course assumed its separation from the remainder of respondent's land, and also assessing the damages by reason of its separation, was to some extent duplicating the damages.

⁴⁷ In re Lucas & C. G. & W. Board, [1909] 1 K. B. 16 (Court of Appeal); In Gough & A., etc. W. Board, [1904] 1 K. B. 417.

⁴⁸ Jones v. New Orleans & S. R. Co., 70 Ala. 227; Justice v. Nesquehoning Valley R. Co., 87 Pa. 28; Oregon R. & N. Co. v. Mosier, 14 Ore. 519, 58 Am. Rep. 321.

⁴⁹ Searl v. School Dist., *infra*;

Bear Gulch P. M. Co. v. Walsh, 198 Fed. 351; California S. R. Co. v. Southern Pac. R. Co., 67 Cal. 59; Chicago, etc. R. Co. v. Vaughn, 206 Ill. 234; McClarren v. Jefferson School Tp., 169 Ind. 140, 13 L.R.A. (N.S.) 417, citing the text and overruling Graham v. Connersville, etc. R. Co., 36 Ind. 143; Omaha B. & T. R. Co. v. Whitney, 68 Neb. 389; Chicago & A. R. Co. v. Goodwin, 111 Ill. 273, 53 Am. Rep. 622; St. Johnsbury, etc. R. Co. v. Willard, 61 Vt. 134, 15 Am. St. 886, 21 L.R.A. 528; Ellis v. Rock Island, etc. R. Co., 125 Ill. 82; Cohen v. St. Louis, etc. R. Co., 34 Kan. 158, 55 Am. Rep. 242; St. Louis, etc.

without license.⁵⁰ If the land-owner is authorized to institute proceedings, by doing so he ratifies the selection made and elects to take pay for the land used and for the damage done to that not taken. The value and damages are assessable as of the time possession was first taken.⁵¹ These principles have no application where there is no authority to condemn the lands entered upon and improved,⁵² and are not recognized in New York⁵³ or

R. Co. v. Nyce, 61 Kan. 394, 48 L.R.A. 241, overruling Briggs v. Chicago, etc. R. Co., 56 Kan. 526; Omaha B. & T. R. Co. v. Whitney, 68 Neb. 389.

The rule stated in the text has been applied to a house erected by the president of a railroad company on land leased by the company. The house was provided for the benefit of employees of the company and was not used for distinctively railroad purposes. The question arose between the lessor and the purchaser at a foreclosure sale of the property of the railroad. Kansas, etc. R. Co. v. Second Street, etc. Co., *infra*.

⁵⁰ *Id.*; Newgass v. Railway Co., 54 Ark. 140; Searl v. School Dist., 133 U. S. 553, 33 L. ed. 740; Jacksonville, etc. R. Co. v. Adams, 28 Fla. 631, 14 L.R.A. 631; Greve v. First Division St. Paul & P. R. Co., 26 Minn. 66; Morgan's App., 39 Mich. 675; Toledo, etc. R. Co. v. Dunlap, 47 id. 456; Lyon v. Green Bay R. Co., 42 Wis. 538; Justice v. Nesquehoning Valley R. Co., 87 Pa. 28; California & P. R. Co. v. Armstrong, 46 Cal. 85; Louisville, etc. R. Co. v. Dickson, 63 Miss. 380, 56 Am. Rep. 809; Jones v. New Orleans & S. R. Co., 70 Ala. 227; Oregon R. & N. Co. v. Mosier, 14 Ore. 519, 58 Am. Rep. 321; Daniels v. C. I. & N. R. Co., 41 Iowa 52; Illinois Cent. R. Co. v. Le Blanc, 74 Miss. 650; International B. & T.

Co. v. McLane, 8 Tex. Civ. App. 665; Bellingham Bay, etc. R. Co. v. Strand, 14 Wash. 144; Seattle & M. R. Co. v. Corbett, 22 Wash. 189; Cowan v. Southern R. Co., 118 Ala. 554; Calumet River R. Co. v. Brown, 136 Ill. 322, 12 L.R.A. 84. See United States v. Land in Monterey County, 47 Cal. 515, which is opposed by California & P. R. Co. v. Armstrong, 46 id. 85, the cases above cited and others referred to in § 1083, unless it be distinguished on the ground that the entry was not made in good faith. See San Francisco, etc. R. Co. v. Taylor, 86 Cal. 246. See also, Kansas City Southern R. Co. v. Second Street Imp. Co., 256 Mo. 386 (quoting the text).

⁵¹ Cohen v. St. Louis, etc. R. Co., 34 Kan. 158, 55 Am. Rep. 242; Cochran v. Missouri, etc. R. Co., 94 Mo. App. 469.

⁵² Price v. Weehawken F. Co., 31 N. J. Eq. 31; Aldridge v. Board of Education, 15 Okla. 354.

⁵³ *In re* New York, etc. R. Co., 37 Hun 317, and cases cited; St. Johnsville v. Smith, 184 N. Y. 341, 5 L.R.A.(N.S.) 922; *In re* White Plains, 124 App. Div. (N. Y.) 1 (as to improvements made after the revocation of a parol license by a sale of the land; as to those made before the sale the trespasser was entitled to notice of the revocation and to a reasonable time to remove them).

The recovery for improvements

Massachusetts, or Missouri if the entry was tortious.⁵⁴ Improvements tortiously made are not to be valued according to their cost or the value of their use to the wrong-doer, but by the enhancement of the value of the land.⁵⁵

In a Virginia case where a railroad company unauthorizedly made improvements on land, became insolvent and its franchise and property were purchased by another company the landowner recovered the value of the land, with the improvements, from the purchaser.⁵⁶ The general rule applicable to railroad companies has been said to be equally applicable to all bodies vested with the right to condemn land.⁵⁷ There are cases which state the rule less broadly. In a case in which the trustees of a school district erected a school house upon land of which they did not know the owner, believing he would consent to such use of it, and purposing, if he did not, to condemn the land, the owner was not entitled to recover the value of the building. The opinion lays stress on the fact that there was no element of wilfulness manifested.⁵⁸ In the Nebraska case cited the

put on land by a trespasser, though he be clothed with the power of eminent domain, is neither their cost nor the value of their use to the trespasser, but is measured by the enhancement of the value of the land. *St. Johnsville v. Smith*, 184 N. Y. 341, 5 L.R.A.(N.S.) 922.

⁵⁴ *Meriam v. Brown*, 128 Mass. 391; *Hunt v. Missouri Pac. R. Co.*, 76 Mo. 115. See *Perley v. City of Cambridge*, 220 Mass. 507, L.R.A. 1915E 432, where a city trespassed on a private way and constructed therein, beneath the surface, a cement water conduit, and later acquired an easement therefor. In fixing the value of the land for the purpose of determining the amount of depreciation caused by the easement, the owner was held entitled to have the jury consider any enhancement of value which the presence of the conduit gave to his land.

⁵⁵ *St. Johnsville v. Smith*, *supra*.

⁵⁶ *Richmond & M. R. Co. v. Humphreys*, 90 Va. 425; *Newport News, etc. R. Co. v. Lake*, 105 Va. 311. See also *Virginia & S. W. R. Co. v. Nickels*, 116 Va. 792, where the same rule was applied. It was said that *prima facie* it made no difference, as far as the general application of the rule was concerned, that the trespasser was a railroad company, as such fact gave it no higher position. It was held that if the entry is made under circumstances which took the case out of the operation of the general rule, the burden was on the railroad company to show such circumstances.

⁵⁷ *International B. & T. Co. v. McLane*, 8 Tex. Civ. App. 665.

⁵⁸ *Chase v. Jemmett*, 8 Utah 231, 16 L.R.A. 805; *Burns v. School Dist.*, 61 Neb. 351.

doctrine was applied without the limitations suggested in the Utah case. A case in the supreme court of the United States proceeds on the same view.⁵⁹ The right to obtain the land without paying for the improvements put upon it exists in the federal government.⁶⁰

§ 1077. Compensation affected by title and nature of interest condemned, and purpose of use; taking railroad property for street and telegraph uses; proof of value. If land is held under restrictions in the deed as to the use which may be made of it or the character of the improvements which may be put upon it or as to the length of the term, or is subject to an easement these matters may affect the measure of recovery.⁶¹ If the owner retains substantial rights in the land condemned his compensation is to be measured with reference to their value.⁶² Though the right to substantial damages attaches to the taking of the fee in a street, there may not be a recovery of consequential damages therefor.⁶³ A railroad company is not obliged

⁵⁹ *Searl v. School Dist.*, 133 U. S. 553, 33 L. ed. 740.

⁶⁰ *United States v. Smith*, 110 Fed. 338.

⁶¹ *In re New York, etc. R. Co.*, 151 App. Div. (N. Y.) 50; *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 54 L. ed. 725, aff'g 195 Mass. 338; *Sheehan v. Fall River*, 187 Mass. 356; *New Bern v. Wadsworth*, 151 N. C. 309; *Creighton v. Board of Water Com'rs*, 143 N. O. 171; *Taber v. New York, etc. R. Co.*, 28 R. I. 269; *Jeffery v. Chicago & M. E. R. Co.*, 138 Wis. 1; *Allen v. Boston*, 137 Mass. 319; *Syracuse v. Stacey*, 169 N. Y. 231 (rights in water); § 1074.

If the restriction does not affect the value of the property the owner is entitled to its full value. *Chicago, etc. R. Co. v. Catholic Bishop*, 119 Ill. 525.

⁶² *Drainage Com'rs v. Knox*, 237 Ill. 148.

⁶³ *In re Opening of Tremont Ave.*, 71 N. Y. Misc. 480.

Where only an easement is taken for street purposes, the measure of damages is the value of the fee as diminished by the burden of the easement, and not the value of the fee. *Custer Tp. v. Dawson*, 178 Mich. 367.

The fee of land subject to private easements of abutting owners taken for a street was assessed at a nominal value in *In re Grant Boulevard*, 212 N. Y. 538.

Deeds conveying lots of land abutting on a street, described with reference to the street as widened by a proposed improvement for which proceedings have been commenced but not completed so as to vest title in the city to the land taken, will convey such an implied easement in the fee of the land proposed to be taken, so far as it abuts the property conveyed, as will prevent the

to take the entire width called for by its petition, and may ask for the adjustment of damages on a narrower strip than that therein described if the whole width is not needed.⁶⁴ A condemning party may bind itself to take less than the whole interest in an estate,⁶⁵ and to lessen the damages which might result to the owner of land adjoining that taken.⁶⁶ An extension of the authority of a railroad company as to the use it may make of a street, followed by an increase of its use, as by laying two tracks where but one was originally authorized, is ground for awarding additional compensation.⁶⁷

Property taken for public use is subject to be again condemned for a different one if the right is conferred by express grant or necessary implication, but not otherwise.⁶⁸ A railroad

vendor from recovering more than nominal damages in the condemnation proceedings. But as to other land still owned by the vendor when the city obtained title, no easement passes, and the owner may recover substantial damages for the land taken. In *re Sedgwick & Bailey Aves.*, 213 N. Y. 438 (reversing in part 162 App. Div. (N. Y.) 236).

⁶⁴ *Peoria, etc. R. Co. v. Bryant*, 57 Ill. 473. See *Schaible v. L. S. & M. S. R. Co.*, 10 Ohio Dec. 334; *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282.

⁶⁵ *Tyler v. Hudson*, 147 Mass. 609.

⁶⁶ *St. Louis, etc. R. Co. v. Clark*, 121 Mo. 169, 26 L.R.A. 751. See § 1066.

⁶⁷ *Henry v. Mason City, etc. R. Co.*, 140 Iowa 201; *Rock Island & P. R. Co. v. Johnson*, 204 Ill. 488; *South & N. A. R. Co. v. Davis*, 185 Ala. 193; *Anhalt v. Waterloo, C. F. & N. R. Co.*, 166 Iowa 479; *Rothschild v. Interborough Rapid Transit Co.*, 162 App. Div. (N. Y.) 532; *Harrold Bros. v. City of Americus*, 142 Ga. 686.

The use of a street by a street railway company for the purpose of

passenger traffic is not such an additional servitude on the fee of the street as will entitle the landowner to compensation, but it is otherwise where the use is for freight traffic, and for such the owner can recover. The reason given for the decision is that the use for passenger traffic is not inconsistent with and is incidental to the public easement in the street, and is supposed to have been compensated for in the original taking, while the use for freight traffic is not contemplated or compensated for in the taking. *Anhalt v. Waterloo, C. F. & N. R. Co.*, *supra*.

The establishment of a power line by a street railroad company in front of plaintiff's land, on a street where the company maintains no tracks, is not an additional servitude on the fee of the street entitling plaintiff to compensation, the company having valid charter rights to maintain tracks on other streets. *Brandt v. Spokane & I. E. R. Co.*, 78 Wash. 214.

⁶⁸ *Western U. Tel. Co. v. Pennsylvania R. Co.*, 59 C. C. A. 113, 123 Fed. 33; *Southern R. Co. v.*

may be crossed by a highway and the easement for such crossing may be condemned by proceedings against the railway company, and the latter is entitled, in some states, to recover damages for such taking, subject, however, to its use for a railroad, for the expense of erecting and maintaining signs required by law at the crossing, for making and maintaining cattle-guards if necessary, and for flooring the crossing and keeping the planks in repair;⁶⁹ and if a street or drain is opened under the tracks the company must be compensated for the cost of a bridge or a viaduct to carry its trains over the same.⁷⁰ It is also to be

Memphis, 126 Tenn. 267, 41 L.R.A. (N.S.) 828.

Pipes, sewers and subways, laid beneath the surface of a street, do not constitute such an additional servitude on the land as to enable an abutter to recover compensation therefor. *MacGinnis v. Marlborough-Hudson Gas Co.*, 220 Mass. 575, L.R.A. 1915D 1080.

Where a water company obtains from a city the right to maintain its pipes under the surface of a street, the right thus granted, though in the nature of an easement and property right, is none the less subject to make another and further use of the street in addition to that to which the street was devoted when plaintiff's right was granted, hence if such use compels the water company to relocate its pipes, and to incur expense thereby, there is no taking which entitles the water company to compensation. *Moffat v. City & County of Denver*, 57 Colo. 473.

⁶⁹ *Boston & A. R. Co. v. Cambridge*, 159 Mass. 283; *Old Colony, etc. R. Co. v. Plymouth*, 14 Gray 155; *Commissioners v. Michigan Cent. R. Co.*, 90 Mich. 385; *Same v. Chicago, etc. R. Co.*, 91 Mich. 291; *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 Mich. 641; *Chi-*

cago, etc. R. Co. v. Hough, 61 Mich. 507; *Central R. Co. v. Bayonne*, 51 N. J. L. 428; *Kansas Cent. R. Co. v. Commissioners*, 45 Kan. 716. See *Kansas City v. Kansas City B. R. Co.*, 102 Mo. 633, 10 L.R.A. 851; *Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329.

Where it was sought to open several streets across the railroad's right of way and land owned and used by the company in operating its road, the damages were the value of the land taken for each street; the burden imposed upon the company by the opening of each street under the statutes and the actual damages resulting to the remainder of the railroad yard by reason of the interference with its use by the opening of each street, without reference to the opening of any other street. *Toledo & O. Cent. R. Co. v. Fostoria*, 7 Ohio C. C. 293.

⁷⁰ *Pere Marquette R. Co. v. Weillanau*, 157 Mich. 699; *Plymouth v. Pere Marquette R. Co.*, 139 Mich. 347; *Cincinnati, etc. R. Co. v. Troy*, 68 Ohio St. 510.

The expense of building a bridge to carry railroad tracks over a canal cut through an embankment cannot be recovered. *Chicago, etc. R. Co. v. Minneapolis*, 115 Minn. 460. See *infra* this section.

compensated for any depreciation of the value of the land for the use to which it had been put.⁷¹ The expense of removing structures which must be removed may be recovered,⁷² and also the cost of adapting the tracks to the altered conditions.⁷³ In Michigan the expense of maintaining a flagman, gates or cattle guards may be recovered; it is otherwise as to the expense caused by cutting trains to avoid the obstruction of a crossing forbidden by statute.⁷⁴ A general statement of the measure of recovery is the difference in the value to the railroad company between the exclusive and joint use of the right of way, excluding such expenses as may be incurred in obedience to the police laws, and on the assumption that the street which is to cross the track will be properly constructed.⁷⁵ In Indiana, Kentucky, Mississippi, Missouri, Nebraska, North Dakota, Minnesota, Ohio and Illinois and some other states there cannot be a recovery of compensation for providing and maintaining cattle-guards and sign-boards at a crossing made by laying out a new street. The duty of making and maintaining crossings is devolved upon railroad companies for the protection of the public in the exercise of the police power, and it is competent to extend it to crossings which may become necessary by events occurring after a railroad is built. It is otherwise in some states, but not in Illinois, as to the planking of the roadway between the tracks; that is an incident of the new highway, and, independently of statute, the municipality laying it would find it necessary to make that con-

If a railroad company has been forced to accept a steel bridge instead of a solid earth right of way upon which to place its tracks the cost of maintaining and renewing the bridge is an element of the compensation to be made. *People v. Sohmer*, 152 App. Div. (N. Y.) 585.

A gas company may not recover the expense of removing its pipes from a street because of a change in its grade. *Seranton G. & W. Co. v. Seranton*, 214 Pa. 586, 6 L.R.A. (N.S.) 1033.

⁷¹ *Commissioners v. Chicago, etc. R. Co.*, *supra*; *Paris v. Cairo, etc. R. Co.*, 248 Ill. 213; *Grafton v. St. Paul, etc. R. Co.*, 16 N. D. 313, 22 L.R.A. (N.S.) 1; *Boston & A. R. Co. v. Cambridge*, *supra*.

⁷² *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82.

⁷³ *Id.*; *Paris v. Cairo, etc. R. Co.*, 248 Ill. 213.

⁷⁴ *Plymouth v. R. Co.*, *supra*.

⁷⁵ *Louisville & N. R. Co. v. Louisville*, 131 Ky. 108, 24 L.R.A. (N.S.) 1213.

venience for travelers.⁷⁶ The railroad company's right to this compensation is not affected by the fact that its business will be increased by the opening of the new highway.⁷⁷ In Massachusetts the increased expense of ringing the bell and operating gates may not be regarded.⁷⁸

The supreme court of the United States, in a case taken to it from Illinois, has affirmed the view of the local court to the effect that the compensation due a railroad company because of the opening of a street across its tracks—the land not being taken, and the railroad not being prevented from using it for its ordinary purposes, and being interfered with only to the

⁷⁶ New York, etc. R. Co. v. Rhodes 171 Ind. 521, 24 L.R.A. (N.S.) 1225; Kansas City v. Kansas City B. R. Co., 187 Mo. 146; Missouri Pac. R. Co. v. Cass County, 76 Neb. 396; Grafton v. R. Co., Louisville & N. R. Co. v. Louisville, *supra*; Lake Shore, etc. R. Co. v. Chicago, 148 Ill. 509; State v. District Court, 42 Minn. 247, 7 L.R.A. 121; State v. Shardlow, 43 Minn. 524; Railway Co. v. Sharpe, 38 Ohio St. 150; Chicago & N. R. Co. v. Chicago, 140 Ill. 309; Chicago & A. R. Co. v. Pontiac, 169 Ill. 155. See Boston & A. R. Co. v. Greenbush, 5 Lans. 461; Portland & R. R. Co. v. Deering, 78 Me. 61, 57 Am. Rep. 784; Illinois Cent. R. Co. v. State, 94 Miss. 759.

⁷⁷ State v. Shardlow, *supra*.

⁷⁸ "In one sense the cost of operating the gates, like that of ringing the bell for crossing, or of keeping a flagman to give notice of the approach of trains, is an expense arising from or incident to maintaining the way across the railroad; and it might, perhaps, without much strain under the principles of the common law and under the language of St. 1857, c. 287, and of its re-enactments, be considered as a fair element of damages. So

also might the increased expense of ringing the bell, which was held not to be an element of damages in both of the former decisions; and so might the expense of maintaining a flagman, which was held inadmissible in the latter of them, both because the order to maintain the flagman might be changed, and because it was made since the time of the location, by relation to which the damages must be assessed. But all these things are in a fair sense part of the operation of the railroad, and are more properly chargeable to ordinary operating expenses than is the cost of erecting and keeping in repair the permanent structures and appliances at the crossing." Boston & A. R. Co. v. Cambridge, *supra*.

In another Massachusetts case it was held that laying water pipes in a highway under a railroad's grade crossing was not such a taking as entitled the railroad to compensation. The reason given for the decision was that the fee of the highway, though owned by the railroad, was subject to highway uses, of which laying water pipes was one. New York, N. H. & H. R. Co. v. Cohasset Water Co., 216 Mass. 291.

extent that its exclusive enjoyment for the purposes of railroad tracks was diminished to the extent of the use of the crossing as a street—is the amount of decrease in the value of its use for railroad purposes caused by its use for street purposes, the latter use being exercised jointly with the company for its purposes.⁷⁹ The right of the railroad to sell the land was too remote a contingency to affect its recovery. The city was not bound to pay the expenses the company would necessarily incur in the construction of gates, keeping flagman, planking the crossing, filling between the rails, etc.; nor was evidence that these would be necessary admissible to show the compensation due. These expenditures were made necessary under the police power of the state. Uncompensated obedience to a regulation enacted for the public safety under that power is not a taking or damaging of private property without just compensation, or of property affected with a public interest.⁸⁰ Substantially the same doctrine has been announced by the New Jersey court of errors and appeals, which holds that nominal damages will satisfy the claim of a railroad for compensation for crossing its tracks at grade by a highway; that if structural changes are made necessary, such as the removal of buildings or changes in the tracks, compensation should be made therefor; that no allowance should be made for erecting or maintaining gates, etc., the employment of a flagman, or for planking between the rails.⁸¹ In Wisconsin a railroad company whose track is crossed by a highway may recover for the resulting diminished value of its easement in the land and the cost of making such structural

⁷⁹ This is the rule applied in several cases in Illinois, where no other elements of damage were present. *Chicago & N. R. Co. v. Chicago*, 140 Ill. 309; *Chicago, etc. R. Co. v. Chicago*, 149 Ill. 457; *Illinois Cent. R. Co. v. Commissioners of Highways*, 161 Ill. 247; *Chicago, etc. R. Co. v. Naperville*, 166 Ill. 87; *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155; *Illinois Cent. R. Co. v. Chicago*, 169 Ill. 329; *Same v. Normal*, 175 Ill. 562; *Same v. Lostant*,

167 Ill. 85; *Chicago & N. R. Co. v. Cicero*, 157 Ill. 48.

⁸⁰ *Chicago, etc. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, aff'g 149 Ill. 457; *Chicago, etc. R. Co. v. Morrison*, 195 Ill. 271; *Paris v. Cairo, etc. R. Co.*, 248 Ill. 213.

⁸¹ *Morris & E. R. Co. v. Orange*, 63 N. J. L. 252, overruling *Paterson & N. R. Co. v. Newark*, 61 N. J. L. 80; *St. Louis S. R. Co. v. Royall*, 75 Ark. 530.

changes in its road-bed and track as become necessary to preserve the track for the old use, except such changes as are required by law under the police power, or the reserved power to amend charters. Such structural changes include planking of the track and maintaining the same, but do not include the removal of the planking from time to time to enable the company to do the necessary tamping and to remove snow and ice from between the rails, the latter being operating expenses and too conjectural to form any basis for compensation. They do not include crossing gates; they are not structural changes in the track, and are not a necessary part of crossing construction. The cost of erecting and maintaining a crossing sign and of constructing and maintaining cattle-guards is not an element of damages because these requirements are imposed under the police power.⁸² If the construction of a public ditch by tiling under the surface of a railroad track will make it necessary for the company to incur expense in supporting its track while the ditch is being made such expense should be considered in awarding compensation.⁸³ A majority of the Court of Appeals of the eighth circuit has refused to permit the recovery of the cost of a new bridge over a public drainage ditch, and has limited the damages to the value of the easement taken.⁸⁴ Compensation is not to be awarded in anticipation of legislative action concerning crossings; if such action shall be taken it will be by virtue of the police power and will not be cause for an award thereof.⁸⁵

The fact that part of the right of way required for a street crossing is occupied by a building the location of which at the place where it is not necessary to its use by the company does not entitle it to compensation based on the market value of the land, in addition to the value of the building and its improvements. In such a case it is proper to consider the damages sustained by the separation of the building from a well, the former

⁸² *Chicago, etc. R. Co. v. Milwaukee*, 97 Wis. 418.

⁸³ *Lake Erie & W. R. Co. v. Commissioners*, 63 Ohio St. 23.

⁸⁴ *Chicago, etc. R. Co. v. Board, Suth. Dam.* Vol. IV.—26.

31 L.R.A.(N.S.) 1117, 104 C. C. A. 573, 182 Fed. 291. See *Same v. Minneapolis*, *supra*.

⁸⁵ *St. Louis, etc. R. Co. v. Fayetteville*, 75 Ark. 534.

being taken and the latter not.⁸⁶ Substantial damages are not due a railroad company because the public use of a street crossing may result in the stoppage or slower movement of trains and increasing the danger of accidents.⁸⁷ Prospective loss of profits to a company as the result of destroying approaches to grain elevators built upon land leased from it, occasioned by the extension of a street across its right of way, cannot be recovered.⁸⁸ If the extension of a street across railroad tracks affects the operations of the company on land not taken so as to increase expenditures in handling and switching cars, making up trains, etc., or prevents the storing of cars on the track proof of the fact is competent on the question of damages.⁸⁹ It is proper, if the opening of a street across the right of way and other premises will render them unavailable for a depot, to which they are peculiarly adapted, and there is no other property available for that purpose, to consider these facts in awarding compensation.⁹⁰ In such a case the value of land within the right of way, but not within the tracks, for the erection and use of such structures, other than tracks, as the railroad company might desire to erect and maintain for its business should be given it, though such land has no market value.⁹¹ But in order that the value of the right of way may be recovered on the basis of its use for special purposes it must be shown it has been put to such use or that there is an immediate intention to devote

⁸⁶ *Illinois Cent. R. Co. v. Normal*, 175 Ill. 562.

⁸⁷ *Chicago & N. R. Co. v. Chicago*, 140 Ill. 309; *Chicago, etc. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 29 L.R.A. 485; *New York, etc. R. Co. v. Rhodes*, 171 Ind. 521, 24 L.R.A.(N.S.) 1225.

⁸⁸ *Illinois Cent. R. Co. v. Lstant*, 167 Ill. 85.

⁸⁹ *Lake Shore, etc. R. Co. v. Chicago*, 151 Ill. 359; *Chicago, etc. R. Co. v. Naperville*, 166 Ill. 87; *Same v. Morrison*, 195 Ill. 271.

⁹⁰ *Chicago & N. R. Co. v. Cicero*, 154 Ill. 656.

⁹¹ *Illinois Cent. R. Co. v. Chicago*, 156 Ill. 98.

A railway company is entitled not only to the value of land taken as land, but also to its value in connection with the uses to which it is being put. If the taking of a switchyard destroys its function as a carrier the compensation must be based upon the value of the use of the yard to the entire road, if it only permanently impairs such function the extent of the impairment must be compensated for. *Southern R. Co. v. Memphis*, 126 Tenn. 267, 41 L.R.A.(N.S.) 828.

it thereto.⁹² A way by user may be shown to exist across a right of way where it is proposed to create a street extension.⁹³

In Maine where a highway is laid across a railroad the compensation for the land taken is to be awarded in view of the use which the company may be reasonably expected to make of it in the near future.⁹⁴ Where a common highway is laid over a turnpike road the owner of the latter will be entitled to recover damages. In apportioning them to the turnpike corporation against several towns the appraisers may take into consideration, along with the distance in each town, the value of the existing road with reference to the cost of construction and state of repair; but not the greater ability of one town to pay, or the greater advantage which its inhabitants would receive from the free highway, and make these matters in part the basis of their apportionment.⁹⁵ In Michigan a railroad company may recover for injury to its track, right of way and franchise occasioned by making a street crossing, in so far as such crossing is the natural, necessary and proximate cause of the injury.⁹⁶ Hence there may be a recovery for the injury sustained because the laying of a street across the tracks renders an adjacent warehouse and the land on which it stands less available and valuable for warehouse purposes.⁹⁷ The expense of keeping a gateman or flagman at a crossing is also an element of damages there.⁹⁸ In Nebraska the lessened expense to the public in grading for the new highway because of the existence of the track measures the recovery.⁹⁹ After an extended examination of the authorities the Georgia court has declared that a railroad company which has laid its tracks across a highway or street must at its own expense made such alteration in its grade as will conform it to the newly-established grade of the

⁹² *Id.*; *Illinois Cent. R. Co. v. Chicago*, 169 Ill. 329.

⁹³ *Chicago T. T. R. Co. v. Chicago*, 217 Ill. 343.

⁹⁴ *Portland & R. R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784.

⁹⁵ *Reed's Petition*, 13 N. H. 381. See *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177.

⁹⁶ *In re First St.*, 66 Mich. 55.

⁹⁷ *Commissioners of Parks v. Chicago, etc. R. Co.*, 91 Mich. 291.

⁹⁸ *Detroit v. Detroit, etc. R. Co.*, 112 Mich. 304.

⁹⁹ *Missouri Pac. R. Co. v. Cass County*, 76 Neb. 396.

highway or street, and that a statute requiring it so to do is valid.¹ The validity of statutes requiring substantially the same thing as to highways laid after the railroad was constructed has been declared.²

In a Kentucky case a railroad company cut through the base of a mountain, destroying a county road laid along the mountain side above the cut, with the result that a large section of the county was cut off from access to the county seat. The right of the county to maintain an action for the damages was sustained. In answering an objection to the damages awarded on the ground that they were excessive the court observed that they might have been prevented at inconsiderable cost on the part of the defendant, and that the cost of any remedy will be largely more than the amount of the verdict.³ On a second appeal it was sought to show by newly-discovered evidence that the road might be restored at much less cost than the amount of the verdict and a new trial was ordered on the theory that such cost would measure the damages.⁴ This view was sustained on a third appeal.⁵

The condemnation will include everything on the land adapted to the proposed public use; thus, if land is taken for a way and has already been used as such, the condemnation includes all things placed, fixed or existing upon it, adapted to its use as a public way, such as gravel, stone or wood paving, plank, flag stones, bridges, culverts or lamp posts and all works erected on or connected with it for use, or rendering its use more safe

¹ *Cleveland v. City Council*, 102 Ga. 233, 43 L.R.A. 638 (*sub nom.* *Cleveland v. Augusta*).

But where a street railroad having a right of way in the center of a street is required to and does raise the level of its tracks to the grade required, it is not liable to an abutter for damages caused thereby. *North Alabama Traction Co. v. Hays*, 184 Ala. 592.

² *Chicago & N. R. Co. v. Chicago*,

140 Ill. 309. See *Chicago, etc. R. Co. v. Chappell*, 124 Mich. 72, holding otherwise where a private drain is made, the statute requiring the railroad company to put in a culvert without compensation.

³ *Louisville & N. R. Co. v. Whitley County Court*, 95 Ky. 215, 44 Am. St. 220.

⁴ S. C., 100 Ky. 413.

⁵ S. C., 20 Ky. L. Rep. 1367.

and beneficial as a way.⁶ Even in the ordinary cases of taking land for the first time for a public way the proprietors have only the right to remove buildings, trees and fences, and generally things not adapted to its use as a way or not required for the supply of materials necessary or useful in making or repairing the way.⁷ If erections upon the land taken are of such a character as to become so incorporated therewith as to be regarded as part of it they should be included in the appraisal.⁸ Steps projecting from the door of a house over land taken for a highway are obstructions thereto and must be removed by the owner of the land, and the expenses are to be included in the assessment of damages occasioned by such taking; so with the eavespouts and bay-windows if they interfere with the public use of the entire limits of the highway.⁹ The regularity of the proceedings by which a town acquired an easement in property is not open to question by one who seeks to condemn it. On its condemnation the town is entitled to be compensated for improvements in the streets, such as sewers and water pipes, but not for material put on the surface of the streets. The taking of part of a system of public works, which the town must restore and maintain, involves an inquiry into the fair cost of restoring it.¹⁰

Where the abutting owner takes title in fee to the center of a street and acquired it without reference to any original dedication which contemplated the future adoption of the street and the vesting of the fee thereof in the public, or in the absence of legislation in force when conveyances were made by former proprietors affecting their rights therein, he has property of value in the street in the degree of control resting in him as to the uses to which the street shall be put, and is entitled to substantial damages for the loss of the fee thereof, which are to be measured by its effect upon the value of his remaining prop-

⁶ *Central B. Co. v. Lowell*, 15 Gray 111.

⁷ *Id.*; *Brown v. Worcester*, 13 Gray 31.

⁸ *Id.*

⁹ *Id.*

¹⁰ *United States v. Nahant*, 82 C. A. 470, 153 Fed. 520; *Nahant v. United States*, 69 L.R.A. 723, 70 C. C. A. 641, 136 Fed. 273.

erty.¹¹ The naked fee in a street, disconnected from abutting property, is presumed to be of merely nominal value.¹²

The compensation due a railroad company for the construction of a telegraph line along its right of way is measurable by the value of the land taken and by the decrease in the value of the use of the right of way for railroad purposes.¹³ If the part sought to be taken is not in actual use and it is shown that the construction of the telegraph line will not materially inter-

¹¹ *Buffalo v. Pratt*, 131 N. Y. 293, 27 Am. St. 592, 15 L.R.A. 413.

¹² *In re Decatur St.*, 133 App. Div. (N. Y.) 321.

Where land taken is so burdened with easements as to destroy its market value, the owner can recover only nominal damages. *Walker v. Mueller*, 160 App. Div. (N. Y.) 704. Where the land taken subject to easements has any market value as burdened therewith, such market value is the measure of damages for its taking. *Richmond v. Thompson's Heirs*, 116 Va. 178.

Where lots are bought in accordance with a recorded plat showing streets and alleys which have never been opened, the lot owners as defendants in condemnation proceedings are entitled to compensation for the lots taken and also their interest in the streets and alleys. *Rawson-Works Lumber Co. v. Richardson*, 26 Idaho 37.

Where the land taken is burdened with a perpetual easement in favor of abutting land, evidence of the physical uses of such easement is competent. *Institution for Savings v. Inhabitants of Brookline*, 220 Mass. 300.

Where the land taken consisted in part of land under water, to which plaintiff derived title under a crown grant which limited the grantee's rights as to the portion under water in favor of the public,

recovery of more than nominal damages for the taking was denied, on the ground that the grant was intended to be subject to public uses. *In re Main Street*, 163 App. Div. (N. Y.) 401.

¹³ *Texas M. R. Co. v. Southwestern Tel. & T. Co.* (Tex. Civ. App.), 57 S. W. 312; *Texas & N. O. R. Co. v. Postal Tel. C. Co.* (Tex. Civ. App.), 52 S. W. 108; *Southwestern Tel. & T. Co. v. Gulf, etc. R. Co.* (Tex. Civ. App.), 52 S. W. 106; *Cleveland, etc. R. Co. v. Ohio Postal Tel. C. Co.*, 68 Ohio 306, 62 L.R.A. 941 (that measure of recovery is not affected because the telegraph company must remove its poles at the instance of the railroad company); *Atlantic C. L. R. Co. v. Postal Tel. C. Co.*, 120 Ga. 268 (the space between the poles is not taken); *Alabama Power Co. v. Keystone Lime Co.*, — Ala. —, 67 So. 833.

Where a railroad company is required by statute to keep its right of way clear of combustible materials, it is proper for the jury to consider, in fixing the depreciation caused by an easement which a telegraph company proposes to take, the question whether such easement will increase the statutory burden of keeping the right of way free of brush, etc. *Postal Tel.-Cable Co. v. Northern Pac. R. Co.*, 128 C. C. A. 350, 211 Fed. 824.

fere with the exercise of the railroad company's franchise the recovery cannot exceed a nominal sum.¹⁴ In an Illinois case, which is a leading one on the question, it is held that the damages are not to be measured by the value of the land between the poles and under the wires, but by the extent to which the value of the use of the land between the poles and under the wires is diminished for railroad purposes.¹⁵ The contingency that the railroad company might at some future time lay another track which the telegraph poles will obstruct is too remote for consideration, it not appearing that there is any immediate demand for or intention to lay such track; this rule is particularly applicable where the petition of the telegraph company binds it to remove the poles or so place its wires that they will not interfere with the improvements the railroad company may make. If such petition avers that if any change in the earth's surface along the right of way has been made the telegraph poles will not be set in such places the railroad company has no claim for compensation proportionate to its expense in preparing its road-bed. If a lease of the right to maintain a telegraph line along the right of way is void as against public policy because it attempts to grant an exclusive right such lease is not admissible to show that the rent stipulated to be paid should be considered in estimating the damages.¹⁶ The railroad company cannot recover because of added expense in burning grass on its right of way by reason of the telegraph poles being thereon; such

¹⁴ *Mobile & O. R. Co. v. Postal Tel. C. Co.*, 120 Ala. 21; *Skowhegan W. Co. v. Skowhegan*, 102 Me. 323; *Postal Tel. C. Co. v. Oregon S. L. R. Co.*, 114 Fed. 787 (\$1 per mile); 104 Fed. 623.

¹⁵ The extent to which an easement is rendered less valuable for the uses to which it was put measures the damages for its condemnation. *Tanner v. Provo Bench C. & I. Co.*, 40 Utah 105; 2 *Lewis on Em. Dom.* (3d ed.) sec. 723, and cases cited. See *Salt Lake City v. East Jordan I. Co.*, 40 Utah 126.

¹⁶ *St. Louis C. R. Co. v. Postal Tel. Co.*, 173 Ill. 508. Two judges dissented. This case is followed in *Mobile & O. R. Co. v. Postal Tel. C. Co.*, 76 Miss. 731, 45 L.R.A. 223, overruling *Postal Tel. C. Co. v. Alabama & V. R. Co.*, 68 Miss. 314; *Railroad v. Telegraph Co.*, 101 Tenn. 62, 41 L.R.A. 403; *Postal Tel. C. Co. v. Oregon S. L. R. Co.*, 104 Fed. 623, 23 Utah 474, 114 Fed. 787; *Illinois Tel. News Co. v. Meine*, 242 Ill. 568, 26 L.R.A.(N.S.) 189, applies the same rule to farm land.

expense is too remote to be a basis for compensation.¹⁷ In Texas there cannot be a recovery of the value of the land occupied by a telephone company, nor for the damages that might accrue to the railroad company by being compelled, in order to reach, keep up and operate its line, to interfere with its fences along the right of way. Such matters must be adjusted in subsequent actions.¹⁸ In Mississippi the damages are measured by the extent that the right of way is of value to the railroad company for any use or for sale, and by any damage it sustains in addition thereto.¹⁹ The value of the land taken by a telegraph company must be ascertained by the use to which it was put; any supposed market value contingent on the abandonment of the operation of the railroad or the subjection of the right of way to any other use is too remote for consideration.²⁰ The compensation paid for the use of the right of way by another telegraph company is immaterial except in so far as the privileges it acquired are impaired.²¹ In Missouri and Louisiana a more liberal rule has been declared in favor of the owner of the right of way. It has been said it is proper to put the whole environment before the jury, and that the cost of putting the right of way in the condition it is in may be considered, as may the inconvenience undergone by the railroad company.²² But in Texas it has been

¹⁷ *Postal Tel. C. Co. v. Oregon R. Co.*, 23 Utah 474; *Atlantic C. L. R. Co. v. Postal Tel.-C. Co.*, 120 Ga. 268; *Texas & N. O. R. Co. v. Postal Tel. C. Co.* (Tex. Civ. App.), 52 S. W. 108; *Southwestern Tel. & T. Co. v. Gulf, etc. R. Co.*, *supra*. The case of *Atlantic C. L. R. Co. v. Postal Tel.-C. Co.*, 120 Ga. 268, is approved in *Western & A R. Co. v. Western U. Tel. Co.*, 138 Ga. 420, 42 L.R.A. (N.S.) 225.

¹⁸ *Texas M. R. Co. v. Southwestern Tel. & T. Co.* (Tex. Civ. App.), 57 S. W. 312.

¹⁹ *Postal Tel.-C. Co. v. Alabama & V. R. Co.*, 68 Miss. 314.

²⁰ *Atlantic C. L. R. Co. v. Tel. Co.*, *supra*.

²¹ *Id.*

²² It is said in *American Tel. & T. Co. v. St. Louis, etc. R. Co.*, 202 Mo. 656: Here is a right of way that has been cleared through heavily timbered lowlands; it has to be kept fenced and free from inflammable matter. Plaintiff condemns the right of access to this right of way thus prepared ready to its hand. It condemns a right to erect its poles and wires, and the further right to go on the premises and keep them in repair. By getting upon defendant's right of way it measurably escapes danger from falling timber. We know it has been held in some cases that a defendant is not entitled to remuneration be-

ruled that such cost has no connection with the damages resulting from the use of the right of way; that evidence that the railroad company contemplated making other improvements is inadmissible, and that under no circumstances is the peculiar advantages the condemnor would derive from its use to be regarded.²³

Under a statute providing for the purchase of a system of waterworks on payment of their fair and equitable value, it was contended that the test of value was the income or earnings capitalized. This view was met by the argument that the franchise had ceased, and that basing the value upon earnings would be to require the city to pay for a franchise it did not need; that the true way of ascertaining the fair and equitable value was to take the property, as a system, regardless of the franchise or the past or possible earnings of the plant. Neither of these contentions met the approval of the

cause of such favored surroundings. The argument runs that defendant having to do all these things before plaintiff came, will have to continue to do them after plaintiff's advent, hence plaintiff is not called on to bear any part of such burden, or pay anything because of such favored conditions. But there is a false note to a proposition that announces that A. is damaged no more by B. sleeping by A.'s fireside and under his roof (A. being obliged to keep a blaze going and a tight roof for his own family) than if B. had pitched his tent on outlands belonging to A. and lying in a state of nature; and such proposition has been deemed unsound in ably-considered cases. *Cleveland, etc. R. Co. v. Ohio Postal Tel.-C. Co.*, 68 Ohio St. 306, 62 L.R.A. 941.

In *Postal Tel. Co. v. Morgan's L. & T. R. & S. Co.*, 49 La. Ann 58, it was said: This inconvenience (to defendant) is an element, however, to go into the general estimate. The

lands may, along defendant's right of way, be of peculiar or particular value for specific purposes, but we do not understand that they are now devoted to these purposes. The plaintiff must, however, make compensation proportionally for the cost and expense of defendant in putting in condition the right of way. It cannot avail itself of improved conditions without compensation. To the same effect is *Postal Tel.-C. Co. v. Railroad Co.*, 49 La. Ann. 1270. In *Orleans & J. R. Co. v. Jefferson & L. P. R. Co.*, 51 La. Ann. 1605, the same rule is recognized, and it is held that the owner is not entitled to recover what it would cost the condemnor to bring other adjacent lands up to a like condition.

²³ *Southwestern Tel. & T. Co. v. Gulf, etc. R. Co.* (Tex. Civ. App.), 52 S. W. 106; *Texas & N. O. R. Co. v. Postal Tel. C. Co.*, *supra*; *Postal Tel. C. Co. v. Oregon S. L. R. Co.*, 104 Fed. 623.

court. The value was fixed without regard to the franchise, which ceased to exist by reason of the purchase; it was not limited to the cost of reproducing the plant, nor was the original cost accepted as the value because that cost and "present value" are not synonymous. Allowance was made for the additional value of the plant by reason of its connections with buildings and the facilities afforded for supplying them with water, notwithstanding the company did not own such connections. The court said, by Brewer, J.: Such connections are not compulsory, but depend upon the will of the property owners and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefor. The city, by this purchase, steps into possession of a waterworks plant—not merely a completed system for bringing water to the city, and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private dwellings. It steps into possession of a property which not only has the ability to earn, but is in fact earning. It should pay therefor not merely the value of a system which might be made to earn, but that of a system which does earn.²⁴ In a case where the entire plant of a water company and other property owned by it, but not used in operating the plant, was taken, the damages, aside from the loss of the franchise, were ascertainable by the cost of construction, allowance being made for depreciation (this not being conclusive or controlling); the fact that the plant was a going concern; its actual earnings, regard being had to the reasonableness of the rates it charged and the existence of the power to limit them, the quality of the water it furnished, the fitness of the plant, and the source of its supply to meet all reasonable requirements; the net income; the cost of reproducing the system by one substantially like it; the time and cost required to develop a similar system with the added net income and profits which might accrue to a

²⁴ *National W. Co. v. Kansas City*, 10 C. C. A. 653, 62 Fed. 853, 541.

²⁷ L.R.A. 827. See *Newburyport*

purchaser during the time required for the construction and development of the business; the capitalization of income at reasonable rates, while not a sufficient test of value, was to be considered. So far as the water system was practically exclusive the good-will of the company was not to be considered. As to property not connected with such system except by reason of common ownership, its value was to be fixed by what it was fairly worth to the owner under conditions permitting a prudent and beneficial sale of it.²⁵ The value of a turnpike road was arrived at, in connection with other evidence, by the amount of its stock which was at par.²⁶ In ascertaining the value of a turnpike "the fair value of a roadbed and the fair value of the franchises at the time of the condemnation are to be determined from the physical condition of the property, its substructure, superstructure, and approaches to bridges, together with the right or privilege of the company to collect tolls from travelers. The entire company rights of the turnpike company are taken and it is the value of the property to the owner, and not to the county taking it, that is to be determined."²⁷ If but part of a turnpike is taken the damage must be arrived at by considering the effect of so doing upon the whole road. If property used by the company, though located without the limits of the right of way, is lessened in value that is an element of damage.²⁸

§ 1078. **Same subject; condemnation of railroad property for railroad uses.** Having considered the question of damages recoverable by a railroad company whose right of way is crossed by a subsequently laid-out street, and along whose right of way a telegraph line is established, it is now proposed to group the authorities on the question of damages where the property of such a company is condemned by another company. The rule

²⁵ *Kennebec W. Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856.

²⁶ *Richmond & L. T. R. Co. v. Madison County F. Court*, 114 Ky. 351.

²⁷ *Chambersburg & B. T. R.*, 20 Pa. Super. Ct. 173, citing *Montgom-*

ery County v. Schuylkill B. Co., 110 Pa. 54; *Clarion T. & B. Co. v. Clarion County*, 172 Pa. 243; *West Chester & W. P. R. Co. v. Chester County*, 182 Pa. 40.

²⁸ *Chambersburg & B. T. R.*, *supra*.

in Massachusetts is thus stated by Gray, C. J.: "A railroad corporation, across whose road another railroad or a highway is laid out, has the like right as individuals or bodies politic and corporate, owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface absolutely required by law, or in fact necessary to be made by the corporation injured in order to accommodate its own land to the new condition."²⁹ But it is not entitled to damages for the interruption and inconvenience occasioned to its business, nor for the increased liability to damages from accidents, nor for increased expense for ringing the bell, nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad."³⁰ These latter items are excluded in Louisiana. There if only an easement is taken the damage is ascertained by the depreciation in the value of the property resulting from its joint use, including the value of the portion used and depreciation in the value of the remainder for railroad use.³¹

²⁹ *Commonwealth v. Boston & M. R.*, 3 Cush. 25, 53; *Old Colony R. v. Plymouth*, 14 Gray 155; *Grand Junction R. & D. Co. v. County Com'rs*, id. 553.

³⁰ *Massachusetts, etc. R. Co. v. Boston, etc. R. Co.*, 121 Mass. 124, citing *Proprietors v. Nashua & L. R.*, 10 Cush. 385, 392; *Boston & W. R. v. Old Colony R.*, 12 id. 605, 611, 2 Allen 142; *Old Colony R. v. Plymouth*, 14 Gray 155. The view stated seems to be approved in *Kansas City S. B. R. Co. v. Kansas City, etc. R. Co.*, 118 Mo. 599.

Nor can the condemnor enhance its damages for the taking by the fact that it is compelled thereby to stop its trains on a steep grade, and the difficulty and loss of time involved thereby in starting after the

stop. *Vicksburg, A. & S. R. Co. v. Louisiana & A. R. Co.*, 136 La. 691.

³¹ *Kansas City, etc. R. Co. v. Louisiana, etc. R. Co.*, 116 La. 178, 5 L.R.A.(N.S.) 512; *Northern Pac. R. Co. v. Union Lumber Co.*, 76 Wash. 563.

So where a city took an easement for street purposes in land occupied and in part used for railroad purposes at the time of taking, it is competent for the city to show, as bearing on the amount of depreciation caused by the taking, that the land in which an easement was taken was worth little except for railroad purposes, and that by the taking the railroad was not deprived of the use of any part of the land which it was using for railroad purposes at the time of taking.

In Illinois compensation is due for property "injured" as well as that which is "taken." Hence, if land used for a railroad right of way is taken, and it has no market value, compensation is to be made with reference to the use to which it is put.³² In such a case the damages may extend beyond the area of the land taken; the obstructions which would thereby be placed in the way of prosecuting the business of the company whose road is crossed in reaching the different parts of its line and its capacity for doing business are elements of damage.³³ In addition to showing the use to which the property was devoted and how it was used it is proper to prove, as bearing on the value of property without market value, the amount of business done, the capacity of the property for business and for expansion to meet the increasing demands of that business.³⁴ In another case the doctrine that direct and immediate damages only are recoverable was applied. "It is," said the court, "that injury which depreciates the value of the property, whether by taking a portion of it or rendering the portion left less useful or, in case of a railroad company or other corporate body, less capable of transacting its business—such a hindrance and inconvenience as to occasion loss, or diminish and limit its capacity to transact its business by decreasing the power to transact as much or necessarily increasing the expense of what may be done, although not diminished. And this hindrance or obstruction must produce immediate or future loss. But when the new structure is made, if it does not necessarily abridge the owner's capacity without increased expense to transact an equal volume of business, then, although there may be inconvenience and annoyance, unless the property is depreciated in value, these are not elements of damage."³⁵ In Michigan "any additional

Town of Eunice v. Louisiana W. R. Co., 135 La. 882.

³² Lake Shore, etc. R. Co. v. Chicago & W. I. R. Co., 100 Ill. 21.

³³ Id.; Chicago, etc. R. Co. v. Englewood C. R. Co., 115 Ill. 375, 56 Am. Rep. 173.

³⁴ Sanitary Dist. v. Pittsburgh, etc. R. Co., 216 Ill. 575.

³⁵ Peoria, etc. R. Co. v. Peoria & F. R. Co., 105 Ill. 110. Hence it was ruled that damages cannot be recovered for delay, inconvenience or expense which may result in the operation of a railroad because of its compliance with a statutory police regulation requiring trains to stop at all points where the road is

expense created in the ordinary use" of the pre-existing road,³⁶ "or any other injury or damage to its track, right of way or franchise, occasioned by the crossing, and which may properly be considered as the natural, necessary and approximate cause thereof," is recoverable.³⁷ In Wisconsin no part of the expense of making or maintaining any crossing made necessary by the crossing of an existing railroad by another may be imposed upon the former. This includes any appliances required to be used for the safety of the public.³⁸ In Washington the expense to which the condemnee is put for maintaining additional watchmen, signals, etc., are competent on the question of depreciation in value due to the taking.³⁹ In New Jersey the condemning company may specify in its petition the mode in which it proposes to cross the track of the other, and compensation will be awarded for damage which results from that mode. If a material change is thereafter made from the method indicated and additional damage results compensation therefor must be made. If, however, the petition does not define how the crossing will be made the assessment of damages will be upon the same basis as where the land of individuals is condemned for railroad purposes—any manner of crossing at present lawful and necessary will be considered, and also all lawful changes which may be made in the future.⁴⁰

In several states the right of way at grade of a railroad company across a highway does not stand on any different footing than that of any other corporation authorized by the state to use the highway for purposes of travel. Hence, such

crossed by other tracks. *Id.*; *Flint, etc. R. Co. v. Detroit, etc. R. Co.*, 64 Mich. 350. Nor for the increased danger of crossing the projected road at grade. *Peoria, etc. R. Co. v. Peoria & F. R. Co.*, *supra*.

³⁶ *Flint, etc. R. Co. v. Detroit, etc. R. Co.*, *supra*; *Commissioners of Parks, etc. v. Michigan Cent. R. Co.*, 90 Mich. 385; *Same v. Chicago, etc. R. Co.*, 91 Mich. 291; *Grand Rapids v. Bennett*, 106 Mich. 528.

³⁷ *Toledo, etc. R. Co. v. Detroit, etc. R. Co.*, 62 Mich. 564, 4 Am. St. 875; *Chicago, etc. R. Co. v. Springfield, etc. R. Co.*, 67 Ill. 142, 96 id. 274.

³⁸ *State v. Railroad Com.*, 140 Wis. 145.

³⁹ *Northern Pac. R. Co. v. Union Lumber Co.*, 76 Wash. 563.

⁴⁰ *National Docks, etc. Co. v. United Cos.*, 53 N. J. L. 217, 26 Am. St. 421.

impairment of its property as results from the crossing at grade of the tracks of a railroad company laid across a highway by the track of an electric tramway company for the lawful location of its road is *damnum absque injuria*.⁴¹ The probability that accidents may occur because of the crossing of one railroad by another cannot be considered as an element of damages, nor can any allowance be made in such case for delay, inconvenience or damages arising from the part of the crossing which is in the street.⁴² In Minnesota the accustomed rental charged by railroad companies for the use of land on which to erect and maintain grain elevators is the basis upon which compensation is awarded when land is condemned for such use.⁴³

In a case in Iowa the defendant company built its line of road in close proximity to a right of way previously acquired by the plaintiff, at some places running parallel to the latter, and for three miles upon the plaintiff's right of way, which it crossed five times; two of which crossings were at such an acute angle as to be impracticable as railway crossings. It did not appear that the defendant's acts prevented the building of the plaintiff's road nor did it appear that the plaintiff had bought the right of way. The conclusion reached was that the appropriation made was not of the entire right of way, and that the compensation could not be estimated on that basis, but on the basis of the value of the advantage gained by the defendant.⁴⁴ In a Missouri case which upheld the right of one street railway company to use the track of another such company it was ruled that the loss of business because of the division of the patronage of the latter was not an element of damages; neither were the delays, inconveniences or jolts arising from making

⁴¹ New York, etc. R. Co. v. Bridgeport T. Co., 65 Conn. 410, 29 L.R.A. 367; Chicago, etc. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 29 L.R.A. 485; Chicago, etc. R. Co. v. Steel, 47 Neb. 741; Same v. Whiting, etc. R. Co., 139 Ind. 297, 26 L.R.A. 337, 47 Am. St. 264; Du Bois T. P. R. Co. v. Buffalo, etc. R. Co., 149 Pa. 1; Mississippi Cent.

R. Co. v. Hattiesburg Traction Co., — Miss. —, 67 So. 897.

⁴² Kansas City S. B. R. Co. v. Kansas City, etc. R. Co., 118 Mo. 599.

⁴³ Stewart v. Great Northern R. Co., 65 Minn. 515, 33 L.R.A. 427 (*sub nom.* Stewart's Application).

⁴⁴ Chicago, etc. R. Co. v. Cedar Rapids, etc. R. Co., 86 Iowa 500.

the connections from one track to another; it was not proper to charge the former company with a portion of the special franchise tax paid by the latter for the privilege of constructing and operating its road. The grounds upon which and the basis for allowing compensation included the payment by the company using the tracks of interest on one-half the value of the road whose tracks it used, such value to be computed as of the time the proceeding was begun, and not its cost at the time when it was a cable road; the payment of one-half the annual property taxes, one-half of the annual cost of repairs and maintenance of the tracks and paving; of one-half the cost of sanding, watering, cleaning and salting the tracks; one-half the cost of renewing them and of granite and wood paving, whenever these were required, and by requiring it to construct switches and connections with the tracks where the roads intersected and maintain them, and keep and pay switchmen.⁴⁵ Where a railroad is bound to keep its bridge in such condition that all water in the bed of the river where the public has an easement shall flow naturally, there is a taking requiring compensation to the railroad where the public causes an increase in the flow by artificial means, requiring the enlargement of the bridge and channel, and thereby increasing the burden on the railroad.⁴⁶

§ 1079. **Same subject; injury to franchise; ascertainment of its value.** So long as the exercise of rights under a franchise are not interfered with there is no liability for damages because competition which results from a public improvement makes the right valueless, although some of the land owned by the holder of the franchise may be taken.⁴⁷ But if property, as a bridge and the corporate right to maintain it and collect tolls, is taken, the general rule that the market value governs the

⁴⁵ *Grand Ave. R. Co. v. Citizens' R. Co.*, 148 Mo. 665.

⁴⁶ *Cache River Drain Dist. v. Chicago & E. I. R. Co.*, 264 Ill. 97.

⁴⁷ *Moses v. Sanford*, 11 Lea 731; *Riverton F. Co. v. McKeesport & D. B. Co.*, 179 Pa. 466.

A riparian owner is not, by vir-

tue of his possession, entitled to a ferry franchise; in the absence of a franchise or possession for twenty years or more the value of a franchise is not involved in the condemnation of his land. *Mills v. County Com'rs*, 4 Ill. 53.

compensation does not apply, for the reason that such property cannot be said to have such value. Its cost is not the standard because the value of it depends upon its earnings. The damages must be measured by the value of the use, if the market value of the stock is not proven. The value of the use depends upon facts existing and shown at and about the time of the taking unless they are proven to be exceptional.⁴⁸ The damages are comprised of the value of the structure and franchise to the owner, not to the party seeking to acquire it, as shown by the amount of the net tolls, and the market value of the capital stock; no one of these facts may be relied upon to show value in all cases.⁴⁹ Where the owner of a ferry franchise held a lease of the land used for a landing, which land was taken by a railroad company with the result of a material interference with the landing of boats, the damages were measured by the difference between the value of the leasehold for the purpose to which it was put until the end of the lease and its value for that period as so affected. The damages for the depreciation in the value of the franchise were only ascertainable in connection with the compensation for injury to the right in the land.⁵⁰ Where the land condemned was owned by a corporation operating a union depot and adjoined the same, the injury to the defendant's franchise was compensated for by an allowance for injury to the real estate and plant directly caused by the presence of the plaintiff's railway on the land taken and the operation of its railroad in transportation thereon.⁵¹

A turnpike company whose road has been occupied by the tracks of a street railway may recover for injury immediately

⁴⁸ *Mason v. Harper's Ferry B. Co.*, 20 W. Va. 223; *Montgomery County v. Schuylkill B. Co.*, 110 Pa. 54.

The cost of the bridge, the income derived from it and all other facts and circumstances showing its value are proper. *Dougherty Co. v. Tift*, 75 Ga. 815; *West Chester & W. P. R. Co. v. Chester County*, 182 Pa. 40; *Lock Haven B. Co. v. Clinton County*, 157 Pa. 379. In *Dough-*
Suth. Dam. Vol. IV.—27.

erty County v. Tift, 75 Ga. 815, the cost, income and other facts are said to be material.

⁴⁹ *Millin B. Co. v. Juniata County*, 144 Pa. 365, 13 L.R.A. 431; *Harrisburg, etc. T. Co. v. Cumberland County*, 225 Pa. 467.

⁵⁰ *Pittsburgh, etc. R. Co. v. Jones*, 111 Pa. 204, 56 Am. Rep. 260.

⁵¹ *St. Louis, etc. R. Co. v. Hannibal Union D. Co.*, 125 Mo. 82.

and directly resulting. The damage is not measured by the additional cost of maintaining the turnpike only, but by the depreciation in the value of the property as a whole. If the occupation and use and presence of the tracks and cars are such a menace to travel as to cause those who would otherwise use the road to cease doing so, in whole or in part, its earning capacity is thereby affected, and proof may be made of the decrease in revenues and depreciation in the market value of the capital stock. Loss of revenue from competition should not be regarded; neither should such loss caused by the diversion of travel from the turnpike by any cause for which the railway company is not responsible.⁵² But where a street car company having an exclusive franchise had its tracks paralleled by those of a cable tramway the loss of patronage to the former, resulting from inconvenience of access where the cars of the latter passed between the street cars and the sidewalks, was an element of damage, though difficult of ascertainment as to the extent thereof; it was otherwise as to the loss of patronage caused by the improved facilities of the tramway or the fact of competition.⁵³

Damages for the loss of a privilege granted by law include the enhancement of its value resulting from legislation subsequent to the grant, but not increased value following acts done under color of license or under a revocable license.⁵⁴ It has been held that in awarding damages for injury to a franchise the possibility of the repeal of the statute which gave it is not to be considered;⁵⁵ but the better rule is that the probable life of the franchise may be inquired into.⁵⁶ Where the corporation whose property was taken had the non-exclusive privilege of supplying a village and its inhabitants with water, its contract with the village being soon to expire, though there was a pos-

⁵² Allentown & Co. T. Co. v. Lehigh Valley T. Co., 174 Pa. 273.

⁵³ Omaha Horse R. Co. v. Cable Tram-Way Co., 32 Fed. 727.

⁵⁴ Kingsland v. Mayor, etc., 110 N. Y. 569, 45 Hun 198. See In re Commissioners of State Reservation at Niagara, 37 Hun 537.

⁵⁵ Mason v. Harper's Ferry B. Co., 20 W. Va. 223.

⁵⁶ West Chester & W. P. R. Co. v. Chester County, *supra*.

The danger to a bridge by flood and ice may be considered to the extent that its value may be lessened thereby. *Mifflin B. Co. v.*

sibility of an extension of such contract, in the absence of evidence showing a legal obligation upon the village or the inhabitants thereof to take water in excess of the contracts in effect there was no *data* to support an award of anything in excess of nominal damages.⁵⁷ Under a statute providing for the condemnation of the property of a water-works company by a city and a direction that the fair value of such property for the purposes of its use by the city shall be paid the company's right to lay pipes in the streets was not to be regarded because the city had authority to furnish water, and the laying of pipes would not be an additional burden to the highway.⁵⁸ In a recent case in Maine this question received full consideration, and many points were passed upon. The statute under which the proceedings were had, authorized the condemnation by a corporation of all the property of a water company upon making just compensation therefor. This was construed to include the franchise of said company within the territory described, regardless of whether it had exercised all its rights and privileges thereunder. The value of the local franchise was to be determined in part by the net income of the business; but being a *quasi* public, or public service, corporation, and therefore subject to restriction as to its charges, the reasonableness of these was to be regarded. In solving the question as to what constitutes reasonable rates the main factors are the right of the company to a fair income upon the fair value of its property, regard being had to its cost, depreciation and operating expenses, the right of the public to be served at such rates, the ordinary hazard of the enterprise and the fact that the franchise was not perpetual. The value of the franchise was not affected by the previous conduct of the company, nor by the rates it had charged its patrons, but was dependent upon its net earning power, present and prospective, the rates being assumed to be reasonable, and the value being estimated with reference to the owner and not to the party condemning. In considering the pro-

Juniata County, 144 Pa. 365, 13 L.R.A. 431.

⁵⁷ In re Board of Water Com'rs, 71 App. Div. (N. Y.) 544. See Long

Island W. S. Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165.

⁵⁸ Newburyport W. Co. v. Newburyport, 168 Mass. 541.

spective development of the franchise regard must be had to the probability that further investment may be required to develop the use, and to the fact that the owner will be entitled to any appreciation based on natural causes.⁵⁹ The property of such a corporation is to be valued as a going concern in view of the right to charge reasonable tolls, the income derived therefrom, the prospects of the company and the market value of its stock.⁶⁰

§ 1080. **Same subject; elevated railroad and sub-way cases.** Under the constitution of New York the liability of corporations exercising the power of eminent domain does not extend beyond making compensation for property taken. The cases which impose a larger responsibility are based upon statutes. This taking need not be of real property. Owners of land which abuts upon streets in New York city have easements therein for ingress and egress and for the free circulation of light and air, which easements are interests in real estate and constitute property. In estimating their value they are not considered as property, separate and distinct from the land to which they are appurtenant.⁶¹ Hence the property owner's right to compensation is measured, not by the value of the easements in the street separate from his abutting property, but by the damages which such property sustains as a result or consequence of the loss of the easements.⁶² This involves an inquiry into

⁵⁹ *Kennebec W. Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856.

In *Brunswick & T. W. Dist. v. Maine W. Co.*, 99 Me. 371, the rules for ascertaining the value of a portion of a system of waterworks situated in two towns are given. They are too numerous for detailed statement here.

⁶⁰ In *re Monongahela W. Co.*, 223 Pa. 323.

⁶¹ Such easements are incapable of being separated from the property and pass, upon a sale thereof, to the purchaser with the right to any remedy for their invasion. *Shepard v. Manhattan R. Co.*, 169 N. Y. 160, and cases cited.

⁶² "While damages have been allowed where premises are so situated that they are to be considered as a single parcel, although the total frontage might not be upon the street occupied by the elevated railway, yet where such premises are improved by buildings distinct within themselves, some of them having no frontage upon the avenue occupied by the railroad, it is difficult to see upon what theory an award for the destruction of easements upon the avenue upon which such buildings have no frontage can be predicated." *Keene v. Metropolitan E. R. Co.*, 79 Hun 451. See *Cooper v. Manhattan R. Co.*, 85 Hun

the effect of the improvement upon the whole property and a consideration of all its advantages and disadvantages. If the rental or market value of an entire building affected is diminished there may be a recovery; but in the case of an elevated railroad which causes a diminution in the rental value of the upper floors, if there is an increase in the rental value of it as a whole, to the same or a greater extent, there is no injury.⁶³ The effect of the road upon business in the particular street generally may be considered in assessing damages.⁶⁴ The consideration of benefits must include such as are general, as well as those which are special.⁶⁵ Evidence of the affect of the railroad upon business in the particular street is not improper because it appears that the diminution in business is in part attributable to other causes.⁶⁶ The fact that the presence of the road has changed the character of the street on which the plaintiff's property is situated is not ground for recovery.⁶⁷ In estimating the damages the structure is not alone to be consid-

217; *Reilly v. Manhattan R. Co.*, 43 App. Div. (N. Y.) 80; *Leffman v. Long Island R. Co.*, 120 App. Div. (N. Y.) 528.

An owner cannot recover for damage caused by the construction of an elevated structure on the street which his property abuts where the structure turns off the street a short distance before reaching plaintiff's property, and is therefore not directly in front of it, and where such damages as are caused to plaintiff are not due to interference with his easement, and are shared by all other abutters in the vicinity. *Keteltas v. Interborough Rapid Transit Co.*, 164 App. Div. (N. Y.) 870.

⁶³ *Newman v. Metropolitan E. R. Co.*, 118 N. Y. 618, 7 L.R.A. 289, summarizing the result of *Story v. New York E. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan E. R. Co.*, 104 N. Y. 268; *Sutro v. Manhattan R. Co.*, 137 N. Y. 592;

Sperb v. Metropolitan E. R. Co., 137 N. Y. 596; *Wright v. New York E. R. Co.*, 78 Hun 450; *Markert v. Manhattan R. Co.*, 87 Hun 213, are to the same effect. The general subject is discussed in *Bohm v. Metropolitan E. R. Co.*, 129 N. Y. 576, 14 L.R.A. 344.

⁶⁴ *Cotton v. Boston E. R. Co.*, 191 Mass. 103; *Newman v. Metropolitan E. R. Co.*, *supra*; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157, 60 Am. Rep. 437; *Carroll v. New York E. R. Co.*, 14 App. Div. (N. Y.) 278, affirmed without opinion, 162 N. Y. 603.

⁶⁵ *Saxton v. New York E. R. Co.*, 139 N. Y. 320; *Bohm v. Metropolitan E. R. Co.*, 129 N. Y. 576, 14 L.R.A. 344.

⁶⁶ *Drucker v. Manhattan R. Co.*, *supra*; *Shepard v. Same*, 169 N. Y. 160.

⁶⁷ *Stacey v. Metropolitan E. R. Co.*, 15 App. Div. (N. Y.) 534.

ered; account must be taken of the incidental injuries caused by the running of trains upon it,⁶⁸ such as the effect upon the health of tenants, that being a damage to the premises which would affect their market value.⁶⁹ The owner's right to recover is not affected by the value of the improvements he has put upon the land; if they do not bring the return they would have done but for the wrongful occupation of the street the wrongdoer must answer for the loss.⁷⁰ A religious corporation may, in an equitable action to recover past and fee damages resulting to it from the operation of a road in a street on which its house of worship is situated, recover as past or rental damages for the serious interruption and interference by noise with its religious exercises.⁷¹ The failure of property affected by the operation of a railroad to appreciate in value in something like the same ratio as similar property not so affected may be attributed to the road.⁷²

If the occupation of the property has preceded the institution of condemnation proceedings the value of the easements affected is to be measured as of the time of the trial,⁷³ and by the difference between the value of the property to which they are appurtenant with the easements unimpaired and its value with them in the condition they are left by the road.⁷⁴ As we have seen, the damages are measured by the decreased value of the whole property; this rule applies as well where the action is brought by lessees and occupants as where the owner is the complainant.⁷⁵ The latter may recover to the extent of the diminished rental value though he occupied the premises, or, at

⁶⁸ *Peirson v. Boston E. R. Co.*, 191 Mass. 223; *Sperb v. Metropolitan E. R. Co.*, 137 N. Y. 155, 20 L.R.A. 752; *Lazarus v. Metropolitan R. Co.*, 14 App. Div. (N. Y.) 438.

⁶⁹ *Cotton v. Boston E. R. Co.*, *supra*.

⁷⁰ *Storm v. New York E. R. Co.*, 82 Hun 11; *Shepard v. Metropolitan E. R. Co.*, 48 App. Div. (N. Y.) 452.

⁷¹ *Rector, etc. v. New York E. R. Co.*, 21 App. Div. (N. Y.) 47.

⁷² *Manhattan R. Co. v. O'Sullivan*, 6 App. Div. (N. Y.) 571.

⁷³ *Otten v. Manhattan R. Co.*, 2 App. Div. (N. Y.) 396; *Hynes v. Same*, 54 App. Div. (N. Y.) 256.

⁷⁴ *Kenkele v. Manhattan R. Co.*, 55 Hun 398; *In re Brooklyn E. R. Co.*, 55 Hun 165; *Odell v. New York E. R. Co.*, 130 N. Y. 690.

⁷⁵ *Taylor v. Metropolitan E. R. Co.*, 50 N. Y. Super. Ct. 311; *Kearney v. Same*, 129 N. Y. 76.

his option, on the basis of the lessened usable value.⁷⁶ There cannot be a recovery of rental value for any period during which the premises were not in condition to rent.⁷⁷ Such value is not, necessarily, to be based upon the purpose for which the property was in fact occupied; the owner is entitled to recover to the extent of the lessened rental value for any purpose for which it might have been rented but for the defendant's wrong.⁷⁸ If the rent to be paid after a certain period, before the expiration of which an elevated road is erected in front of the premises, is to be fixed by appraisers the lessor may recover for the lessened amount at which, but for such erection, they would have fixed the rent.⁷⁹

Damages for loss of business are too remote.⁸⁰ If the recovery of permanent damages is sought and a tender made of a deed of the premises the railroad company is not subjected to increased liability because it appropriated the premises without right,⁸¹ nor for specific items of damage during particular periods of time, nor for loss of rents in addition to compensation for the property or diminution in its value.⁸² The adaptability of the premises to a particular business and the effect of the impairment of the easement upon that business are to be considered.⁸³ If the easement lost was used for business purposes and its loss prevents access to a river the compensation is measurable by the cost of restoring the lost communication, if that is practicable, with an additional allowance for the increased expense attendant upon the use of the new means of communication.⁸⁴ Where the recovery of fee damage is sought

⁷⁶ *Woolsey v. New York E. R. Co.*, 134 N. Y. 323; *Caldwell v. New York & H. R. Co.*, 111 App. Div (N. Y.) 164.

⁷⁷ *Martin v. Manhattan R. Co.*, 63 Hun 350.

⁷⁸ *Scott v. Manhattan R. Co.*, 60 N. Y. Super Ct. 233.

⁷⁹ *Winthrop v. Manhattan R. Co.*, 17 App. Div. (N. Y.) 509, affirmed without opinion, 161 N. Y. 638; *Kernochan v. Same*, 161 N. Y. 339.

⁸⁰ *Taylor v. Metropolitan E. R. Co.*, 50 N. Y. Super. Ct. 311; *Kearney v. Same*, 129 N. Y. 76.

⁸¹ *Ireland v. Metropolitan E. R. Co.*, 52 N. Y. Super. Ct. 450; *Taylor v. Same*, *Kearney v. Same*, *supra*.

⁸² *Ireland v. E. R. Co.*, *supra*.

⁸³ *In re Union E. R. Co.*, 55 Hun 163.

⁸⁴ *In re New York, etc. R. Co.*, 29 Hun 646.

that is most satisfactorily established by showing how the rental values have been affected by the defendant's interference with the property. The inquiry may extend beyond this, as though the proceedings sought the condemnation of the property. But only such damages can be recovered as might be awarded in such a proceeding.⁸⁵

In considering the damages sustained by the operation of an elevated railroad the noise, smoke, cinders, invasion of privacy, etc., attendant upon it are to be regarded⁸⁶ (except where damages are sought to be recovered for injury to the fee),⁸⁷ and in an action to recover for the unlawful use and operation of a road it is not a partial justification that some of the consequences endured would have followed a lawful exercise of authority and no action therefor could have been maintained.⁸⁸ There cannot be an apportionment of the damages where the railroad company uses more of the street than it is entitled to do on the basis of the extent to which its use is unauthorized.⁸⁹ The hazard from fire growing out of the maintenance and operation of an elevated road is not an element of damage to

⁸⁵ *Crampton v. Brooklyn E. R. Co.*, 3 App. Div. (N. Y.) 263.

If property was built for and is adapted to a special use only there may be a recovery for the lessened value of its use for that purpose, and the owner may show that the rent of it was reduced after the construction of the road. *Birch v. Lake Roland E. R. Co.*, 83 Md. 362.

⁸⁶ *Cotton v. Boston E. R. Co.*, 191 Mass. 103; *Caldwell v. New York & H. R. Co.*, 111 App. Div. (N. Y.) 164; *Lahr v. Metropolitan E. R. Co.*, 104 N. Y. 268; *Ireland v. Same*, 52 N. Y. Super. Ct. 450; *Ode v. Manhattan R. Co.*, 56 Hun 199; *Kane v. New York E. R. Co.*, 125 N. Y. 164, 11 L.R.A. 640; *Messenger v. Manhattan R. Co.*, 129 N. Y. 502; *Moore v.*

New York E. R. Co., 130 N. Y. 523, 14 L.R.A. 731.

Increased noise from the operation of surface cars because of the reverberation caused by the defendant's structure is a ground of damage. *Logan v. Boston E. R. Co.*, 188 Mass. 414; *Cotton v. Same*, *supra*. It is not necessary to determine how much of the noise is due to that for which the defendant would not be liable and how much is due to the excess. *Baker v. Same*, 183 Mass. 178.

⁸⁷ *American B. N. Co. v. New York E. R. Co.*, 129 N. Y. 252.

⁸⁸ *Lahr v. E. R. Co.*, 104 N. Y. 268.

⁸⁹ *Matter of Brooklyn E. R. Co.*, 6 App. Div. (N. Y.) 53.

the abutting owner.⁹⁰ Nor can it be shown that horses of the tenants of the plaintiff's building were frightened by it.⁹¹

Exemplary damages have been denied where there was a failure to institute condemnation proceedings before operating the road on the ground that liability for compensatory damages had not then been established.⁹² As appears elsewhere,⁹³ the rule in New York is that permanent damages cannot be recovered in an action of trespass upon the assumption that the wrong done is permanent and irremediable. This rule applies to common-law actions against elevated railroad companies.⁹⁴ It has been departed from in one case where the parties agreed upon the rule of damages.⁹⁵ In Illinois the damages recoverable because of the operation of an elevated road are measured by the general rules which govern in other condemnation proceedings, and the same rules of evidence apply, whether actual construction has been accomplished or not.⁹⁶ A city which constructs a railroad under a street must answer to the abutting owner for impairment of the support of his buildings though the construction and operation are in all respects proper, for the value of the property taken without deduction for benefits, subject to the public easement, for the results of the excavation of shafts for the prosecution of the work, including the rental value of the premises if that was affected. The condition of the property down to the time of the trial may be shown.⁹⁷

§ 1081. Same subject; injuries to various interests; damages in favor of tenants. Just compensation is not limited to and assessable only in favor of the owner in fee. A life interest or a term of years may be carved out of the fee. In such case the

⁹⁰ *Siegel v. New York & H. R. Co.*, 62 App. Div. (N. Y.) 290; *In re Brooklyn E. R. Co.*, 6 App. Div. (N. Y.) 53.

⁹¹ *Swan v. Boston E. R. Co.*, 188 Mass. 405.

⁹² *Powers v. Manhattan R. Co.*, 120 N. Y. 178.

⁹³ § 1016.

⁹⁴ *Pond v. Metropolitan E. R. Co.*, 112 N. Y. 186, 8 Am. St. 734.

⁹⁵ *Lahr v. Metropolitan E. R. Co.*, 104 N. Y. 268.

⁹⁶ *Aldis v. Union E. R. Co.*, 203 Ill. 567.

⁹⁷ *In re Rapid Transit R. R. Com'rs*, 197 N. Y. 81, 36 L.R.A. (N.S.) 647.

tenant for life or lessee, as well as the remainder-man or lessor, is equally entitled to compensation for injury to his interest.⁹⁸ Every person having any interest, partial or temporary, or permanent and absolute, is entitled to damages proportioned to the injury to that interest.⁹⁹ If the reversionary interest in the land sought to be condemned is so remote that its value is merely nominal or speculative it is not required that even nominal damages be awarded,¹ at least where the proceeding was instituted by the party who sought to obtain it and that party is charged with the costs in any event.² In fixing the damages due a tenant the injury done the easement is only to be regarded.³ His estate in the land is not increased because his lease gives him an option to buy the land. His remedy is to buy the fund into which the land has been converted by the proceedings.⁴ The amount or profitableness of the business done by a tenant on the

⁹⁸ *Coleough v. Nashville, etc. R. Co.*, 2 Head 171; *Getz v. Philadelphia & R. R. Co.*, 105 Pa. 547; *Philadelphia, etc. R. Co. v. Getz*, 113 id. 214; *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. 290; *Corrigan v. Chicago*, 144 Ill. 537, 21 L.R.A. 212; *Matter of Daly*, 29 App. Div. (N. Y.) 286 (ruled under sec. 982 New York consolidation act, ch. 410, laws of 1882); *Gluck v. Mayor, etc.*, 86 Md. 315.

⁹⁹ *Staudt v. Murphysboro E. R., L., H. & P. Co.*, 169 Ill. App. 276, quoting the text; *Birmingham R., L. & P. Co. v. Oden*, 146 Ala. 495; *Musanti v. State*, 73 N. Y. Misc. 534; *Parks v. Boston*, 15 Pick. 198; *Lawrence v. Boston*, 119 Mass. 126; *Biddle v. Hussman*, 23 Mo. 597; *Breed v. Eastern R. Co.*, 5 Gray 470; *Platt v. Bright*, 29 N. J. Eq. 128; *State v. Hulick*, 33 N. J. L. 307; *First Parish v. Middlesex*, 6 Gray 106; *Miller v. Newark*, 35 N. J. L. 460; *Chicago v. Garrity*, 7 Ill. App. 474; *Morin v. St. Paul, etc.*

R. Co., 30 Minn. 100; *Fulton County v. Amorous*, 89 Ga. 614.

A territory may recover the rental value of school land taken and depreciation in the rental value of that affected by the taking for such time as it was entitled to collect the rents thereon. *Territory v. Choctaw, etc. R. Co.*, 20 Okla. 663.

A tenant may recover for fixtures destroyed by a taking, though they might be said to be mere trade fixtures, for the reason that though personal property, they are part of the realty as long as they remain fixtures. *In re Willcox*, 165 App. Div. (N. Y.) 197.

¹ Sec § 1063.

² *Chicago West Division St. R. Co. v. Metropolitan, etc. R. Co.*, 152 Ill. 519.

³ *Vernon S. R. Co. v. Mayor*, 95 Ga. 387.

⁴ *Cornell-A. S. Co. v. Boston & P. R. Co.*, 209 Mass. 298; *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. 290 as to the first proposition.

premises is not material to the scope of his recovery.⁵ A lessee who has the right to remove improvements made upon the leased premises during his term only if they are sold cannot recover the value of the improvements.⁶ The owner of timber standing on the land of another may recover for the taking of it its value upon the stump, with interest from the time of the appropriation; if the timber had no market value where it stood such value may be fixed by proof thereof at the nearest market, less the expense of getting it there.⁷ It is strongly intimated in Minnesota that a homesteader on government land, whose patent thereto is not earned, is entitled to practically the same damages as if he owned the fee;⁸ but the better rule is that he is entitled to recover for the same causes that the absolute owner may recover for, the extent of his recovery depending upon the improvements, the length of time he has been in possession and other facts which may affect his right to obtain a patent.⁹ As against a trespasser on land occupied by a pre-emption settler who has paid its price and complied with the other conditions of law there may be a recovery as owner of the fee if the patent is obtained intermediate the trespass and the time suit was brought.¹⁰ A homestead settler who has filed upon a claim may recover the diminished rental value of the land because of its unauthorized occupation for railroad uses.¹¹ If no steps have been taken to acquire title there can be a recovery only to the extent that improvements put on the land are injured.¹² There cannot be a recovery for the value of buildings "transplanted" to land in bad faith with knowledge of

⁵ *West Chicago Park Com'rs v. Boal*, 232 Ill. 248. But see § 1069.

⁶ *McAllister v. Reel*, 59 Mo. App. 70; *Cornell-A. S. Co. v. Boston & P. R. Co.*, *supra*.

⁷ *Turner v. State*, 67 App. Div. (N. Y.) 393.

⁸ *Red River, etc. R. Co. v. Sture*, 32 Minn. 95; *Enoch v. Spokane Falls & N. R. Co.*, 6 Wash. 393. Compare *Flint, etc. R. Co. v. Gordon*, 41 Mich. 420.

⁹ *Burlington, etc. R. Co. v. Johnson*, 38 Kan. 142; *Ellsworth, etc. R. Co. v. Gates*, 41 Kan. 574; *Chicago, etc. R. Co. v. Hurst*, 41 Kan. 740.

¹⁰ *Spokane Falls & N. R. Co. v. Ziegler*, 167 U. S. 65, 42 L. ed. 79.

¹¹ *Larsen v. Oregon R. & N. Co.*, 19 Ore. 240.

¹² *Knoth v. Barclay*, 8 Colo. 300.

the pendency of proceedings for its condemnation, nor for any expenditures made on the land for foundations for such buildings.¹³ One who erects a building on land to which he has no title and who is a trespasser cannot recover for the taking of the building.¹⁴

If actual entry upon land cannot be made until compensation is paid or secured the owner may remain in possession after a railroad has been located and until entry and recover for the loss of crops planted before security or notice of intent to enter for the purpose of construction was given. A tenant of the owner has the same right under like circumstances although he became such with knowledge of the location of the road.¹⁵ In states where the condemnation of a portion of the demised premises operates as an apportionment of the rent *pro tanto* between landlord and tenant the damages are apportioned by giving the former the value of his reversion and the rents reserved during the term, less an abatement for immediate payment, and the latter the value of the term, less the rent he has agreed to pay.¹⁶ A lessee who makes an agreement with the lessor to cancel his lease and has not assigned his claim for damages

¹³ In re Parkway, 150 App. Div. (N. Y.) 482.

¹⁴ Norris v. Pueblo, 12 Colo. App. 290.

Where the owner of the building is not a trespasser, though he has no title, and has erected the building upon land subject to private rights of way, with the express or implied consent of the owners of the easements, the owner is entitled to substantial damages for the taking of the building; if his right to maintain the building be absolute, the measure of damages is the value of the building; if conditioned by the right of the holders of the easements to require the removal of the building, the measure is the value of the building subject to that right. In re Mayor, 84 App. Div.

(N.Y.) 455; In re Star St., 73 Misc. (N. Y.) 383.

Compensation cannot be successfully claimed for parts of buildings which encroach on portions of a street dedicated to and accepted by the public, regardless of where the ownership of the fee to the center of the street may be. In re Prospect St., 77 Misc. (N. Y.) 254; In re Pearsall St. (Misc.), 135 N. Y. Supp. 763.

¹⁵ Lafferty v. Railroad Co., 124 Pa. 297, 10 Am. St. 587, 3 L.R.A. 124; Gilmore v. Pittsburgh, etc. R. Co., 104 Pa. 275; Werthman v. Mason City, etc. R. Co., 128 Iowa 135.

¹⁶ Commissioners v. Johnson, 66 Miss. 248; Biddle v. Hussman, 23 Mo. 597; Corrigan v. Chicago, *supra*.

cannot recover for such cancellation. "When he entered into the agreement with the landlord to cancel the lease his interest was in property, a part of which had been taken, so that the remainder was of little value for the use for which it was leased. In the arrangement which he made to give up the lease the value of his interest in its damaged condition was the subject of the contract, and presumably the terms which he was able to make with the landlord were much less favorable than they would have been if the property had not been injured by the taking."¹⁷ Where the taking justifies a tenant in considering the premises untenable he may not recover because he paid rent after they became so.¹⁸ Where damages for the vacation of streets may be recovered by abutting owners, the erection of a viaduct is a practical vacation so far as a lessee is concerned, and the shutting off of light and air, these being essential to the prosecution of his business, may be considered in ascertaining the damages he has sustained.¹⁹

The damages to a life estate may be measured by the net annual value of the premises multiplied by the tenant's expectancy of life and reduced to its present cash value.²⁰ The division of ownership, however, cannot operate to subject the condemning party to the payment of greater damages than if one person had a complete and perfect title.²¹ The measure of damages for the interest of a remainder-man in land taken is the value of the land taken at the termination of the life estate, together with incidental damages at such time.²² If a lessee shows no other damage he can only recover the amount due his landlord for rent;²³ though he may be compensated for the loss of the landlord's covenant to renew his lease.²⁴ By refusing to

¹⁷ Pegler v. Hyde Park, 176 Mass. 101.

¹⁸ Board of Chosen Freholders v. Emmerich, 57 N. J. Eq. 535.

¹⁹ Western N. Union v. Des Moines, 157 Iowa 685.

²⁰ Pittsburgh, etc. R. Co. v. Bentley, 88 Pa. 178.

²¹ Booker v. Venice & O. R. Co., 101 Ill. 333.

²² Chambers v. Chattanooga Union R. Co., 130 Tenn. 459; Southern R. Co. v. Jennings, 130 Tenn. 450.

²³ North Pennsylvania R. Co. v. Davis, 26 Pa. 238.

²⁴ Seattle & M. R. Co. v. Scheike, 3 Wash. 625; North Pennsylvania R. Co. v. Davis, 26 Pa. 238. See *In re Delancey St.*, 120 App. Div. (N. Y.) 700, for the rule upon which dam-

join in an appraisal of the leasehold interest as stipulated in the lease a landlord who seeks to condemn such interest justifies an adjustment of the rights of the tenant on the basis of the agreed rent for the preceding term.²⁵ The rent received by a tenant who has sublet the premises may be shown.²⁶ The use to which the tenant may put the premises has a bearing on the measure of his recovery.²⁷ After a lease has been terminated by a notice to quit the tenant holding over as tenant at will cannot recover for an injury to the property caused by the opening of a street. It cannot be shown that the landlord's custom was to continue the tenancy indefinitely and that the only reason for giving the notice to quit was the proceedings for opening the street.²⁸ But the authorities are not harmonious on this point. In Maryland the court said that the jury had a right to consider the probability of a renewal of the tenant's term because the evidence tended to show that this circumstance increased its market value, which was the measure of his damages.²⁹ This view is not accepted in Massachusetts. Where it appeared that the owner had been in the habit of renewing the tenant's lease from time to time the court observed that that fact added nothing except by way of corroboration to the testimony that the parties intended to keep on. "Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioner's holding they could not be taken into account in determining what the respondent should pay. They added nothing to the tenant's legal rights, and legal rights are all that must be paid for. Even if such intentions added to the salable value of the lease the addition would represent a speculation on a chance, not a legal right. The court was right in excluding expert evidence as to an increase in value from that source."³⁰ The fact

age is to be computed in favor of a lessee who has improved the property and has the right to have his lease renewed.

²⁵ *North Coast R. Co. v. Kraft*, 63 Wash. 250.

²⁶ *West Chicago Park Com'rs v. Boal*, *supra*.

²⁷ *North Coast R. Co. v. Kraft*, *supra*.

²⁸ *Shaaber v. Reading*, 150 Pa. 402.

²⁹ *Baltimore v. Rice*, 73 Md. 307.

³⁰ *Emery v. Boston T. Co.*, 178 Mass. 172, 185, 86 Am. St. 473.

that the tenant has relet the damaged premises may mitigate his injury, but it does not bar a recovery.³¹ If a lease may be terminated at the will of the lessor on giving thirty days' notice a verdict for nominal damages in favor of the lessee will not be interfered with.³²

In addition to the recovery of the amount by which his interest is diminished³³ a tenant may be compensated for the injury to or destruction of growing crops, and for the loss of buildings he erected for his own use, or for the expense of their removal if that was made necessary; but not for injury to the buildings, trees or other improvements on the land at the time he entered upon its possession;³⁴ nor for the value of any buildings or other improvements which he had no right to remove without the lessor's consent. As to improvements made by the tenant and which he was bound to deliver to the lessor in good condition, the latter takes a present estate subject to the former's right to use during the term.³⁵ A life tenant cannot recover for improvements made by him for the convenience of his business, so far as they are real estate, or for the injury caused to them, so far as they are chattels, or for the loss of their use in his business.³⁶ If a permanent attachment made to leased premises cannot be removed and used to any advantage elsewhere the lessee is not entitled to recover the cost of putting

³¹ *Witman v. Reading*, 191 Pa. 134.

³² *Boecken v. Naperville*, 166 Ill. 151.

³³ *Wertham v. Mason City, etc. R. Co.*, 128 Iowa 135.

³⁴ *Burt v. Wigglesworth*, 117 Mass. 302; *Burt v. Merchants' Ins. Co.*, id. 1; *Edmands v. Boston*, 108 id. 535; *Matter of New Reservoir*, 1 Sheldon (Buffalo Super. Ct.), 408; *Ross v. Elizabethtown R. Co.*, 20 N. J. L. 230. See *Detroit v. Little*, 146 Mich. 373.

³⁵ *Corrigan v. Chicago*, 144 Ill. 537, 21 L.R.A. 212.

Where a tenant erected on the leased land buildings which he had

not the right to remove, and an improvement on a street on which the property abutted compelled the raising of the buildings, though it did not otherwise damage the fee, the tenant was held entitled to recover, the cost of raising the building being competent solely on the question of the depreciation in the value of the leasehold, and not as a separate element of damage. The reason given for the decision was that the raising of the building was necessary to continue the productive value of the leasehold. *Coons v. McKees Rocks Borough*, 243 Pa. 340.

³⁶ *Williams v. Commonwealth*, 168 Mass. 364.

it up and taking it down and for damage done to it. The presumption is that the value of its use was included in the sum awarded for the leasehold.³⁷ In estimating the value of a leasehold interest the value of the use of improvements made upon the premises during the term are to be taken into account, the tenant having the option to remove them at the expiration of the term. On refusing to remove the improvements after the condemnation of the property and their removal by the condemnor it is not right to value them as if they were in place; the amount received for them, after a proper and *bona fide* effort to dispose of them to the best advantage, measures the recovery, less the expense of severing and removing them from the premises.³⁸ The measure of recovery for the taking of a building is not the cost of its reproduction but its market value at the time of appropriation.³⁹ A lessee may show when and to what extent a building owned by him was repaired and the cost of laying a sidewalk leading to it.⁴⁰ The value of removable fixtures is to be ascertained as if they were detached at the expiration of the tenant's term.⁴¹ Neither the cost of removing them nor the profits lost while they were being removed enter into the recovery.⁴² A lessee who has been released from the payment of rent for the condemned premises cannot recover rents paid for other premises during the period covered by such release; neither can there be a recovery of the amount paid to employees engaged elsewhere than on the condemned premises because of a temporary suspension of business caused by the removal therefrom, especially if damages have been allowed for interruption to business.⁴³ The damages due a lessee cannot be

³⁷ *Metropolitan West Side E. R. Co. v. Siegel*, 161 Ill. 638, 650.

³⁸ *Consolidated I. Co. v. Pennsylvania R. Co.*, 224 Pa. 487.

³⁹ *Musanti v. State*, 73 N. Y. Misc. 534.

⁴⁰ *West Chicago Park Com'rs v. Boal*, 232 Ill. 248.

⁴¹ *In re New York*, 101 App. Div. (N. Y.) 527.

An award to a tenant who has the

right to remove buildings at the end of the term is presumed to include the value of such buildings in addition to the value of the unexpired term of the lease. *Harrelson v. Oro Grande Lime & Stone Co.*, 23 Cal. App. 479.

⁴² *United States v. Meyers*, 190 Fed. 688.

⁴³ *Metropolitan W. S. R. Co. v. Siegel*, *supra*.

reduced because his occupation of the property continued after the taking.⁴⁴ The nature of the title and the lessor's right to determine the tenancy are material as bearing upon the extent of the depreciation in the value of the tenant's estate. Under a statute providing for the payment of "all damages sustained" there may be a recovery for injury done a building though as between the tenant and his landlord it is a removable fixture; and if, during the course of altering the grade of a street, access to the building is made more difficult the injury is special and peculiar to the tenant and ground for compensation.⁴⁵

§ 1082. Same subject; to whom payment due; existence of servitude or easement; rights remaining in owner. The allowance for damages should be confined to such interest in the land as is represented by the parties to the proceeding;⁴⁶ if lessees are not parties damages cannot be allowed for injury to the leasehold estate.⁴⁷ Payment to any other than the true owner constitutes no defense to his claim.⁴⁸ It cannot be made to one tenant in common so as to affect the right of other tenants to damages;⁴⁹ nor to the landlord so as to bar the claim of his tenant.⁵⁰ One having no title cannot claim damages⁵¹ unless he has been injured as an occupant,⁵² and the title may be incidentally investigated with a view to awarding the damages

⁴⁴ Pegler v. Hyde Park, 176 Mass. 101.

⁴⁵ Sheehan v. Fall River, 187 Mass. 356.

⁴⁶ Morin v. St. Paul, etc. R. Co., 30 Minn. 100; Indiana, etc. R. Co. v. Conness, 184 Ill. 178; Chicago, etc. R. Co. v. Ellis, 52 Kan. 41.

⁴⁷ Little Rock, etc. R. Co. v. Alister, 62 Ark. 1.

⁴⁸ Sherwood v. Lafayette, 109 Ind. 411, 58 Am. Rep. 414; Lafferty v. Railroad Co., 124 Pa. 297, 10 Am. St. 587, 3 L.R.A. 124; Tanner v. Kellogg, 49 Mo. 118; Missouri River, etc. R. Co. v. Owen, 8 Kan. 409; Hood v. Finch, 8 Wis. 381.

⁴⁹ Brinkerhoff v. Wemple, 1 Wend. 470.

Suth. Dam. Vol. IV.—28.

⁵⁰ Musanti v. State, 73 N. Y. Misc. 534; Gluck v. Mayor, etc., 81 Md. 315, 48 Am. St. 515; Penney v. Commonwealth, 173 Mass. 507, 73 Am. St. 312. *Contra*, Shauver v. Phillips, 7 Ind. App. 12, holding that the only recourse of the tenant is against the landlord.

⁵¹ Allyn v. Providence R., 4 R. I. 457; Rooney v. Sacramento R. Co., 6 Cal. 638; Robbins v. Milwaukee, etc. R. Co., 6 Wis. 636; Menot v. Cumberland County Com'rs, 28 Me. 125; Clapp v. Boston, 133 Mass. 367 (parol licensee); Winter v. Montgomery, 83 Ala. 589.

⁵² Costello v. Burke, 63 Iowa 361.

to the proper persons.⁵³ But the condemning party may by his proceedings recognize title in a person proceeded against so as to preclude any question.⁵⁴ In one case it was held that where a railroad company applies for the appointment of a commission to ascertain the value of and condemn land needed by it for a right of way and makes the parties in possession defendants, the latter are entitled to have the value of the land, as determined, paid to them although third parties have given notice of their ownership of it.⁵⁵ In another case where such a company took possession of the land, disturbed the defendant and initiated the proceedings as to damages it was not in its power to limit the scope of the proceedings to that part of the land only to which the defendant could establish a perfect title, the entire tract being used for one general purpose.⁵⁶ Where the claimant is plaintiff he must show his title.⁵⁷ Railroad companies, by virtue of their compulsory power, do not acquire absolute fee-simple title to land, but only the right to use it for their purposes; and compensation must be allowed for the value of the use so appropriated. What, if anything, would be left to the land-owner of value, consistent with the enjoyment of the easement by the company, should also be considered.⁵⁸ If, however, there is no evidence of the existence either upon or beneath the surface of the land condemned of any surplus earth, stone, coal or mineral which the owner of the fee may

⁵³ *Thurston v. Portland*, 63 Me. 149; *Brisbine v. St. Paul, etc. R. Co.*, 23 Minn. 114.

⁵⁴ *Rippe v. Chicago, etc. R. Co.*, 23 Minn. 18; *Sacramento, etc. R. Co. v. Moffatt*, 7 Cal. 577.

⁵⁵ See *St. Paul, etc. R. Co. v. Matthews*, 16 Minn. 341; *Norristown T. Co. v. Burket*, 26 Ind. 53; *Auditor v. Crise*, 20 Ark. 540; *Crise v. Auditor*, 17 Ark. 572; *Selma R. v. Camp*, 45 Ga. 180; *Mt. Sterling v. Givens*, 17 Ill. 255; *Peoria, etc. R. Co. v. Laurie*, 63 Ill. 264; *Same v. Bryant*, 57 Ill. 473; *St. Louis, etc. R. Co. v. Teters*, 68 Ill. 144; *Wright v. Wisconsin R. Co.*, 29 Wis.

341; *Chandler v. Jamaica Pond A. Co.*, 125 Mass. 544.

⁵⁶ *Kansas City S. B. R. Co. v. Norcross*, 137 Mo. 415.

⁵⁷ *Peoria, etc. R. Co. v. Bryant; Robbins v. Milwaukee, etc. R. Co.*, *supra*.

⁵⁸ *Southern Pac. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 70 L.R.A. 221, 106 Am. St. 36; *Alabama, etc. R. Co. v. Burkett*, 42 Ala. 83; *Neville Road Case*, 8 Watts 172; *Philadelphia v. Linard*, 97 Pa. 242. See *Lake Superior, etc. R. Co. v. Greve*, 17 Minn. 322.

remove the fact that his ownership thereof is not divested is of no practical importance as affecting his damages.⁵⁹

Where a claim has accrued for damages to an entire tract of land by reason of the actual construction of a railroad over a part of it or the proceedings taken have vested title in the condemnor and before the damages have been assessed or paid the land is sold without any provision in respect to them, the right to such damages remains in the vendor.⁶⁰ They belong to the owner at the time of the injury, and do not pass to a subsequent vendee or lessee unless they are specially assigned to him,⁶¹

⁵⁹ *Cummins v. Des Moines, etc. R. Co.*, 63 Iowa 397; *Lewis v. Omaha, etc. R. Co.*, 158 Iowa 137; *Southern Pac. R. Co. v. San Francisco Sav. Union*, *supra*; *Barrall v. Quick*, 111 Ky. 22; *Robbins v. St. Paul, etc. R. Co.*, 22 Minn. 286; *Dethampl v. Lake Koen I. Co.*, 73 Kan. 54; *Railway v. Combs*, 51 Ark. 324. See § 1070.

⁶⁰ *Pomeroy v. Chicago, etc. R. Co.*, 25 Wis. 641. See *Pick v. Rubicon H. Co.*, 27 Wis. 433.

⁶¹ *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 39 L. ed. 873; *Maffet v. Quine*, 93 Fed. 347; *North-erna Pac. R. Co. v. Murray*, 87 id. 648, 31 C. C. A. 183; *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659; *Flickinger v. Omaha B. & T. R. Co.*, 98 Iowa 358; *People v. Phillips*, 88 App. Div. (N. Y.) 560; *Moore v. Lancaster*, 212 Pa. 642, 2 L.R.A.(N.S.) 819; *Penney v. Commonwealth*, 173 Mass. 507, 73 Am. St. 312; *Chesapeake & O. R. Co. v. Chambers*, 95 Va. 503; *Turner v. Missouri Pac. R. Co.*, 130 Mo. App. 535; *Bridges v. Southern R.*, 86 S. C. 267; *Dilts v. Plumville R. Co.*, 222 Pa. 516; *Sargent v. Machias*, 65 Me. 591; *Matter of Grade Crossing Com'rs* 64 App. Div. (N. Y.) 71, affirmed without opinion, 169 N. Y. 605; *Tenbrooke v. Jahke*,

77 Pa. 392; *Chicago, etc. R. Co. v. Loeb*, 118 Ill. 203; *Wabash, etc. R. Co. v. McDougall*, 118 Ill. 229; *Indiana, etc. R. Co. v. Allen*, 100 Ind. 409; *Campbell v. Philadelphia*, 108 Pa. 300; *Lasch's App.* 109 id. 72; *Smith v. Railway Co.*, 88 Tenn. 611; *Little Rock, etc. R. Co. v. Allister*, 68 Ark. 600; *Midland R. Co. v. Trevarthen*, 1 Colo. App. 152; *St. Louis, etc. R. Co. v. Nyce*, 61 Kan. 394, 48 L.R.A. 241; *Mayor, etc. v. Ewing*, 116 Ala. 576. But see *Caldwell v. Bank*, 20 Ind. 294.

In Illinois the judgment of condemnation does not pass the title; only payment effects that. Ordinarily if the party in whom title to land was vested when such a judgment was entered sells the land before the damages are paid the grantee is entitled to them. *Rice v. Chicago*, 57 Ill. App. 558; *Chandler v. Morey*, 195 Ill. 596. But it is otherwise where the purchaser at a guardian's sale buys the land with notice that the damages awarded for opening a road across it were reserved for the ward when they should be paid. *Chandler v. Morey*, *supra*.

In *Whitecotton v. St. Louis & H. R. Co.*, 104 Mo. App. 65, the deed of a purchaser at a foreclosure sale made after the location of the road

or to such owner's heirs.⁶² It is otherwise if the claim for compensation is not ripe at the time the conveyance is made.⁶³ A lessor may show on the assessment of damages a surrender of a lease after the land demised had been taken for a highway, with a release of the lessee's claim for damages.⁶⁴ But in Massachusetts a release from a third person after the taking does not enlarge the rights of the party to whom it was given.⁶⁵

If land sought to be condemned for an easement is already burdened with one public servitude or private easement in a third party the imposition of another servitude of the same kind gives no right to substantial damages;⁶⁶ but it is otherwise if there is a subsequent condemnation for a different purpose, inconsistent with or subversive of the first;⁶⁷ and in such

upon the land, the trust deed under which the sale was made having been executed prior thereto, recovered the value of the land taken, but not the incidental damage done that not taken. He was presumed to have bought the land for a less price because of such damages, and if the owner or mortgagee did not demand them his right to them was not affected.

⁶² *Neal v. Knox, etc. R. Co.*, 61 Me. 298.

⁶³ *Magee v. Brooklyn*, 144 N. Y. 265; *New Brighton v. Peirsol*, 107 Pa. 280; *Rice v. Chicago*, 57 Ill. App. 558; *Phillips v. Postal Tel. C. Co.*, 130 N. C. 513; *Carli v. Stillwater, etc. R. Co.*, 16 Minn. 260; *Virginia-Carolina R. Co. v. Booker*, 99 Va. 633.

⁶⁴ *Dickenson v. Fitchburg*, 13 Gray 546.

⁶⁵ *Wood v. Commissioners*, 122 Mass. 394.

⁶⁶ *In re Olean*, 17 L.R.A. 640, 135 N. Y. 341; *In re Schneider*, 136 App. Div. (N. Y.) 444; *In re Carroll St.*, 137 App. Div. (N. Y.) 39; *Peabody v. City of Boston*, 220 Mass. 376.

The reason of the rule laid down in the text is well stated in a late Massachusetts case, where the appropriation of the street for a subway deprived the owners of the fee of certain uses previously made by them of the subsurface. The court said: "The public acquired the right to use the land, within the boundaries of the taking of the easement of travel, for all reasonable means of transportation for persons and commodities which the advance of civilization may render suitable for a highway. The fee of the land remains in the landowner, who may use it in any reasonable way not inconsistent with the paramount right of the public easement which is coextensive with the limits of the highway. When the needs of the public for the purposes of travel increase, they are superior and the landowner must withdraw even to the extent of being quite excluded." *Peabody v. City of Boston, supra*.

⁶⁷ *Story v. New York E. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan E. R. Co.* 104 N. Y. 263; *Street R. Co. v. Doyle*, 88 Tenn. 747, 17 Am. St. 933; *Tri*

case damages are recoverable in Maryland as though the former had not existed; ⁶⁸ but the rule is otherwise in some states. ⁶⁹ A plank-road laid by a company over a highway is not a different public use which will give abutting owners a right to compensation as for an additional servitude; but such company will be liable if by excavations it endangers the stability of houses on the line. ⁷⁰

§ 1083. **Assessment of damages and benefits, time of; mitigation of liability by act of third party.** As the value of real estate is liable to be much affected generally and specially by the improvement for which it may be taken, as well as by various other causes, the inquiry at what time in the proceeding practically or legally to appropriate it are the damages to be ascertained for the purpose of just compensation is important. Possession for public use cannot be taken, nor is the title of the owner divested, until payment is made or adequately provided for. ⁷¹ The time of the taking is that at which the value is fixed, but the cases do not agree as to what is to be deemed the taking—whether the actual appropriation or the condemnation. ⁷² In Pennsylvania it seems to have been held that the jury should consider the matter as if called upon

State Tel. & T. Co. v. Cosgriff, 19 N. D. 771.

⁶⁸ Moale v. Baltimore, 5 Md. 314, 61 Am. Dec. 276. See Pinkerton v. Boston, etc. R. Co., 109 Mass. 527.

⁶⁹ In re Lawrence St. (Misc.), 136 N. Y. Supp. 845; Muller v. Southern Pac. Branch R. Co., 83 Cal. 240; Central Branch Union Pac. R. Co. v. Andrews, 30 Kan. 590; Adams v. Chicago, etc. R. Co., 39 Minn. 286, 12 Am. St. 644, 1 L.R.A. 493.

⁷⁰ Williams v. Natural Bridge P. R. Co., 21 Mo. 580.

⁷¹ Daniels v. Chicago, etc. R. Co., 35 Iowa 129, 14 Am. Rep. 490; Henry v. Dubuque, etc. R. Co., 10 Iowa 540; Bensley v. Mountain Lake W. Co., 13 Cal. 306, 73 Am. Dec. 575; Rider v. Stryker, 63 N. Y.

136; Cook v. South Park Com'rs, 61 Ill. 115; People v. Williams, 51 Ill. 63.

⁷² Sunday v. Louisville & N. R. Co., 62 Fla. 395 (time of lawful appropriation); Milwaukee, etc. R. Co. v. Eble, 3 Pin. 334; Montclair R. Co. v. Benson, 36 N. J. L. 557; Miller v. Easton, etc. R. Co., 37 id. 222; Stafford v. Providence, 10 R. I. 567, 14 Am. Rep. 710; Patterson v. Boom Co., 3 Dill. 465; St. Joe, etc. R. Co. v. Orr, 8 Kan. 419; Virginia, etc. R. Co. v. Lovejoy, 8 Nev. 100; Daniels v. C. I. & N. R. Co., 41 Iowa 52; San Francisco, etc. R. Co. v. Mahoney, 29 Cal. 112; Hosher v. Kansas City, etc. R. Co., 60 Mo. 329; Arnold v. Covington Bridge, 1 Duv. 372.

to estimate the injury at the moment when compensation could first be demanded,⁷³ that is at the date of the filing of the bond.⁷⁴ This is the difference in the value of the land before the improvement is made and after its completion,⁷⁵ that it is proper to tell the jury the market value should be ascertained before the road or the prospect of it had produced any effect upon the land, then the value immediately after the completion should be ascertained, and the difference would settle the question of damages.⁷⁶ But a later case fixes the time for awarding compensation where the taking is by municipal corporations as of the time the improvement is made, not at the date of the passage of an ordinance for making it;⁷⁷ and that appears to be the rule where the taking is by a private corporation.⁷⁸

⁷³ *Schuylkill N. Co. v. Thoburn*, 7 S. & R. 411; *Shenango, etc. R. Co. v. Braham*, 79 Pa. 447; *Pennsylvania, etc. R. Co. v. Bunnell*, 81 id. 426; *Philadelphia v. Linnard*, 97 id. 242.

⁷⁴ *Graham v. Pittsburgh, etc. R. Co.*, 145 Pa. 504; *Rudolph v. Pennsylvania, etc. R. Co.*, 186 Pa. 541, 47 L.R.A. 782.

⁷⁵ *Hornstein v. Atlantic, etc. R. Co.*, 51 Pa. 87; *Delaware, etc. R. Co. v. Burson*, 61 Pa. 369.

⁷⁶ *Metropolitan St. R. Co. v. Walsh*, 197 Mo. 392; *Hornstein v. R. Co.*, *supra*; *Long v. Harrisburg, etc. R. Co.*, 126 Pa. 143. In accord: *In re Joint Drainage Dist.*, 160 Iowa 293.

When the action is for consequential damages, no part of the land being taken, the right thereto accrues when the improvement is completed. *Pennsylvania, etc. R. Co. v. Ziemer*, 124 Pa. 560. Compare *Rudolph v. Pennsylvania R. Co.*, *supra*, the facts of which varied somewhat from those of the former case.

⁷⁷ *Uhle v. Philadelphia*, 30 Pa. Super. Ct. 480; *Change of Grade of Norwood St.*, 12 Pa. Dist. 309;

Whitaker v. Phoenixville, 141 Pa. 327; *Philadelphia Ball Club v. Philadelphia*, 192 Pa. 632, 73 Am. St. 835, 46 L.R.A. 724; *Rankin v. Pittsburgh*, 7 Pa. Dist. 489; *Devlin v. Philadelphia*, 206 Pa. 518.

The rule is less strict where land is not actually taken and the extent of the injury can only be ascertained after the improvement is made. *Robbins v. Scranton*, 217 Pa. 577. In such a case the questions at issue may be settled by the facts existing when the trial occurs. *Joliet v. Blower*, 155 Ill. 414; *Manson v. Boston*, 163 Mass. 479.

Where the grade of a street has been changed without authority the value of the abutting property affected must be fixed as of the time of the adoption of the grade by the public. *Edsall v. Jersey Shore*, 220 Pa. 591.

⁷⁸ *Walker v. South Chester R. Co.*, 174 Pa. 288.

"The rule which seems to us to be deducible from the cases is this: Where the entry is not tortious, or when under a tortious entry, the occupancy has become lawful by agreement of the parties or other-

The time of plotting streets across land has been said to be a proper time for fixing its value.⁷⁹ If the original entry was without right the rule which requires that the damages shall be computed as of the time the owner's title was divested does not preclude a knowledge and consideration of the condition of the land before the entry was made. The owner has a right to have his damages assessed with reference to the condition of his property before the trespass was committed.⁸⁰ The opinion in a late case interprets the earlier cases as favoring the rule that the damages are to be assessed from the time when the greatest injury was imposed upon the land—when the occupier first indicated by lawful proceedings the intention to impose a permanent servitude upon it.⁸¹ It is held in Mississippi that if the charter of a railroad company which wrongfully enters upon land contemplates that the owner shall be compensated at the time the land is taken it is not entitled to have his damages assessed as of that time when it has held and used the land for years. On the application of the owner he may have his compensation fixed as of the date of his proceeding, as the property is diminished in value, without deduction on account of any supposed benefit.⁸² The same rule applies when the wrong is done by a municipality.⁸³ In Wisconsin a statute provided that land taken for a railroad should be appraised at its value at the time the company acquired title.⁸⁴ Under it the owner was held to be entitled to be paid the value of the property at the time of the taking; that is the just compensation of

wise, before conveyance by the landowner, the damages belong to him and do not pass to his grantee, and should be assessed as of the date of the original entry, adding interest. But where the entry and occupation are unlawful and no steps have been taken to fix the damages for permanent occupancy, the grantee of the person who owned the land at the time of the unlawful entry is entitled to the damages from the inception of his title; damages for the unlawful occupancy and com-

pensation for the purchased privilege to remain permanently." *Calvin v. Postal Tel. Co.*, 11 Pa. Dist. 305.

⁷⁹ *In re South Twelfth St.*, 217 Pa. 362.

⁸⁰ *Graham v. Pittsburgh, etc. R. Co.*, 145 Pa. 504.

⁸¹ *Shevalier v. Postal Tel. Co.*, 22 Pa. Super. Ct. 506.

⁸² *Louisville, etc. R. Co. v. Hopson*, 73 Miss. 773.

⁸³ *Mayor v. Higgins*, 81 Miss. 376.

⁸⁴ *Laws of 1872*, ch. 119, sec. 21.

the constitution. A company having previously built its road, the improvements were to be excluded from the estimate. If the market value is enhanced at the time of the condemnation, however, the land is to be estimated at such enhanced value.⁸⁵ In Iowa the value is to be fixed as of the time of the appropriation, and evidence of a general advance in the price of local lands is admissible though it is attributable to the improvement.⁸⁶ In Minnesota the value is assessed as of the time of the

⁸⁵ *Aspinwall v. Chicago, etc. R. Co.*, 41 Wis. 474; *Driver v. Western Union R. Co.*, 32 Wis. 569, 14 Am. Rep. 726; *West v. Milwaukee, etc. R. Co.*, 56 Wis. 318. *Contra*, *United States v. Narragansett*, 180 Fed. 260. See § 1076.

A similar rule was applied in a Minnesota case where prior to the entry of the railroad into the vicinity where the land taken was located, the land had but an inconsiderable value. *Potts v. Minneapolis, St. P. & S. S. M. R. Co.*, 124 Minn. 413. Similarly it was held that one who in good faith improves his property after proceedings are commenced to condemn it may recover the value of the land as enhanced by the improvements. The reason given for the decision is that in Kentucky the condemnor is not obliged by the mere fact of starting proceedings to ultimately take the property. *Sandy Val. & E. R. Co. v. Bentley*, 161 Ky. 555.

But in Missouri it is held that where the improvement causing the appreciation in value and the improvement for which the taking is made are parts of one and the same general scheme of improvement, the enhancement of value caused thereby cannot be considered by the jury in estimating the value of the land taken, as where a railroad had previously taken land and constructed a freight depot thereon, causing the

increase in value, and later took the land in question for a passenger depot, which taking was also in contemplation by the railroad at the time of the former taking. The reason given is that to allow the competency of such enhancement of value would require, as a corollary, a holding that if there had been a depreciation, instead of an enhancement, the railroad company would be entitled to have such fact considered in fixing the value of the land taken, which is said to be a proposition for which no court would stand. The only alternative was said to be to hold that the effect of such improvement on the value of the land was incompetent for any purpose. The reason given for the decision cannot be said to reconcile the case with the other cases referred to, and it must be regarded as *contra*. *St. Louis Elec. Terminal R. Co. v. MacAdaras*, 257 Mo. 448.

⁸⁶ *Ranek v. Cedar Rapids*, 134 Iowa 563 (two judges dissented).

The value of land on which a drainage ditch is dug is to be fixed as of the time it was made. *Gish v. Castner-W., etc. D. Dist.*, 136 Iowa 155.

It was said in an earlier case "it is the general rule that the damages are to be assessed as of the time when the commissioners make their appraisement if the company pro-

taking, which is at the time of making the award.⁸⁷ The same rule is adopted in Kansas,⁸⁸ Colorado,⁸⁹ formerly in California,⁹⁰ in Wisconsin,⁹¹ Washington,⁹² and Georgia.⁹³ In Kansas and, it seems, Missouri, if the entry is made without consent and condemnation proceedings are not instituted until afterward the assessment will be made as of the time possession was first taken,⁹⁴ and so in Alabama.⁹⁵ It has been held otherwise in Texas,⁹⁶ though the cases are not agreed.⁹⁷ In California and

ceeds under the assessment with reasonable diligence, and that the values as they existed at that time are to control on appeal." *Ellsworth v. Chicago*, etc. R. Co., 91 Iowa 386, and cases cited.

⁸⁷ *Warren v. St. Paul*, etc. R. Co., 21 Minn. 424; *Sherwood v. Same*, *id.* 122; *Winona*, etc. R. Co. v. *Denman*, 10 Minn. 267; *Same v. Waldron*, 11 Minn. 515; *St. Paul*, etc. R. Co. v. *Murphy*, 16 Minn. 500; *Hursh v. St. Paul*, etc. R. Co., 17 Minn. 439; *Warren v. St. Paul*, etc. R. Co., 18 Minn. 384; *Morin v. Same*, 30 *id.* 100; *Kremer v. Chicago*, etc. R. Co., 51 Minn. 15, 38 Am. St. 468. See *Hempsted v. Cargill*, 46 Minn. 118 (under the Milldam Act).

It is immaterial that the improvement has been made without the consent of the landowner. *Blue Earth County v. St. Paul*, etc. R. Co., 28 Minn. 503.

⁸⁸ *St. Joe*, etc. R. Co. v. *Orr*, 8 Kan. 419.

⁸⁹ *Colorado M. R. Co. v. Brown*, 15 Colo. 193; *Twin Lakes H. G. Min. Synd. v. Colorado M. R. Co.*, 16 Colo. 1.

⁹⁰ *San Francisco*, etc. R. Co. v. *Mahoney*, 29 Cal. 112; *Stockton*, etc. R. Co. v. *Galgiani*, 49 Cal. 139. See note 98, *infra*.

⁹¹ *Lyon v. Green Bay*, etc. R. Co., 42 Wis. 543; *Abbott v. Milwaukee L., H. & T. Co.*, 126 Wis. 634.

⁹² *Grays Harbor*, etc. R. Co. v.

Kauppinen, 53 Wash. 238 (time of trial); *State v. Grays Harbor*, etc. R. Co., 54 Wash. 530.

⁹³ *Nelson v. Atlanta*, 138 Ga. 252.

⁹⁴ *Wier v. St. Louis*, etc. R. Co., 40 Kan. 130; *McElroy v. Kansas City*, etc. R. Co., 172 Mo. 546. See *Webster v. Kansas City S. R. Co.*, 116 Mo. 114, favoring the view that the owner might fix upon any time intermediate the taking and the institution of proceedings.

⁹⁵ *Jones v. New Orleans & S. R. Co.*, 70 Ala. 227.

⁹⁶ *Texas Western R. Co. v. Cave*, 80 Tex. 137. See *Gulf*, etc. R. Co. v. *Brugger*, 24 Tex. Civ. App. 367.

⁹⁷ *Stephenville N. & S. T. R. Co. v. Moore*, 56 Tex. Civ. App. 553. See *Morris v. Coleman County* (Tex. Civ. App.), 28 S. W. 380; *Gulf*, etc. R. Co. v. *Lyons*, 2 Willson (Tex.) App. Civ. Cas. § 139 (time of payment or deposit of the money due); *Wichita Falls & W. R. Co. v. Wyrick*, — Tex. Civ. App. —, 147 S. W. 730 (time of taking).

If the condemnor does not comply with the statute on taking an appeal from the award of the commissioners the damages are to be fixed as of the time of the trial of the appeal. *Beaumont*, etc. R. Co. v. *Elliott* (Tex. Civ. App.), 148 S. W. 1125; *Routh v. Texas T. Co.* (Tex. Civ. App.), 148 S. W. 1152.

Idaho the assessment, by virtue of statute, is to be made as of the date of the summons;⁹⁸ but in case of the change of the grade of a street it is to be made as of the time the change was made, and not as of the date of the enactment of the ordinance authorizing the change.⁹⁹ A similar rule obtains in Georgia.¹ In Utah the statutory direction is that the assessment shall be made as of the date of the summons; but in proceedings to condemn land held under a deed of trust as security the value of the land will be fixed as of the date of entering the appearance of the trustee, and not of the date of the summons against the debtor, the trustee not being served.² In Illinois, under ordinary circumstances, the assessment is to be made as of the time the petition for condemnation is filed.³ In Nebraska, Missouri,

⁹⁸ *Los Angeles v. Gayer*, 10 Cal. App. 378; *San Jose & A. R. Co. v. Mayne*, 83 Cal. 566; *Los Angeles v. Pomeroy*, 124 Cal. 597; *Spokane & P. R. Co. v. Lienallen*, 2 Idaho 1101; *Portneuf L. Co. v. Budge*, 16 Idaho 116; *San Joaquin, etc. Co. v. Stevenson*, 26 Cal. App. 274; *Sacramento T. Co. v. McDougal*, 19 Cal. App. 562 (indicating an amendment to the statute if there shall be delay in the trial by the condemnor, in which event the time of the trial governs).

⁹⁹ *Baneroff v. San Diego*, 120 Cal. 432.

¹ *Nelson v. City of Atlanta*, 138 Ga. 252.

In case of the change of grade of a street the damages are consequential and prepayment of them cannot be required; the general rule in tort applies that the action arises when the injury is done which causes the damages. *Nelson v. Atlanta*, *supra*.

² *Oregon S. L., etc. R. Co. v. Mitchell*, 7 Utah 505.

³ *Moll v. Sanitary Dist.*, 228 Ill. 633; *Sanitary Dist. v. Chapin*, 226 Ill. 499; *Chicago, etc. R. Co. v. Mines*, 221 Ill. 448; *South Park*

Com'rs v. Dunlevy, 91 Ill. 49; *Du-
puis v. Chicago, etc. R. Co.*, 115 id. 97.

If the petition is amended solely for the purpose of making the description of the property more exact the assessment should be made as of the time the original petition was filed. *Lieberman v. Chicago, etc. R. Co.*, 141 Ill. 140.

If the proceeding is instituted to obtain an award because of a change in the construction of the improvement, a change of title to the land having taken place since the original condemnation, the value of the land is to be fixed as of the time the first change was made. *Pool v. Coal Belt E. R. Co.*, 157 Ill. App. 24.

In the case of the vacation of a street the right of the owner of the property affected accrues when the vacation occurs. *Chicago v. Burck*, 158 Ill. 103, 29 L.R.A. 568, 49 Am. St. 142.

Where no land is taken and an abutting owner sues in trespass he may show the condition and value of his property at the time of the trial. *Penn Mut. L. Ins. Co. v*

Ohio, Indiana, Louisiana, and Tennessee the time when proceedings are instituted governs the parties' rights;⁴ and so in Arkansas.⁵ It was formerly held in the latter state that "where the assessment of the damages precedes the building of" a railroad "the presumption is that it will be built with skill and proper precautions. But if the road has been completed through the land at the date of trial the jury may consider the state of facts then existing and, with the light afforded by the actual

Heiss, 141 Ill. 35, 33 Am. St. 273
See § 1068.

⁴Missouri Pac. R. Co. v. Hays, 15 Neb. 224; Logansport, etc. R. Co. v. Buchanan, 52 Ind. 163; Lafayette, etc. R. Co. v. Murdock, 68 id. 137; Alloway v. Nashville, 88 Tenn. 510, 8 L.R.A. 123; Fremont, etc. R. Co. v. Bates, 40 Neb. 381; Harlan County v. Hogsett, 60 Neb. 362; Kansas City S. B. R. Co. v. Noreross, 137 Mo. 415 (it is ruled in Ragan v. Kansas City & S. R. Co., 144 Mo. 623, 638, that the damages are to be assessed as of the time of the taking and appropriation); Schaible v. L. S. & M. S. R. Co., 10 Ohio Dec. 334 (Notwithstanding the premises were damaged before that time; for such damage the owner may recover in a proper action); Railroad Co. v. Perkins, 49 Ohio St. 326; Cleveland, etc. R. Co. v. Smith, 177 Ind. 524; Ft. Wayne & S. T. Co. v. Ft. Wayne & W. R. Co., 170 Ind. 49, 16 L.R.A. (N.S.) 537; New Jersey, etc. R. Co. v. Tutt, 168 Ind. 205; Muncie N. G. Co. v. Allison, 31 Ind. App. 50; Louisiana R. & N. Co. v. Sarpy, 125 La. 388. See St. Louis, etc. R. Co. v. Stewart, 201 Mo. 491.

In Tennessee the rule is otherwise where at the time of the location of the improvement on the land the owner is devoting the land to an actual and valuable use, such as a

mill, in which case the owner is entitled to recover its fair cash value as a going concern at the time possession was taken of the land for the improvement. Southern Ry. Co. v. Michaels, 126 Tenn. 702; Southern R. Co. v. Memphis, 126 Tenn. 267, 41 L.R.A. (N.S.) 828.

If possession was taken before the trial the damages are to be computed as of the time it was taken. Chicago, etc. R. Co. v. Moggridge, 116 Tenn. 445.

In a late Missouri case it was held that where the court was requested by the owner to assess the value of the land taken as of the date of the return of the commissioners appointed to assess it he cannot assign as error the fact that such assessment was not made as of the date of the commencement of the proceedings. Kansas City Southern R. Co. v. Second Street Imp. Co., 256 Mo. 386.

In Louisiana where there is no formal taking, the value of the land is to be assessed as of the date of actual entry of the railroad upon the land and its appropriation for railroad purposes. Jacobs v. Kansas City, S. & G. R. Co., 134 La. 389.

⁵Newgass v. Railway Co., 54 Ark. 140; Kansas City S. R. Co. v. Boles, 88 Ark. 533; School Dist. of Ogden v. Smith, 113 Ark. 530.

construction, determine what the damage has been.”⁶ In Massachusetts the statute declares that “the damages for land taken shall be fixed at the value thereof before” the taking. This has been sustained as valid. The doctrine of several cases ruled under it has been thus stated. “The owner of land taken for public use cannot recover therefor an enhanced value which it has acquired merely by reason of the taking, or as the result of the improvement which the taking of that particular land for the specific purpose for which it is taken contemplates; for from the very nature of things its appropriation is a condition precedent to the existence of the improvement, and it cannot share in the effect of the change to create which it must be used.” Hence, where a statute authorized the taking of designated property for a specific purpose the value of it was fixed as of the time the statute was enacted, and not a year later when the actual taking occurred.⁷

In New York, whenever the legislature locates by metes and bounds the lands to be taken and they are declared to be taken by the statute, the compensation is to be awarded as of the time of the taking.⁸ But if the legislature, though describing the land by metes and bounds and directing that it shall be devoted to a public purpose, leaves uncertain what particular portion of the land is to be taken, but refers the question to a body which may exercise its discretion there is no appropriation until final

⁶ *Springfield & M. R. v. Rhea*, 44 Ark. 258.

⁷ *Mowry v. Boston*, 173 Mass. 425. See *Squire v. Somerville*, 120 Mass. 579 (no allowance made for filling the land pursuant to an order of the authorities after it was “taken”); *May v. Boston*, 158 Mass. 21; *Dickenson v. Fitchburg*, 13 Gray 546; *Reed v. Hanover Branch R. Co.*, 105 Mass. 303; *Garvey v. Revere*, 187 Mass. 545; *Dorgan v. Boston*, 12 Allen, 223; *Baneroff v. Cambridge*, 126 Mass. 438.

The rights of the owner are not enlarged because he was led by the officers of the condemning city to

expend money on the property after it was taken. *Cobb v. Boston*, 109 Mass. 438.

In another Massachusetts case where a new grade was established but where the work of constructing the street to grade was interrupted before completion, and so remained at the time of trial, damages were held properly assessed as though the work was completed, as no further damage would have been done to the property by completion of the work. *Wooley v. City of Fall River*, 220 Mass. 584.

⁸ *Matter of Application of Mayor*, 99 N. Y. 569.

action by such body.⁹ The general rule is that the date of the award fixes the rights of the parties.¹⁰ But where a street is opened or closed the right to compensation is perfected by the opening or closing of it.¹¹ In New Jersey if the land-owner permits a railroad company to lay tracks without making compensation and the question of making it thereafter arises in equity the value of the land and the damages at the time of the entry, with interest, measures the recovery. If the company takes the statutory proceedings to condemn the land its value and the damages at the time of the appraisal may be recovered.¹² In Vermont the value of land taken for a highway is to be fixed as of the date of the proceedings before the selectmen.¹³ In Kentucky if the condemning party refuses to pay the damages assessed and appeals, the assessment will be made as of the time of the trial of the appeal.¹⁴ In Connecticut the appraisal and assessment, where a municipality improves streets, may be made, at its option, before or after the execution of the work or during its progress.¹⁵ In Rhode Island, under a statute requiring an adjudication of the fact of the necessity for a taking, it is held that the time of the adjudication is the time of taking, as of which the value of the property taken must be assessed.¹⁶ In Oregon the value is fixed as of the time the city council acts upon the report of the reviewers, rather than as of the time of the trial in the circuit court.¹⁷ A reapportionment

⁹ Matter of the Department of Public Parks, 53 Hun 280; Matter of the Mayor, 24 App. Div. (N. Y.) 7.

Actual opening of first street bounding the block is time for fixing the damages. In re East 172nd St., 141 App. Div. (N. Y.) 623.

¹⁰ Matter of New York E. R. Co., 76 Hun 384; In re Titus St., 139 App. Div. (N. Y.) 238; Gray v. Ft. Plain, 105 App. Div. (N. Y.) 215; In re Hudson River Toll Bridge, 81 N. Y. Misc. 324.

¹¹ In re Walton Ave., 131 App. Div. (N. Y.) 696; In re East 172nd St., 141 App. Div. (N. Y.) 623; In

re Juniper Ave., 162 App. Div. (N. Y.) 291 [aff'd 213 N. Y. 654.]

¹² Trimmer v. Pennsylvania, etc. R. Co., 55 N. J. L. 46.

¹³ Lloyd v. Fair Haven, 67 Vt. 167.

¹⁴ L. & N. R. Co. v. Asher, 10 Ky. L. Rep. 1021.

¹⁵ Peck v. Bristol, 74 Conn. 483; Shannahan v. Waterbury, 63 Conn. 420 (when compensation made or secured).

¹⁶ In re Condemnation of Land, 19 R. I. 382 (time of adjudication).

¹⁷ Portland v. Tigard, 64 Ore. 404.

of benefits and damages must be made as of the time of the original assessment.¹⁸ Any diminution in the value of the use of property pending an appeal from the original award and caused by the proceedings must be compensated for.¹⁹ Under a statute providing that damages resulting from a street improvement shall be fixed at the value of the property before the laying out, alteration or widening of the street the assessment must be made without allowing anything for the increase in the value of the land which arose from the expectation that it would be taken.²⁰ Where the government wrongfully entered on land and erected a building which became part of the realty and then took proceedings to condemn the land for public use, it was held that the owner had a right to have the value of the structure allowed him in the estimate of the damages.²¹ This doctrine is not generally recognized, and has not been uniformly applied by the court which declared it.²²

After property not taken has been damaged its subsequent destruction and the reimbursement of the owner for its loss by an insurer are wholly immaterial to the party who caused the damage.²³

§ 1084. Deduction for benefits; what benefits special. By measuring the damages according to the depreciation in market value the condemning party will get the benefit of any advance in the price of the land as a whole produced by the improvement at the time the inquiry as to value is made. The value taken before the appropriation is supposed to be uninfluenced by the projected improvement.²⁴ The value after it is completed is the value as affected by it; if enhanced, the increase cancels the damage *pro tanto*; if it has the contrary effect the

¹⁸ Newton's App., 84 Conn. 234.

¹⁹ Bishop v. New Haven, 82 Conn. 51.

²⁰ Benton v. Brookline, 151 Mass. 250.

²¹ United States v. Land in Monterey County, 47 Cal. 515. But see California Pac. R. Co. v. Armstrong, 46 Cal. 85; Emerson v. Western

Union R. Co., 75 Ill. 176; Graham v. Connersville, etc. R. Co., 36 Ind. 463; Aspinwall v. Chicago, etc. R. Co., 41 Wis. 474; Justice v. Nesquehoning Valley R. Co., 87 Pa. 28.

²² § 1076.

²³ Rome v. Rhodes, 134 Ga. 650, § 158.

²⁴ Brainerd v. State, 74 Misc. (N. Y.) 100.

diminution adds to the special damage for taking a part and inconveniencing the owner as to the residue. Where damages are assessed for anticipated depreciation by proof of particular facts no account is taken of the general benefits of the improvement; on the contrary, they are purposely excluded.²⁵ And so of any common injury which affects the community or public at large.²⁶ It is immaterial to the application of this principle that the proceedings were instituted after the improvement was made.²⁷ Only those benefits are considered which are special and affect particularly the land in question,²⁸ which result from

²⁵ *Harman v. Bluefield*, 70 W. Va. 129; *Mayor, etc. v. Garrett*, 120 Md. 608; *Minneapolis, etc. E. T. Co. v. Harkins*, 108 Minn. 478; *Macon v. Daley*, 2 Ga. App. 355; *International, etc. R. Co. v. Bell* (Tex. Civ. App.), 130 S. W. 634; *Kirby v. Panhandle & G. R. Co.*, 39 Tex. Civ. App. 252; *Hempstead v. Salt Lake City*, 32 Utah 261; *Guyandot Valley R. Co. v. Buskirk*, 57 W. Va. 417, 110 Am. St. 785; *Pierce v. Chicago & M. E. R. Co.*, 137 Wis. 550; *Meacham v. Fitchburg R. Co.*, 4 Cush. 291; *Fuller v. Mount Vernon*, 171 N. Y. 247. But see *Spokane T. Co. v. Granath*, 42 Wash. 506.

So proximity to a railroad does not enter into the consideration of value of property, as it is not special or peculiar to that property, but is shared in by the general public. *Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.*, — W. Va. —, 83 S. E. 1031.

²⁶ *Petition of Mt. Washington R. Co.*, 35 N. H. 146; *Adden v. White Mts. N. H. R.*, 55 N. H. 415, 20 Am. Rep. 220.

²⁷ *Plymouth & S. T. Co. v. Dempey*, 9 Ohio N. P. (N.S.) 65, following *Geisey v. Railroad Co.*, 4 Ohio St. 308.

²⁸ *Ft. Worth Imp. Dist v. Weathered* (Tex. Civ. App.), 149 S. W.

550; *Burns v. Reynoldsville*, 48 Pa. Super. Ct. 122; *Routh v. Texas T. Co.* (Tex. Civ. App.), 148 S. W. 1152; *Rutherford v. Williamson*, 70 W. Va. 402; *Warren County v. Rand*, 88 Miss. 395; *Shimer v. Easton R. Co.*, 205 Pa. 648; *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170; *Union T. Co. v. Pfeil*, 39 Ind. App. 51; *Chicago Great Western R. Co. v. Kemper*, 256 Mo. 279; *Carolina & Y. R. R. Co. v. Armfield*, 167 N. C. 464; *In re Queen Anne Boulevard*, 77 Wash. 91; *Wiegand v. Siddons*, 41 App. Cas. (D. C.) 130; *City of Birmingham v. Kennedy*, 9 Ala. App. 541; *City of Paragould v. Milner*, 114 Ark. 334; *Sanitary Dist. v. City of Boening*, 267 Ill. 118; *Music v. Big Sandy & K. R. R. Co.*, 163 Ky. 628; *In re Aiken*, 262 Mo. 403; *Coons v. McKees Rocks Borough*, 243 Pa. 340; *Newell v. Loeb*, 77 Wash. 182; *Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.*, — W. Va. —, 83 S. E. 1031; *Eutaw v. Botnick*, 150 Ala. 429; *Newton's Appeals*, 84 Conn. 234; *Atlanta T. C. Co. v. Georgia R. & E. Co.*, 132 Ga. 537; *Glendenning v. Stahley*, 173 Ind. 674; *Gish v. Castner, etc. Dist.*, 137 Iowa 711; *Manning v. Shreveport*, 119 La. 1044, 13 L.R.A. (N.S.) 452; *Mantorville R. & T. Co. v. Slinger-*

the improvement for which the land is taken²⁹ and affect its

land, 101 Minn. 488, 118 Am. St. 647, 11 L.R.A.(N.S.) 277; Knapheide v. Jackson County, 215 Mo. 516; Fuess v. Kansas City, 191 Mo. 692; New York, etc. R. Co. v. Siebrecht (Misc.), 130 N. Y. Supp. 1005; Bost v. Cabarrus County, 152 N. C. 531; Southport, etc. R. Co. v. Platt Land, 133 N. C. 266; Taber v. New York, etc. R. Co., 28 R. I. 269; Panhandle & G. R. Co. v. Kirby, 42 Tex. Civ. App. 340; Tidewater R. Co. v. Cowan, 106 Va. 817; Spokane T. Co. v. Granath, 42 Wash. 506; American States S. Co. v. Milwaukee & N. R. Co., 139 Wis. 199; Seattle v. Board of Home Missions, etc., 70 C. C. A. 597, 138 Fed. 307; Weir v. St. Paul, etc. R. Co., 18 Minn. 155; Wood v. Hudson, 114 Mass. 513; Symonds v. Cincinnati, 14 Ohio 148; Paine v. Woods, 108 Mass. 168; Palmer Co. v. Ferrill, 17 Pick. 58; Green v. Fall River, 113 Mass. 262; Dwight v. Hampden, 11 Cush. 201; Meacham v. Fitchburg R. Co., 4 Cush. 291; Young v. Harrison, 17 Ga. 30 (see Wolff v. Georgia S. & F. R. Co., 94 Ga. 555); Trinity College v. Hartford, 32 Conn. 452; Hilbourne v. Suffolk, 120 Mass. 393, 21 Am. Rep. 522; Hyde Park v. Washington T. Co., 117 Ill. 233; Whitely v. Mississippi, etc. B. Co., 38 Minn. 523; Omaha v. Schaller, 26 Neb. 522; Newman v. Metropolitan E. R. Co., 118 N. Y. 618, 7 L.R.A. 289; Pittsburgh, etc. R. Co. v. McCloskey, 110 Pa. 436; G., C. & S. F. R. v. Fuller, 63 Tex. 467; Childs v. New Haven & N. Co., 133 Mass. 253; Washington I. Co. v. Chicago, 147 Ill. 327, 37 Am. St. 322; Smith v. St. Joseph, 122 Mo. 643; Dayton v. Lincoln, 39 Neb. 74; Mangles v. Chosen Freeholders, 55 N. J. L. 88, 17 L.R.A. 785; Lewiston

& Y. F. R. Co. v. Ayer, 27 App. Div. (N. Y.) 571; Blair v. Charleston, 43 W. Va. 62, 64 Am. St. 837, 35 L.R.A. 852; Monongahela N. Co. v. United States, 148 U. S. 312, 37 L. ed. 463; Little Rock, etc. R. Co. v. Allister, 68 Ark. 600; Lake Roland E. R. Co. v. Frick, 86 Md. 259; Homer v. Duluth, 70 Minn. 378.

Where a street improvement in different degrees affected two contiguous lots belonging to the same owner, and the owner disclaimed damages as to one, it was held that benefits to the lot disclaimed could not be set off against the damages claimed for the other. The reason given was that platted lots are *prima facie* separate tracts, and were not proved otherwise. In re Queen Anne Boulevard, 77 Wash. 91.

²⁹ Nelson v. Atlanta, 138 Ga. 252; Fuller v. Mt. Vernon, 171 N. Y. 247; Seattle v. Board of Home Missions, etc., 70 C. C. A. 597, 138 Fed. 307; Bragan v. Birmingham R., L. & P. Co., 163 Ala. 93; Pickles v. Ansonia, 76 Conn. 278; Illinois, etc. R. Co. v. Borns, 219 Ill. 179; Cape Girardeau & C. R. Co. v. Blechle, 234 Mo. 471; Shimer v. Easton R. Co., 205 Pa. 648; Kennedy v. Travis County, — Tex. Civ. App. —, 130 S. W. 844; Burton L. Co. v. Houston, 45 Tex. Civ. App. 363; Oregon S. L. R. Co. v. Fox, 28 Utah 311 (abandonment of land of owner previously condemned); Forbes v. Orange, 88 Conn. 255; In re New York, etc. R. Co., 49 Hun 539; Herrmann v. East St. Louis, 58 Ill. App. 166; Butler v. Same, 74 id. 649; Cole v. St. Louis, 132 Mo. 633.

The terms "general benefits," "benefits common to other property," and other like expressions

market value or use, such as can be computed;³⁰ and such as are direct, not consequential; proximate, not remote; actual,

used by courts have recently been defined in an Illinois case from which excerpts are made: Property may be specially benefited by an improvement, and at the same time other property, upon the same improvement, be likewise specially benefited. This may be illustrated by the assessment of special benefits for a local improvement. Presumably all the property along the line of the improvement will be more or less specially benefited—that is, benefited beyond the general benefit supposed to diffuse itself from the improvement throughout the municipality ordering it made. If property is enhanced in value by reason of the improvement, as distinguished from the general benefits to the whole community at large, it is said to be specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may be, to a greater or less degree, likewise specially benefited. *Wilson v. Board of Trustees*, 133 Ill. 443. In other words, it is not such benefit as is special to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but is such benefits as that the particular property is by the improvement enhanced in value,—that is, specially benefited. If a piece of property is enhanced in value, such enhancement—or, in other words, benefit to the property—cannot be said to be common to any other piece of property. Each piece of property specially enhanced in value is thus specially

Suth. Dam. Vol. IV.—29.

benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. It follows, necessarily, that where the benefits are designated as “general benefits,” “benefits common to other property,” and the like expressions to be found in decided cases, it is meant those general, intangible benefits which are supposed to flow to the general public from a public improvement. *Metropolitan West Side E. R. Co. v. Stickney*, 150 Ill. 362, 26 L.R.A. 773; *Same v. White*, 166 Ill. 375; *Illinois, etc. R. Co. v. Borms*, 219 Ill. 179. Compare *Herrmann v. East St. Louis*, 58 Ill. App. 166. The opinion quoted from has been approved in *Blair v. Charleston*, 43 W. Va. 62, 64 Am. St. 837, 35 L.R.A. 852. *Aswell v. Scranton*, 175 Pa. 173, 52 Am. St. 841, is in harmony, as are *McCray v. Fairmont*, 46 W. Va. 442; *Rowe v. Pulp Co.*, 42 W. Va. 551, 57 Am. St. 870. See § 1085.

Action taken by the landowner to mitigate the injury to his estate does not inure to the advantage of the condemnor though it subsequently lessens the extent of his loss by making other improvements. *Chicago v. Bureky*, 158 Ill. 103, 29 L.R.A. 568.

³⁰ *Metropolitan West Side E. R. Co. v. White*, 166 Ill. 375; *Peoria, etc. T. Co. v. Vance*, 225 Ill. 270, 9 L.R.A.(N.S.) 781; *Mantorville R. & T. Co. v. Slingerland*, 101 Minn. 488, 11 L.R.A.(N.S.) 277.

Benefits, to be such, must enhance the value of the property. *Buckhannon & N. R. Co. v. Great Scott*

and not constructive.³¹ Benefits or damages accrued by reason of previous improvements are not to be considered when a subsequent condemnation is sought.³² These benefits are estimated like the damages.³³ Benefits to the land-owner's business cannot be set off, but his business may be considered in so far as the value of the real estate and the benefits received by it were affected by its adaptedness to be used in the business.³⁴ Thus, the damages resulting from cutting off transportation facilities from the condemned land may be mitigated by the advantages of that nature which may be supplied by the operation of the road for which the condemnation was made.³⁵ The benefits resulting to a homestead from the improvement of a street are not to be assessed on the basis that might be proper if it were business property, it not appearing that it was the intention of the owner to change its use.³⁶ It has been laid

Coal & Coke Co., — W. Va. —, 83 S. E. 1031.

³¹ *Mantorville R. & T. Co. v. Slingerland*, 101 Minn. 488, 11 L.R.A.(N.S.) 277.

The fact that the extent of the influence of benefits upon values is difficult of ascertainment is no reason why such benefits should not be considered in fixing value. *Custer Tp. v. Dawson*, 178 Mich. 367.

³² *Gulf, etc. R. Co. v. Brugger*, 24 Tex. Civ. App. 367; *Guyer v. Davenport, etc. R. Co.*, 196 Ill. 370; *Knickerbocker v. Seattle*, 69 Wash. 336; *Spokane v. Thompson*, 69 Wash. 650.

³³ *Zinser v. Board of Sup'rs*, 137 Iowa 600, citing the text; *Trinity College v. Hartford*, 32 Conn. 452; *Railroad Co. v. Tyree*, 7 W. Va. 693; *St. Louis, etc. R. Co. v. Richardson*, 45 Mo. 466; *Winona, etc. R. Co. v. Waldron*, 11 Minn. 515; *Weir v. St. Paul, etc. R. Co.*, 18 Minn. 155; *Mitchell v. Thornton*, 21 Gratt. 164; *Hosher v. Kansas City, etc. R. Co.*, 60 Mo. 329; *Quincy R. Co. v. Ridge*, 57 Mo. 599; *Lee v.*

Tebo R. Co., 53 Mo. 178; *Mississippi River B. Co. v. Ring*, 58 Mo. 491; *Pacific R. v. Chrystal*, 25 Mo. 544; *Freedel v. North Carolina R. Co.*, 4 Jones 89; *James River & K. Co. v. Turner*, 9 Leigh 313; *Lake Shore, etc. R. Co. v. Baltimore & O. R. Co.*, 149 Ill. 272.

Where an assessment of benefits is separately made in the case of a change in the grade of a street the most rational and reliable measure of the effect of the change of grade on the value of land not taken is the cost of restoring it to its former relative position for advantageous use. *Mayor v. Garrett*, 120 Md. 608.

³⁴ *Hamilton v. Pittsburg, etc. R. Co.*, 190 Pa. 51, 51 L.R.A. 319; *Butchers' S. & M. Ass'n v. Commonwealth*, 169 Mass. 103. See *Guinn v. Ohio River R. Co.*, 46 W. Va. 151, 76 Am. St. 806.

³⁵ *Chicago, etc. R. Co. v. McGrew*, 104 Mo. 282.

³⁶ *Dallas v. Kahn*, 9 Tex. Civ. App. 19.

down that as to non-residence property, valuable for some other use than that to which it has been put, the benefits are to be assessed with reference to its availability for any purpose for which it is adapted.³⁷ The scope and general nature of the plan pursuant to which a change has been made in the grade of a street may be shown.³⁸ It is generally held that if special benefits have been set off in a proceeding to condemn a street the same property is not subject to be assessed therefor in a proceeding to raise money to pay for the property taken or damaged;³⁹ but as to this the Missouri court differs.⁴⁰ Where land was condemned for bridge purposes and its owner was paid for the damage sustained, less the benefits resulting, and there was subsequently made a change in the plans of the bridge company in consequence of which additional land was taken from the same owner the benefits resulting to him from the original construction of the bridge were not involved in the second condemnation. So far as that was concerned the inquiry was limited to the damages sustained and the benefits resulting by the change of plans.⁴¹

It is the business of the tribunal to which the ascertainment of just compensation is confided to balance the advantages that are special against the disadvantages that are actual, and with the aid of whatever testimony is laid before it to find out, as far as practicable, how much less the land would bring in the market by reason of the improvement in question, and that sum will represent what has been really taken away from the owner and should be given back in damages.⁴² If this special

³⁷ *Kennedy v. Travis County* (Tex. Civ. App.), 130 S. W. 844.

³⁸ *Edsall v. Jersey Shore*, 220 Pa. 591.

³⁹ *Schuchard v. Seattle*, 51 Wash. 41; *State v. District Court*, 66 Minn. 161; *Chicago v. McCartney*, 216 Ill. 377; *Leopold v. Chicago*, 150 Ill. 568. See *Fuller v. Mount Vernon*, 171 N. Y. 247.

⁴⁰ *Widman I. Co. v. St. Joseph*, 191 Mo. 459.

⁴¹ *McElheny v. McKeesport & D.*

B. Co., 153 Pa. 108; *Seattle v. Board of Home Missions, etc.*, 70 C. C. A. 597, 138 Fed. 307.

⁴² *Entaw v. Botnick*, 150 Ala. 429; *Hornstein v. Atlantic, etc. R. Co.*, 51 Pa. 87; *Boston, etc. R. Co. v. Old Colony R. Co.*, 12 Cush. 605; *Hagaman v. Moore*, 84 Ind. 496; *Atlanta v. Green*, 67 Ga. 386; *Monroe v. Atlanta*, 70 id. 611; *Pittsburgh, etc. R. Co. v. Robinson*, 95 Pa. 426.

benefit is equal to the compensation the owner should otherwise receive he will be entitled to nothing else.⁴³ The assessment for benefits must be limited to the damages awarded for the property taken or injured.⁴⁴ In estimating benefits the test applied is not the number of lots or tracts benefited, but the relation of the lands to the improvement and its specific effect upon their value.⁴⁵ It is not competent for the land-owner to limit the scope of the assessment of benefits to land included in his remonstrance.⁴⁶ If the contention is made that the damages are offset in whole or in part by some special and peculiar benefit caused to the property affected by the improvement the fair and reasonable cost of making such benefit practically available is to be taken into account in ascertaining the amount of benefit to be offset.⁴⁷ The city of New York may, where it has condemned property, deduct from the award taxes which were a lien against the property condemned,⁴⁸ and interest thereon from the day the award became payable.⁴⁹ But it is otherwise as to taxes levied intermediate the award of commissioners and its

⁴³ *Eutaw v. Botnick*, 150 Ala. 429; *Herrin & S. R. Co. v. Nolte*, 243 Ill. 594; *Speck v. Kenoyer*, 164 Ind. 431; *In re Broad St. Widening*, 225 Pa. 184; *Robbins v. Seranton*, 217 Pa. 577; *Kennedy v. Travis County*, — Tex. Civ. App. —, 130 S. W. 844; *McFadden v. Schill*, 84 Tex. 77; *Tacoma v. Weatherby*, 57 Wash. 295; *Whitman v. Boston, etc. R. Co.*, 3 Allen 133; *Trinity College v. Hartford*, 32 Conn. 452; *Washington I. Co. v. Chicago*, 147 Ill. 327, 37 Am. St. 222; *Chicago, etc. R. Co. v. Wolf*, 147 Ill. 360; *Metropolitan West Side E. R. Co. v. Stickney*, 150 Ill. 362, 26 L.R.A. 773; *Hurt v. Atlanta*, 100 Ga. 274, 280; *Guinn v. Ohio River R. Co.*, 46 W. Va. 151, 76 Am. St. 806; *Aswell v. Seranton*, 175 Pa. 173, 52 Am. St. 841; *Lingo v. Burford*, 112 Mo. 459; *Himes v. Pittsburg*, 213 Pa. 362; *Taber v. New York, etc. R. Co.*, 28 R. I. 269.

⁴⁴ *Wilmington & W. R. Co. v. Smith*, 99 N. C. 131.

⁴⁵ *Rich v. New York E. R. Co.*, 16 Daly 518; *Gray v. Manhattan R. Co.*, 16 Daly 510.

⁴⁶ *Speck v. Kenoyer*, 164 Ind. 431.

⁴⁷ *Butchers' S. & M. Ass'n v. Commonwealth*, 163 Mass. 386; *Blair v. Charleston*, 43 W. Va. 62, 64 Am. St. 837, 35 L.R.A. 852; *Seattle v. Board, etc.*, 70 C. C. A. 597, 138 Fed. 307. See *In re Mercer St.*, 55 Wash. 116.

It is therefore competent to prove the reasonable expense of making land conform to the new grade established, as bearing on the question of the extent to which the land has been benefited by the improvement. *City of Baltimore v. Johnson*, 123 Md. 320.

⁴⁸ *Carpenter v. New York*, 44 App. Div. (N. Y.) 230.

⁴⁹ Same case, 51 App. Div. (N. Y.) 584.

confirmation.⁵⁰ In appraising property taken by such city under chapter 152, laws of 1894, there should be added to the award interest thereon and taxes from the date the property was appropriated to the time when the award was made, but there should be deducted rentals received by the owner during that time, or, if none were received, the value of the use and occupation of the premises.⁵¹ Where the consideration of benefits is limited to proceedings brought by a city it is immaterial what has occasioned the proceedings.⁵²

§ 1085. *Same subject.* Where an assessment was made for damages for flowing lands by means of a dam it was held that the benefit resulting to the lot flowed and the adjoining land from the formation of ice on it in the ordinary use of the dam, where such ice might be cut and sold as merchandise without appreciably diminishing the water-power for which the dam was erected, might be considered, and also benefits resulting to the same land by reason of the greater convenience afforded the owner by means of the flowing, and through the use of his land to exercise his right in common with the public to take ice from a natural pond by which the overflowed land was bounded.⁵³ But where the establishment of a road rendered the building of fences necessary the damages allowed for the appropriation of the land, could not be diminished by the value of any advantages which might accrue to the adjacent

⁵⁰ Matter of Board of Education, 169 N. Y. 456.

Similarly it was held in the District of Columbia that no taxes could be deducted from an award for land taken on the theory that till payment of the award title did not pass from the condemnee to the condemnor, in a case where the award was not paid for several years after it was made, during which time the condemnor had possession and use of the land, and the condemnee had been deprived of it. The decision is put on the ground of the want of equity and justice involved in such a deduc-

tion. *Newman v. Blake & Knowles Steam Pump Works*, 41 App. Cas. (D. C.) 449.

No deduction is to be made from the value of the land because of assessments due the condemnor for improvements, these not having been levied nor accrued. *Hunter v. City of New York*, 151 App. Div. (N. Y.) 30.

⁵¹ Matter of *Riverside Park*, 59 App. Div. (N. Y.) 603, affirmed without opinion, 167 N. Y. 627.

⁵² *Spokane v. Thompson*, 69 Wash. 650.

⁵³ *Paine v. Woods*, 108 Mass. 160.

property from the erection of the fences.⁵⁴ Benefits of two kinds may accrue to lands bounding on a way laid out, altered or widened: First, the special and direct benefit arising from its position upon the way itself; and second, the general benefit, not arising from such location, but from the facilities and advantages caused by the way which affect all the estates in the neighborhood equally and which are shared in common with such estates. The direct and peculiar benefit may be set off against the damages. The general benefit cannot.⁵⁵ The advantages that an abutter may receive from his location on a highway laid out, altered or widened are none the less peculiar and special to him because other estates on the street receive special and peculiar benefits of the same kind.⁵⁶ If a lot is drained or fer-

⁵⁴ *Bland v. Hixenbaugh*, 39 Iowa 532.

⁵⁵ *Peoria, etc. T. Co. v. Vance*, 225 Ill. 270, 9 L.R.A.(N.S.) 781; *El-dorado, etc. R. Co. v. Everett*, 225 Ill. 529; *Phifer v. Commissioners*, 157 N. C. 150; *Fowler v. Norfolk & W. R. Co.*, 68 W. Va. 274; *Hilbourne v. Suffolk*, 120 Mass. 393, 21 Am. Rep. 522; *Carpenter v. Landaff*, 42 N. H. 218; *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321; *Commissioners v. Johnston*, 71 N. C. 398.

In *Greenville & C. R. Co. v. Partlow*, 5 Rich. 436, the charter of the company directed that the commissioners or jury, "in making the valuation, shall take into consideration the loss or damage which may occur to the owner in consequence of the land or right of way being taken, and also the benefit or advantage he may receive from the establishment or erection of the railroad or works, and shall state particularly the nature and amount of each; and the excess of loss or damage, over and above the benefit and advantage, shall form the measure of valuation of said land or right of way." This

was held to include general as well as special benefits.

⁵⁶ *Nelson v. Atlanta*, 138 Ga. 252; *Hagaman v. Moore*, 84 Ind. 496; *Trosper v. Commissioners*, 27 Kan. 391; *Hilbourne v. Suffolk*, *supra*; *Allen v. Charlestown*, 109 Mass. 243; *Kirkendall v. Omaha*, 39 Neb. 1; *Barr v. Omaha*, 42 Neb. 341; *Dallas v. Kahn*, 9 Tex. Civ. App. 19. But see *Whitcher v. Benton*, 50 N. H. 25, and *Trinity College v. Hartford*, 32 Conn. 476, and note 6, § 1084.

In Missouri "it has been ruled from the beginning that the benefits to be deducted from the damages sustained by the land-owner by the taking or damaging his property is only the direct and peculiar benefit that would result in particular to his tract, and not the general benefit that his lands would derive in common with the lands of other owners in his neighborhood." *Cole v. St. Louis*, 132 Mo. 633, 640, and local cases cited. See *Rives v. Columbia*, 80 Mo. App. 173.

A statute providing for the deduction of benefits which will result from the laying out of a road means

tilized by a public improvement the benefit is direct and special;⁵⁷ so if it discontinues a portion of an old highway, the part vacated thereby inuring to the person to be compensated.⁵⁸ Relief from the dust of a street in consequence of an improvement of it is to be regarded.⁵⁹

§ 1086. *Same subject.* In New Hampshire in estimating damages from the opening of a highway nothing can be deducted on account of benefits not special to the particular owner to be compensated; and where he obtained access to his land, not having it otherwise except across land which he did not own, such benefit is not special. The court said this was not a benefit for which he should pay, but a general improvement in which many would share.⁶⁰ In Illinois, as a set-off against consequential damages arising from a railroad crossing a farm, it is proper to take into consideration the facilities afforded by the road and a convenient depot for getting the products of the farm to market, as also the actual increase in the market value of the farm occasioned by the road.⁶¹ But such considerations are not effective if the depot is located on land adjoining the plaintiff's which was conveyed to the condemnor by a third party; there is no assurance that the claimed benefits will be enjoyed because the conveyance might be cancelled and a re-conveyance made.⁶² In some states the benefit which may be allowed must enhance the value of the land affected by improving its physical condition and adaptability for use.⁶³ In the case in which this was

not the benefits to result from the road when improved as is directed in the statute, but those resulting from the road as it is laid out. *Mangles v. Chosen Freeholders*, 55 N. J. L. 88, 17 L.R.A. 785.

⁵⁷ *Washburn v. Milwaukee, etc. R. Co.*, 59 Wis. 364; *Milwaukee R. Co. v. Eble*, 3 Pin. 334; *Butchers' S. & M. Ass'n v. Commonwealth*, 169 Mass. 103; *Rives v. Columbia*, 80 Mo. App. 173.

⁵⁸ *Tingley v. Providence*, 8 R. I. 493.

⁵⁹ *Acker v. Knoxville*, 117 Tenn. 224.

⁶⁰ *Carpenter v. Landaff*, 42 N. H. 218; *Whitcher v. Benton*, 50 id. 25; *Adden v. White Mts. N. H. R.*, 55 id. 413, 20 Am. Rep. 220, approved in *Little Rock, etc. R. Co. v. Allister*, 68 Ark. 600. See *Virginia, etc. R. Co. v. Lynch*, 13 Nev. 92.

⁶¹ *Wilson v. Rockford, etc. R. Co.*, 59 Ill. 273; *Hayes v. Ottawa, etc. R. Co.*, 54 id. 373.

⁶² *Illinois, etc. R. Co. v. Borms*, 219 Ill. 179.

⁶³ *Washburn v. Milwaukee, etc. R. Co.*, 59 Wis. 364; *Pochila v. Calvert, etc. R. Co.*, 31 Tex. Civ. App. 398. *Contra*, *Mantorville R. & T.*

held the question was as to the advantage of the location of a railroad depot. In Massachusetts such a benefit has sometimes been considered special,⁶⁴ and so in Pennsylvania,⁶⁵ though the question is for the jury.⁶⁶ Where compensation was claimed for the location and construction of a railroad between coal mines and a navigable river on the landowner's premises, whereby the conveniences of river transportation for getting the coal to market were injured or cut off, it was competent for the railroad company to show, for the purpose of reducing the damages,⁶⁷ that the river transportation, in connection with the coal banks, had ceased to be valuable or become of less value by means of the facilities for coal transportation afforded by the railroad. In case of a railroad appropriation for a right of way through a tract of land, where a local incidental benefit to the residue of the land is blended or connected, either in locality or subject-matter, with the local incidental injury to such residue the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done to the value of the residue of the land. This, in spite of the fact that general resulting benefits from the railroad to the value of such residue of the land is prohibited from being taken into account in estimating the amount of compensation to be paid the owner.⁶⁸ In Minnesota the mere increase of transportation facilities and the prospective feasibility of connecting industrial works upon the land with a railroad are not usually sufficient to constitute special benefits, the landowner not having the legal right to compel the carrier to furnish him with particular facilities.⁶⁹ In a case

Co. v. Slingerland, 101 Minn. 488, 11 L.R.A.(N.S.) 277.

⁶⁴ Peabody v. Boston E. R. Co., 191 Mass. 513; Shattuck v. Stoneham Branch R., 6 Allen 115. See Childs v. New Haven & N. Co., 133 Mass. 253; Fifty Associates v. Boston, 201 Mass. 585.

⁶⁵ Pittsburgh, etc. R. Co. v. Robinson, 95 Pa. 426.

⁶⁶ Gorgas v. Philadelphia, etc. R.

Co., 144 Pa. 1; Castleberry v. Atlanta, 74 Ga. 164.

⁶⁷ Cleveland & P. R. Co. v. Ball, 5 Ohio St. 569.

⁶⁸ Id.

⁶⁹ Mantorville R. & T. Co. v. Slingerland, 101 Minn. 488, 11 L.R.A.(N.S.) 277. The opinion in this case was prepared by the late Justice Jaggard, and is specially valuable because of its lucidity and

where a depot was erected one-half mile from the land in question the court said: "We think it is one of those benefits which the owner receives in common with the community generally. This benefit is by virtue of the fortuitous circumstance of the depot's being located in his vicinity, and not in any sense because of the condemnation of, and the construction of the railroad across, his particular parcel of land. He would receive this benefit if the railroad never crossed his land, and could not, of course, be required to pay for it. Why, then, should he be required to pay merely because a part of his land is condemned for right of way, to the injury of the remaining portion?"⁷⁰

There must be a reasonable degree of certainty that benefit will result from the public improvement.⁷¹ Hence, the mere possibility that other streets may be laid through or near the property in question by the public authorities and it thereby be rendered more valuable is not to be considered because such streets may never be opened, and if they are, the land-owner is liable to have his property assessed for the benefits which accrue to him.⁷² But if the opening of a particular street enables the owner of land to lay out another street or streets upon it, thereby increasing his available frontage and the market value of his property, it will be assumed he will do so, and the resulting benefit may be considered.⁷³ If the property taken or injured is held in different interests the parties can be

the collection and classification of the cases. The railroad was built along the only feasible route to reach stone quarries; without the road the land was of no immediate value for commercial or quarrying purposes; with the road it was possibly of considerable value therefore.

⁷⁰ Kirby v. Panhandle & G. R. Co., 39 Tex. Civ. App. 252; Pochila v. Calvert, etc. R. Co., 31 Tex. Civ. App. 398.

⁷¹ Washington I. Co. v. Webster, 147 Ill. 327, 37 Am. St. 222; Mantorville R. & T. Co. v. Slingerland; Illinois, etc. R. Co. v. Borms, 219

Ill. 179; Ft. Worth Imp. Dist. v. Weatherred (Tex. Civ. App.), 149 S. W. 550; Western N. Union v. Des Moines, 157 Iowa 685.

So it was held that the fact that the improvement caused the removal of bawdy houses from the vicinity of the property in question was too remote and speculative to be considered as a benefit of the property damaged by the improvement, which in that case was a church. Nelson v. City of Atlanta, 138 Ga. 252.

⁷² Alleghany v. Black, 99 Pa. 152.

⁷³ Id.

charged with the benefit resulting only in proportion to their interests.⁷⁴ The condemnor has the burden of showing what benefits are special and the extent to which they affect the value of the property.⁷⁵

§ 1087. **Same subject.** No deduction can be made for benefits without legislative authority; ⁷⁶ the existence of such authority in congress has been denied.⁷⁷ On the other hand, it has been decided that it is competent for the legislature to provide that all benefits, general as well as special, shall be considered.⁷⁸ Legislative authority to deduct benefits is not necessary where the taking is by the state or by a municipality as an agency of the state.⁷⁹ In the absence of an express agreement between the parties no deduction is to be made for benefits arising from the use of the land after its condemnation or the use of any privileges granted its owner by the condemnor. "If either party has suffered injury or acquired rights in such subsequent dealings the remedy for such injury or the enforcement of those rights must be had in some other form of proceeding."⁸⁰ In many states benefits are excluded by constitution or statute from consideration in determining what shall be paid for the *value* of property taken for public use; but the inhibition in this form has not always been deemed to exclude this consideration in reduction of consequential damages resulting from the appropriation. In other states the same restricted application of

⁷⁴ Turnpike Road v. Brosi, 22 Pa. 29.

⁷⁵ Poehila v. Calvert, etc. R. Co., 31 Tex. Civ. App. 398; Fuller v. Mt. Vernon, 171 N. Y. 247.

⁷⁶ District of Columbia v. Prospect Hill Cemetery, 5 App. Cas. (D. C.) 497, 518; In re New York, 190 N. Y. 350, 16 L.R.A.(N.S.) 335; In re New St., 63 N. Y. Misc. 495.

⁷⁷ Maryland & W. R. Co. v. Hiller, 8 App. Cas. (D. C.) 289. See Monongahela N. Co. v. United States, 148 U. S. 312, remarks in which are relied upon in the opinion in the principal case. To the same effect is District of Columbia v. Armes, 8

App. Cas. (D. C.) 393. Shoemaker v. United States, 147 U. S. 282, which holds that it is competent for congress, in providing for the cost of a public park, to direct that a proportionate cost of it shall be assessed upon property specially benefited, is not referred to in the District of Columbia cases cited.

⁷⁸ Miller v. Asheville, 112 N. C. 759. See n. 55, § 1085.

⁷⁹ In re Water Front, 118 App. Div. (N. Y.) 865; Bohm v. Metropolitan E. R. Co., 129 N. Y. 576, 14 L.R.A. 344.

⁸⁰ Old Colony R. Co. v. Miller, 125 Mass. 1, and local cases cited.

benefits is made on general principles as proper and necessary to give "just compensation."⁸¹ The rule that the damage to land actually taken cannot be reduced by considering benefits applies to all kinds of property, rights in property and the uses of property of which the owner will be deprived.⁸² In California the language of the constitution, "irrespective of any benefit from any improvement proposed by such corporation," is not limited to the land taken by a railroad company, but extends to benefits which may accrue to the land not taken, and the amount of damages thereto must be fixed irrespective of any benefit which may result to the owner from the improvement.⁸³

⁸¹ *In re City of New York*, 190 N. Y. 350, 16 L.R.A.(N.S.) 335; *In re Com'r of Public Works*, 135 App. Div. (N. Y.) 561; *Todd v. Kankakee R. Co.*, 78 Ill. 530; *Carpenter v. Jennings*, 77 Ill. 250; *Wilson v. Rockford, etc. R. Co.*, 59 Ill. 273; *Hayes v. Ottawa, etc. R. Co.*, 54 Ill. 373; *Raleigh R. Co. v. Wicker*, 74 N. C. 220; *Shipley v. Baltimore, etc. R. Co.*, 34 Md. 336; *Railroad Co. v. Tyree*, 7 W. Va. 693; *Mitchell v. Thornton*, 21 Gratt. 164; *Augusta v. Marks*, 50 Ga. 612; *Atlanta v. Central R. Co.*, 53 Ga. 120; *Vicksburg, etc. R. Co. v. Calderwood*, 15 La. Ann. 481; *Buffalo, etc. R. Co. v. Ferris*, 26 Tex. 588; *New Castle R. Co. v. Brumback*, 5 Ind. 543; *Memphis v. Bolton*, 9 Heisk. 508; *Giesy v. Cincinnati, W. & Z. R. Co.*, 4 Ohio St. 330; *Wagner v. Gage Co.*, 3 Neb. 237; *Woodfolk v. Nashville, etc. R. Co.*, 2 Swan, 422; *Chapman v. Oshkosh, etc. R. Co.*, 33 Wis. 629; *Newby v. Platte County*, 25 Mo. 258; *Commissioners v. O'Sullivan*, 17 Kan. 58; *Harwood v. Bloomington*, 124 Ill. 152, 7 Am. St. 350; *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104; *Leroy & W. R. Co. v. Ross*, 40 Kan. 598, 2 L.R.A. 217;

Interstate Con. R.-T. R. Co. v. Simpson, 45 Kan. 714, 23 Am. St. 746; *Fremont, etc. R. Co. v. Whalen*, 11 Neb. 585; *St. Louis, etc. R. Co. v. Anderson*, 39 Ark. 167; *Lake Shore, etc. R. Co. v. Baltimore & O. R. Co.*, 149 Ill. 272; *Leopold v. Chicago*, 150 Ill. 568; *Ginn v. Moultrie, etc. Drainage Dist.*, 188 Ill. 305; *Martin v. Fillmore County*, 44 Neb. 719; *Dulaney v. Nolan County*, 85 Tex. 225; *Taber v. New York, etc. R. Co.*, 28 R. I. 269; *Burton L. Co. v. Houston*, 45 Tex. Civ. App. 363. See *New York, etc. R. Co. v. Siebrecht (Misc.)*, 130 N. Y. Supp. 1005.

⁸² *Metropolitan West Side E. R. Co. v. Springer*, 171 Ill. 170; *Olympia L. & P. Co. v. Harris*, 58 Wash. 410; *Eutaw v. Botnick*, 150 Ala. 429.

The same rule governs when condemnation is sought by a natural person vested with a franchise. *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. 188, 59 L.R.A. 581.

⁸³ *Pacific Coast R. Co. v. Porter*, 74 Cal. 261; *Muller v. Southern Pac. B. R. Co.*, 83 Cal. 245; *San Bernardino & E. R. Co. v. Haven*, 94 Cal. 489; *San Jose & A. R. Co. v. Mayne*, 83 Cal. 566.

This is the rule in several states.⁸⁴ It applies to counties which take lands for highway purposes. A county is not a municipal corporation within the meaning of a clause in the constitution excepting such corporations from the operation of the clause quoted.⁸⁵ In Washington a railroad company authorized by a city to construct its road on certain streets occupies the same position as the city would, had it done the work, and may offset benefits resulting to abutting property owners by virtue of a clause in the constitution allowing municipalities that right; but damages caused by operating the road cannot be set off.⁸⁶ In Iowa the principle excluding benefits applies to all cases,⁸⁷ except in cases of street improvements.⁸⁸ In Indiana they are excluded⁸⁹ in all except highway cases.⁹⁰

In Kentucky the right to just compensation for property taken for public use is held to exclude all benefits in reduction of the value of the property taken, and to limit their application to the reduction of damages resulting from such taking. In an early case the court said: "When the property of one citizen is taken without his consent for the use of the whole community of which he is a member, the constitution imperiously requires, not that the public shall decide whether he is

⁸⁴ *Giesy v. Cincinnati, etc. R. Co.*, 4 Ohio St. 308; *Little Miami R. Co. v. Collett*, 6 id. 182; *Cincinnati, etc. R. Co. v. Longworth*, 30 id. 108; *St. Louis, etc. R. v. Anderson*, 39 Ark. 167 (see *Little Rock, etc. R. Co. v. Allister*, 68 Ark. 600); *Springfield, etc. R. v. Rhea*, 44 Ark. 258; *St. Joseph, etc. R. v. Orr*, 8 Kan. 419; *Reisner v. Union D. & R. Co.*, 27 Kan. 382; *Florence, etc. R. Co. v. Shepherd*, 50 Kan. 438; *Alabama, etc. R. Co. v. Burkett*, 42 Ala. 83; *Enoch v. Spokane Falls & N. R. Co.*, 6 Wash. 393, overruling *Northern Pac., etc. R. Co. v. Coleman*, 3 Wash. 234; *Britton v. Des Moines, O. & S. R. Co.*, 59 Iowa 540; *Broadway C. M. Co. v. Smith*, 136 Ky. 725, 26 L.R.A.(N.S.) 565.

⁸⁵ *San Mateo County v. Coburn*, 130 Cal. 631.

⁸⁶ *Kaufman v. Tacoma, etc. R. Co.*, 11 Wash. 632; *In re Pike St.*, 42 Wash. 551; *Spokane T. Co. v. Granath*, 42 Wash. 506.

A county is a municipal corporation. *Lincoln County v. Brock*, 37 Wash. 14.

⁸⁷ *Haggard v. Independent School Dist.*, 113 Iowa 486.

⁸⁸ *Meardon v. Iowa City*, 148 Iowa 12.

⁸⁹ *Union T. Co. v. Pfeil*, 39 Ind. App. 51; *Indianapolis Northern T. Co. v. Ramer*, 37 Ind. App. 264; *Same v. Dunn*, 37 Ind. App. 248.

⁹⁰ *Pichon v. Martin*, 35 Ind. App. 167.

entitled to any compensation, but that the just compensation shall be paid or secured; and that compensation implies the value at least of the thing taken. No citizen can be compelled to give his land to the public without an equivalent; and what is that equivalent but the value in money of the land surrendered to the public use? He may act unreasonably and unjustly in an imaginable case by insisting on pecuniary compensation, or in refusing to make a surrender without exacting the value of the property. But he has a right to insist on being paid the value of the thing taken from him, although he may be incidentally benefited with others in the appropriation of it to public use. If, however, claiming more than the value of the property taken, he seeks indemnity for consequential inconvenience or injury, then the true question will be whether, upon a survey of all advantages as well as disadvantages which will be likely to result to him, the balance will be for or against him; and if ascertained to be in his favor, then, of course, he will be entitled to nothing for alleged damages for such inconvenience or injury because, the whole case being properly considered in all its bearings, he will sustain no damage. Thus, and only thus, advantages and disadvantages may be compared and set off the one against the other.”⁹¹ This view has been adhered to.⁹² The compensation guaranteed by the constitution, it is there insisted, cannot consist of the mere estimate of a jury or appraisers of the prospective and speculative advantages which in their opinion will accrue to the owner from the proposed use of his land by the public, but must be a pecuniary compensation equivalent to the value of the land to be taken. These advantages may be set off against the consequential damages and inconvenience which the owner may sustain, but not against the value of the land itself nor against the injury to the residue of the tract. To that extent at least he is entitled, under all circumstances, to a specific compensation without deduction or set-off.⁹³ This mode of adjusting the

⁹¹ *Sutton's Heirs v. Louisville*, 5 Dana 33.

⁹² *Rice v. Turnpike Co.*, 7 Dana 87.

⁹³ *Id.*; *Elizabethtown, etc. R. Co.*

v. Helm's Heirs, 8 Bush 681; *Asher v. L. & N. R. Co.*, 87 Ky. 391; *Big Sandy R. Co. v. Dils*, 120 Ky. 563. See *Chattahoochee Valley R. Co. v. Bass*, 9 Ga. App. 83; *Broadway C.*

compensation is deemed to be the true and only effectual exposition of the constitution.⁹⁴ There is this other distinguishing feature of the law as held in that state: advantages which may offset the consequential damages are not confined to those which are special to the land from which a part is taken. The advantages which the owner may derive from the construction of a railroad, for instance, are not in the least diminished by the fact that they will be enjoyed by others, nor does that furnish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from its establishment. Other persons, it is true, may enjoy the same advantages without being subjected to the same inconveniences; but this results from the nature of the improvement itself and does not in any degree detract from the value of these advantages to the owner of the land through which the road passes.⁹⁵

The value which the constitution of Kentucky guaranties is the value to the owner, where the property taken is a part of a greater tract; and it is to be estimated by considering its relative position to his other land and the circumstances which may diminish or enhance that value; the real value of the land to the owner as it is actually situated, and not merely regarding it as a separate and independent piece of land, he has a right to demand. It is held that nothing else can secure him just compensation. The inquiry should be, what is its value, situated as it is, if he were not the owner of it, but owned adjacent property on both sides of it, under precisely the same circumstances?⁹⁶ "This question of value," the court say, "can be most readily and fairly determined by ascertaining the value of the entire tract of land, excluding the enhancement

M. Co. v. Smith, 136 Ky. 725, 26 L.R.A.(N.S.) 725.

⁹⁴ Jacob v. Louisville, 9 Dana 114; Henderson, etc. R. Co. v. Dickerson, 17 B. Mon. 178, 66 Am. Dec. 148.

⁹⁵ Henderson, etc. R. Co. v. Dickerson, *supra*; Louisville, etc. R. Co. v. Thompson, 18 B. Mon. 744-5;

Same v. Glazebrook, 1 Bush 325; Louisville v. Kaye, 122 Ky. 599.

⁹⁶ Henderson, etc. R. Co. v. Dickerson, 17 B. Mon. 178, 66 Am. Dec. 148; Louisville, etc. R. Co. v. Barrett, 91 Ky. 487. See West Virginia, etc. R. Co. v. Gibson, 94 Ky. 234.

resulting from the contemplated improvement; then,⁹⁷ what will be its value after the appropriation of a portion of such estate therein as may be proposed to be taken. The difference in value thus found is the true compensation to which the owner is entitled.”⁹⁸ The particular facts and circumstances to be considered in adjusting the difference in the value of a tract of land before and after a portion of it has been taken or appropriated to public use cannot, from the nature of things, be set out in detail or defined with any degree of precision; but every circumstance injuriously affecting the citizen in the enjoyment of his land not taken, which can be satisfactorily demonstrated to grow out of his being deprived of the use theretofore enjoyed by him of the portion taken, should receive due consideration and be allowed its proper weight. The appraisers or jury should disregard reasons which are purely personal to the owner, not affecting the market value of his remaining lands, and also such prospective damages as may follow the construction and operation of the proposed railway or other public work. These prospective damages are to be considered in the determination of the consequential damages, and the rule laid down in the case of *Sutton's heirs* controls the settlement of that question. A survey is taken of all the advantages and disadvantages which may be reasonably anticipated to result from the prudent construction and operation of the proposed railway, and if the balance be against the owner of the land, then to the extent that such balance diminishes its market value he should have a judgment on account of incidental damages; otherwise, of course, he is entitled to nothing.⁹⁹

The liability of a trespasser or a party guilty of negligence in making a public improvement is not diminished by benefits on the subsequent institution of condemnation proceedings.¹ In New York, where no land is taken, but only an easement of nominal value, and the action is in equity by the owner or lessee

⁹⁷ Still excluding this enhancement.

⁹⁸ *Elizabethtown, etc. R. Co. v. Helm's Heirs*, 8 Bush 681.

⁹⁹ *Id.*

¹ *Louisville, etc. R. Co. v. Hopson*, 73 Miss. 773; *Richmond & M. R. Co. v. Humphreys*, 90 Va. 425; *Atlanta v. Word*, 78 Ga. 276; *Fisher v. Naysmith*, 106 Mich. 71.

of city lots abutting on a street to recover past damages for the trespass committed and also damages for the permanent injury, benefits may be deducted though they affect several pieces of property in the same vicinity; in fact, all benefits, whether special or general, occasioned by the construction and operation of the road which directly enhance the rental value of the property are to be considered.²

§ 1088. **What lands considered in assessing benefits and damages.** The owner's lands taken into consideration in the estimate of damages and benefits are those adjoining and connected with the land taken and forming a part of the same parcel.³ The fact that the property consists of several lots, blocks or legal subdivisions of sections as sold by the government will not prevent its being considered as one tract or parcel if it is occupied and used as such.⁴ Nor will land so occupied be deemed

²Newman v. Metropolitan E. R. Co., 118 N. Y. 618, 7 L.R.A. 289; Bohn v. Same, 129 N. Y. 576, 14 L.R.A. 344; Sutro v. Manhattan R. Co., 137 N. Y. 592.

³Idaho & W. R. Co. v. Caey, 73 Wash. 291; Routh v. Tex. T. Co. (Tex. Civ. App.), 148 S. W. 1152; Burns v. Reynoldsville, 48 Pa. Super. Ct. 122; Lewis v. Omaha, etc. R. Co., 158 Iowa 137; Illinois, etc. R. Co. v. Freeman, 210 Ill. 270; Sharp v. United States, 191 U. S. 341, 48 L. ed. 211; Illinois, etc. R. Co. v. Humiston, 208 Ill. 100; Yellowstone Park R. Co. v. Bridger C. Co., 34 Mont. 545, 115 Am. St. 546; Coatsworth v. Lehigh Valley R. Co., 73 N. Y. Misc. 645; State v. Superior Court, 44 Wash. 108; Sultan W. & P. Co. v. Weyerhauser T. Co., 31 Wash. 558; Jeffery v. Osborne, 145 Wis. 351; American States S. Co. v. Milwaukee N. R. Co., 139 Wis. 199; Kremer v. Chicago, etc. R. Co., 51 Minn. 15, 38 Am. St. 468 (regardless of when title was obtained); Hilbourne v. Suffolk, 120 Mass. 393, 21 Am. Rep. 522; Mix

v. La Fayette, etc. R. Co., 67 Ill. 319; St. Louis, etc. R. Co. v. Brown, 58 Ill. 61; Todd v. Kankakee, etc. R. Co., 78 Ill. 530; Meacham v. Fitchburg R. Co., 4 Cush. 291; White v. Fifth Ave. & High St. B. Co., 189 Pa. 500.

The scope of the inquiry is not limited by an unnecessary allegation as to the quantity of land owned. Kirby v. Panhandle & G. R. Co., 39 Tex. Civ. App. 252.

⁴West Skokie D. Dist. v. Dawson, 243 Ill. 175; Gray v. Iowa Cent. R. Co., 129 Iowa 68; Lake Koen N., R. & L. Co. v. McLain L. & I. Co., 69 Kan. 364; Smith County v. Labore, 37 Kan. 480; Seace v. Wayne County, 72 Neb. 162; Kavan v. South Omaha, 86 Neb. 469; Gorgas v. Philadelphia, etc. R. Co., 215 Pa. 501, 114 Am. St. 574; Scott v. Donora Southern R. Co., 222 Pa. 634; Burton L. Co. v. Houston, 45 Tex. Civ. App. 363; Stevens v. New York E. R. Co., 130 N. Y. 95; Driver v. Western Union R. Co., 32 Wis. 569, 14 Am. Rep. 775; Welch v. Milwaukee, etc. R. Co., 27 Wis.

separated by a highway, railroad, street or alley running through it,⁵ or by county lines, although that condemned is wholly in one county;⁶ or because it formerly had been divided into two farms owned by different parties from whom the present owner derived title.⁷ If two disconnected properties, are so inseparably connected in the use for which they are applied as that the injury and destruction of one must necessarily and permanently injure the other they may be regarded as one for the purpose of assessing damages.⁸ If the condemning party originally entered upon the land wrongfully and before the institution of proceedings the owner conveyed in fee to another a

108; *Ham v. Wisconsin, etc. R. Co.*, 61 Iowa 716; *Cummins v. Des Moines, etc. R. Co.*, 63 Iowa 397; *Cox v. Mason City, etc. R. Co.*, 77 Iowa 20; *Dudley v. Minnesota & N. R. Co.*, 77 Iowa 408; *Reisner v. Union D. R. Co.*, 27 Kan. 382; *Wilmes v. Minneapolis & N. R. Co.*, 29 Minn. 242; *Springfield & S. R. Co. v. Calkins*, 90 Mo. 538; *Union E. Co. v. Kansas City S. B. R. Co.*, 135 Mo. 353; *Kansas City S. B. R. Co. v. Norcross*, 137 Mo. 415; *A. & N. R. Co. v. Boerner*, 34 Neb. 240, 33 Am. St. 637; *Omaha Southern R. Co. v. Todd*, 39 Neb. 818; *Orth v. Milwaukee*, 92 Wis. 230.

Where fourteen lots were occupied as an entirety, ten of them being owned by the occupant and the others held by him under a lease, the damages resulting from taking a portion of the leased lots were measured by the decrease in the market value of the whole tract during the time the lease was to run. *Chicago & E. R. Co. v. Dresel*, 110 Ill. 89.

⁵ *Id.*; *Wabash, etc. R. Co. v. McDougall*, 126 Ill. 111, 9 Am. St. 359, 1 L.R.A. 207; *Baker v. Pennsylvania R. Co.*, 236 Pa. 479; *Kansas City S. R. Co. v. Boles*, 88 Ark. 533;

Suth. Dam. Vol. IV.—30.

Union T. Co. v. Pfeil, 39 Ind. App. 51; *Cook v. Boone Suburban E. R. Co.*, 122 Iowa 437; *Missouri, etc. R. Co. v. Schmuuck*, 79 Kan. 545 (mining land); *Same v. Roe*, 77 Kan. 224; *St. Louis, etc. R. Co. v. Drummond*, 205 Mo. 167; *In re Lehigh Valley R. Co.*, 78 N. J. L. 699, reversing s. e., 77 N. J. L. 239; *Cleveland, etc. R. Co. v. Smith*, 177 Ind. 524; *Hannibal B. Co. v. Schaubacher*, 57 Mo. 582; *Page v. Chicago, etc. R. Co.*, 70 Ill. 324; *Chapman v. Oshkosh R. Co.*, 33 Wis. 629; *Sherwood v. St. Paul, etc. R. Co.*, 21 Minn. 127; *St. Paul, etc. R. Co. v. Murphy*, 19 Minn. 500; *Kansas City, etc. R. Co. v. Merrill*, 25 Kan. 421; *Goodwine v. Evans*, 134 Ind. 262; *Peck v. Bristol*, 74 Conn. 483; *Haggard v. Independent School Dist.*, 113 Iowa 486.

⁶ *Glendenning v. Stahley*, 173 Ind. 674 (if the title is in one person); *Atchison & N. R. Co. v. Gough*, 29 Kan. 94.

⁷ *Frick C. Co. v. Painter*, 198 Pa. 468.

⁸ *Rudolph v. Pennsylvania Schuylkill Valley R. Co.*, 186 Pa. 541, 47 L.R.A. 782; *In re New York, etc. R. Co. v. Bell*, 101 N. Y. 685 (leased lands).

strip of land adjoining that occupied by the wrong-doer he is, notwithstanding such conveyance, entitled to be compensated for the injury done to his tract as a whole.⁹ But unless the property claimed to be one tract is so used and occupied if it is separated by streets, it will be regarded as consisting of separate parcels as so divided.¹⁰ If the action is by an abutting owner to recover damages for the construction of a viaduct it is proper to exclude testimony as to the effect of the improvement upon other lots in the same block if they are separated from that on account of which the action was brought, by an alley and front on another street.¹¹ Where the plaintiff owned land which abutted on a street occupied by the defendant's railroad, and also owned another and larger tract separated from the first by the land of another, which second tract did not abut on the street, but was connected with the first and with the street by a private right of way over the intervening tract, damages could not be recovered on account of the second tract.¹² In at least one case the value of land has been considered in connection with the land of another owner. Where the strip condemned was one foot wide and more than three hundred feet long and lay between the street and unplatted land of another the court said: The strip in controversy and the unplatted tract, when taken together, are just as valuable as if owned by the same person. At the present time the unplatted tract at the back of this strip is less valuable because cut off from access to the street, and the strip in and of itself has no value; but in the nature of things either tract is of value to the owner of the other. A tract of

⁹ *Graham v. Pittsburgh, etc. R. Co.*, 145 Pa. 504.

¹⁰ *In re New York Cent. R. Co.*, 6 Hun 149; *White v. Metropolitan, etc. E. R. Co.*, 154 Ill. 620; *St. Louis, etc. R. Co. v. Aubuchon*, 199 Mo. 352, 9 L.R.A.(N.S.) 426; *Burburde v. St. Joseph*, 130 Mo. App. 453; *Seattle v. Atwood*, 59 Wash. 112.

The test is the right of the owner to use the street or railroad dividing his land as a passageway

from one part of it to another. *Kansas City, etc. R. Co. v. Littler*, 70 Kan. 556.

¹¹ *Chicago v. Spoor*, 190 Ill. 340; *Evansville & R. R. Co. v. Charlton*, 6 Ind. App. 56; *Lawrence v. Philadelphia*, 154 Pa. 20; *Gibson v. Fifth Ave. & High St. B. Co.*, 192 Pa. 55, 73 Am. St. 795.

¹² *Pennsylvania Co. v. Pennsylvania Schuylkill Valley R. Co.*, 151 Pa. 334, 31 Am. St. 762.

land may be of value but for a single purpose; it may be of value to but few persons, and it may have no value except in connection with other lands owned by other parties. But if it has a value for any purpose, or to any person, or in connection with other lands a jury may not find it is without value.¹³

If city property, in fact unoccupied, is platted or divided into lots, nothing else being shown, it will be treated as lots intended for use as such, and not as an entire tract.¹⁴ But an owner is not barred of the right to compensation for land not taken because he has platted it, and it is divided from that taken by a line designated on the plat.¹⁵ The mere platting of building lots in anticipation of an opportunity to sell them does not sever them from the residue of the farm.¹⁶ Where two tracts of land were separated by a cattle drive sixteen feet wide, over and under which the land-owner had a right of way with full privilege to bridge over or tunnel under, the tracts were considered as one.¹⁷ If the whole body of land is wild, diversified, and not used as an entirety the question as to how much of it shall be considered in assessing damages is for the jury, and it is proper to regard the cuts and fills which will be made in constructing the proposed railroad and what effect it will have on farming operations.¹⁸ Agricultural land may be separated so as not to be treated as an entirety by an intervening bluff.¹⁹ Damages and benefits to separate tracts are to be separately assessed; ²⁰ though compensation may be made for the severance of one farm from another so far as damage results to their

¹³ *In re East Galer St.*, 47 Wash. 603, approving *San Diego L. & T. Co. v. Neale*, 78 Cal. 63, 3 L.R.A. 83.

¹⁴ *Wilcox v. St. Paul, etc. R. Co.*, 35 Minn. 439; *In re Commissioner of Public Works*, 135 App. Div. (N. Y.) 561.

¹⁵ *Metropolitan West Side E. R. Co. v. Johnson*, 159 Ill. 434, 31 Am. St. 762.

¹⁶ *Alabama Cent. R. Co. v. Musgrove*, 169 Ala. 424; *Scott v. Donora S. R. Co.*, 222 Pa. 634 (the in-

dicated streets not having been accepted); *Bridgeman v. Hardwick*, 67 Vt. 653.

¹⁷ *Union T. R. Co. v. Peet Bros. Mfg. Co.*, 58 Kan. 197.

¹⁸ *Ellsworth v. Chicago, etc. R. Co.*, 91 Iowa 386.

¹⁹ *Minnesota R. Co. v. Doran*, 15 Minn. 230; *Kessler v. Pittsburg, etc. R. Co.*, 208 Pa. 50.

²⁰ *Pichon v. Martin*, 35 Ind. App. 167; *St. Louis, etc. R. Co. v. Brown*, 58 Ill. 61; *Potts v. Railroad Co.*, 119 Pa. 278, 4 Am. St. 646.

owner by reason of their being made so small they cannot be as profitably worked as before.²¹

The questions which arise in this connection are so far influenced by the facts involved in them that the enunciation of a rule which will be applicable generally is impracticable. That announced by the Minnesota court is probably as good as any that has been formulated: "To constitute unity of property between two contiguous, but *prima facie* distinct, parcels of land there must be such a connection or relation of adaptation, convenience and actual and permanent use between them as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used."²² The court observes in a Massachusetts case that "whether a particular lot of land constitutes an independent parcel is a question which cannot be determined in the affirmative by the mere fact that it is separated from other land by a highway or street, or by paper lines, or by fences; nor can it be determined in the negative by the mere fact that it is all in one ownership and is not divided by streets or by paper lines. But when, as in the present case, the evidence shows that there is an actual division by streets wrought and in use for travel and by recorded paper lines, and there is no evidence that any two of the lots are used together or held for sale as one parcel, and the only use shown is a separate and distinct use and holding of each lot by itself, we think each lot is a separate and distinct parcel."²³

On the consolidation of proceedings to condemn under distinct petitions, separate verdicts being required, the land covered by each petitioner is to be regarded as a separate tract. *Olympia L. & P. Co. v. Harris*, 58 Wash. 410.

Conveyances made after the institution of proceedings under statutes indicating the land to be condemned do not, in the absence of intervention by the purchasers,

make it necessary that the several tracts be separately considered. *Wilkinson v. District of Columbia*, 22 App. (D. C.) 289.

²¹ *Sharpe v. United States*, 50 C. C. A. 597, 112 Fed. 893, 57 L.R.A. 932.

²² *Peck v. Superior, etc. R. Co.*, 36 Minn. 343; *Drake v. Bosworth*, 140 Mo. App. 37.

²³ *Wellington v. Boston & M. R.*, 164 Mass. 380.

If the land-owner answers and raises an issue as to the amount of damage resulting from the building of a railroad through the land described in the company's petition, and which is also described in the answer, in the absence of any claim made therein for injury to other land there cannot be a recovery for any depreciation in its value though that unde-scribed was used with the other as a single farm tract.²⁴ If the owner of lands on the seashore has no property rights therein no recovery should be permitted for the loss of any that may thereafter accrue as the result of legislation, even if the con-demning party would enjoy the benefit of the rights which might be granted. Such a contingency is too remote to be made the basis of judicial calculation.²⁵ The same objection defeats the claim of the owner of one legal subdivision of land which is cut off from another subdivision which he farms under a verbal lease, though he has a vested interest in the latter sub-ject to a life estate.²⁶ Where an undeveloped water power has not been made appurtenant to land not taken and is appurtenant only to that taken its value is to be ascertained only in connec-tion with the latter.²⁷ Taking land, the use of which is restricted for the benefit of land not taken gives the owner of the latter no cause of action.²⁸ Land and buildings upon it constitute but one piece of property, and benefits and damages are to be ascertained by ascertaining the effect upon it as a whole.²⁹ But if a building has no market value apart from the land its value independently of it may be shown.³⁰ The gen-eral rule laid down in the opening clauses of this section will not be followed where it will be inequitable to do so, as where the owner of a lot in previous condemnation proceedings has elected to take an award for the entire value of a building

²⁴ Northern Pac., etc. R. Co. v. Coleman, 3 Wash. 228.

²⁵ Bellingham Bay, etc. R. Co. v. Strand, 4 Wash. 311.

²⁶ Conness v. Indiana, etc. R. Co., 193 Ill. 464.

²⁷ Inland Empire R. Co. v. Mc-Kinley, 48 Wash. 675.

²⁸ Herr v. Board of Education, 82 N. J. L. 610.

²⁹ Seattle v. Board of Home Mis-sions, etc., 70 C. C. A. 597, 138 Fed. 307.

³⁰ San Pedro, etc. R. Co. v. Board of Education, 32 Utah 305, 11 L.R.A.(N.S.) 645.

which stood partly on the part of the lot condemned therein and partly on the part subsequently condemned.³¹

§ 1089. **Proof of value and damages.** These are not susceptible of precise proof and can only be approximately shown by the opinions of witnesses having the requisite information. If the true value of an estate immediately before and immediately after the location of a road over it could be accurately ascertained such a discovery would afford the most exact means of determining the real pecuniary damage sustained by its owner. The market value is a near, and perhaps the closest, approximation to it; and, therefore, any evidence which is competent in its general character to prove that, is apposite and admissible. In the very nature of things there can be no absolute standard by which the value of land or interests therein can be measured; and, of course, when it cannot be tested by the fact of a recent sale the nearest approach to it which can be obtained is a knowledge of the opinion and judgment of intelligent, practical men who are acquainted with the property. Evidence of such opinion and judgment must of necessity often be all that can be resorted to, and it is always competent and admissible, leaving its weight in each particular case to be determined by the jury in connection with the circumstances under which it is offered.³²

³¹ *In re Parkway*, 150 App. Div. (N. Y.), 482.

³² *Ft. Smith*, etc. B. Dist. v. *Scott*, 103 Ark. 405; *Nelson v. Atlanta*, 138 Ga. 252; *Hall v. Kansas City*, etc. E. R. Co., 89 Kan. 70; *Portland v. Tigard*, 64 Ore. 404; *Drexler v. Braddock*, 238 Pa. 376; *Baker v. Pennsylvania R. Co.*, 236 Pa. 479; *In re Bremerton*, 73 Wash. 565; *Southern Pac. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 106 Am. St. 36, 70 L.R.A. 221; *Kansas City, etc. R. Co. v. Weidenmann*, 77 Kan. 300; *Cape Girardeau & C. R. Co. v. Blechle*, 234 Mo. 471; *Mengell v. Mohnsville W. Co.*, 224 Pa. 120; *Union R. Co. v. Hunton*, 114 Tenn. 609; *Wray v.*

Knoxville, etc. R. Co., 113 Tenn. 544 (facts on which opinions based should be given); *Tacoma v. Bonnell*, 58 Wash. 593; *Guyandot Valley R. Co. v. Buskirk*, 57 W. Va. 417, 110 Am. St. 785; *Wolf v. Green Bay, etc. R. Co.*, 140 Wis. 337; *Pierce v. Chicago & M. E. R. Co.*, 137 Wis. 550; *Alameda v. Cohen*, 133 Cal. 5; *Dwight v. Hampden*, 11 Cush. 203; *Wyman v. Lexington, etc. R. Co.*, 13 Mete. (Mass.) 316; *Reynolds v. Burlington, etc. R. Co.*, 106 Ill. 152; *Pittsburgh, etc. R. Co. v. Robinson*, 95 Pa. 426; *St. Louis, etc. R. v. Anderson*, 39 Ark. 167; *Leroy & N. R. Co. v. Hawk*, 39 Kan. 638, 7 Am. St. 566; *Santa Ana v. Harlin*, 99 Cal. 538; *Metro-*

Opinions are not incompetent because the property, by reason of the use to which it has been put, has no market value; qualified witnesses may testify to its value to the owner.³³ The demand for consequential damages must be sustained by evidence disclosing the nature and extent thereof and *data* from which a reasonable estimate of their amount may be made.³⁴

Market value means the fair value of property as between one who wants to purchase and one who wants to sell;³⁵ not what could be obtained for it under peculiar circumstances when a greater than its fair price could be realized, nor its speculative value; not a value received because of the necessities of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction. It is what it would bring at a fair public sale when one party wanted to sell and the other to buy.³⁶ The jury in making an

politan West Side E. R. Co. v. Dickinson, 161 Ill. 22; St. Louis etc. R. Co. v. St. Louis Union S. Y. Co., 120 Mo. 541; Hewitt v. Pittsburg, etc. R. Co., 19 Pa. Super. Ct. 304; City of Lexington v. Chenault, 151 Ky. 774, 44 L.R.A.(N.S.) 301 (stating the form of questions as to value before and after the injury).

An expert who has some knowledge of the property in question is qualified. Louisiana R. & N. Co. v. Morere, 116 La. 997. Such knowledge may be based on the testimony of others. Same v. Kohn, 116 La. 159.

³³ Sanitary Dist. v. Pittsburgh, etc. R. Co., 216 Ill. 575.

³⁴ Postal Tel.-C. Co. v. Peyton, 124 Ga. 746. 3 L.R.A.(N.S.) 333.

³⁵ Wiegand v. Siddons, 41 App. Cas. (D. C.) 130; Sandy Val. & E. R. Co. v. Bentley, 161 Ky. 555; David v. Louisville & I. R. Co., 158 Ky. 721; Louisiana Ry. & Nav. Co. v. Baton Rouge Brickyard, 136 La. 833; Suburban Land Co. v. Arlington, 219 Mass. 539; Carolina & Y. R. R. Co. v. Armfield, 167 N. C. 464;

Coons v. McKees Rocks Borough, 243 Pa. 340; Seattle, P. A. & L. C. R. Co. v. Land, 81 Wash. 206.

³⁶ In re New York, W. & B. R. Co., 151 App. Div. (N. Y.) 50; Blincoe v. Choctaw, etc. R. Co., 16 Okla. 286, 4 L.R.A.(N.S.) 890; Lawrence v. Boston, 119 Mass. 126; Little Rock Junction R. v. Woodruff, 49 Ark. 381, 4 Am. St. 51; Cohen v. St. Louis, etc. R. Co., 34 Kan. 158, 36 Am. Rep. 5; Moulton v. Newburyport W. Co., 137 Mass. 163; Sullivan v. Lafayette County, 61 Miss. 271; Brown v. Calumet River R. Co., 125 Ill. 600; Kiernan v. Chicago, etc. R. Co., 123 Ill. 188; Calumet River R. Co. v. Moore, 124 Ill. 329; Richardson v. Board of Levee Com'rs, 68 Miss. 539; Board of Levee Com'rs, v. Hendricks, 77 Miss. 488. See § 1064.

Evidence of the amount of business done on property and of the profits arising therefrom is too speculative and uncertain. De Boul v. Freeport, etc. R. Co., 111 Ill. 499. And evidence of the cost of buildings upon property is not an ele-

estimate upon the testimony of the opinions of witnesses should not adopt those of men who are sanguine in their estimate of value, nor of those who are overcautious; but of prudent, practical men, men of experience, thought and consideration who have had opportunity of forming correct opinions of the value of the lands and the damages sustained.³⁷ Testimony as to whether the land in question is in demand or not may be received; ³⁸ but not as to what it would yield in crops.³⁹

The market value of land is not a question of science or skill upon which only an expert can give an opinion. Persons in the neighborhood are presumed to have sufficient knowledge of its value.⁴⁰ The opinions of witnesses founded upon a knowledge of the location, productiveness or adaptation of the land to other uses, not speculative, or of the market or selling price of similar

ment of damages unless it is shown that they increase its value to the extent of their cost. *Jacksonville & S. R. Co. v. Walsh*, 106 Ill. 253.

³⁷ *Somerville, etc. R. Co. v. Doughty*, 22 N. J. L. 503; *In re Valley Stream*, 152 App. Div. (N. Y.), 422. See *Bradley Mfg. Co. v. Chicago & S. T. Co.*, 229 Ill. 170.

³⁸ *St. Louis, etc. R. Co. v. St. Louis Union S. Y. Co.*, 120 Mo. 541; *Sandy Val. & E. R. Co. v. Bentley*, 161 Ky. 555; *Lexington & E. R. Co. v. Napier's Heirs*, 160 Ky. 579.

Thus evidence was competent that the land taken was the only available land in the vicinity suitable for business purposes, the condemnor having bought or taken all other such land. *Sandy Val. & E. R. Co. v. Bentley*, *supra*. Similarly it is competent to show that the land in question was tillable, and that it was situated in a region where the land was usually only suitable for mining. *Lexington & E. R. Co. v. Napier's Heirs*, *supra*.

³⁹ *Board of Levee Com'rs v. Hendricks*, 77 Miss. 488.

⁴⁰ *Wichita Falls & N. W. Ry. Co. v. McAlary*, — Okla. —, 144 Pac. 583; *Wichita Falls & N. W. Ry. Co. v. Harvey*, — Okla. —, 144 Pac. 581; *International, etc. R. Co. v. Bell*, — Tex. Civ. App. —, 130 S. W. 634; *Shattuck v. Stoneham, etc. R. Co.*, 6 Allen, 115; *Swan v. Middlesex*, 101 Mass. 173; *Pennsylvania, etc. R. Co. v. Bunnell*, 81 Pa. 414; *Montana R. Co. v. Warren*, 6 Mont. 275; *San Diego L. & T. Co. v. Neale*, 78 Cal. 63, 3 L.R.A. 83; *Leroy & W. R. Co. v. Hawk*, 39 Kan. 638; *Springfield & S. R. Co. v. Calkins*, 90 Mo. 538; *Johnson v. Freeport, etc. R. Co.*, 111 Ill. 413; *Union E. Co. v. Kansas City S. B. R. Co.*, 135 Mo. 353; *Kansas City S. B. R. Co. v. Norcross*, 137 Mo. 415; *Kansas City, etc. R. Co. v. Dawley*, 50 Mo. App. 480. As to the admissibility of expert testimony in New York elevated railroad cases, see *Roberts v. New York E. R. Co.*, 128 N. Y. 455, 13 L.R.A. 499; *Doyle v. Manhattan R. Co.*, 128 N. Y. 488; *Gallagher v. Kingston W. Co.*, 25 App. Div. (N. Y.) 82, affirmed without opinion, 164 N. Y. 602.

land in the vicinity are evidence to prove its value.⁴¹ But while such opinions are competent, it has been generally held that witnesses cannot, upon direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for such lands of like quality and location, or for the land in question or any part thereof; or how much the company have been compelled to pay in other and like cases; or the price at which another

Where the measure of damages is depreciation in market value due to a change of grade, such value must be proved by the testimony of practical men qualified to testify as to market value before and after the injury. *Knickerbocker Ice Co. v. City of Philadelphia*, 246 Pa. 84.

⁴¹ *Byrd I. Co. v. Smyth*, — Tex. Civ. App. —, 157 S. W. 260; *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170; *Telluride P. Co. v. Bruncau*, 41 Utah 4 (extent of depreciation); *Colusa & H. R. Co. v. Glenn*, 25 Cal. App. 634; *Geohegan v. Union El. R. Co.*, 266 Ill. 482; *In re East 161st St.*, 159 App. Div. (N. Y.) 662; *Wichita Falls & N. W. Ry. Co. v. McAlary*, — Okla. —, 144 Pac. 583; *Wichita Falls & N. W. Ry. Co. v. Harvey*, — Okla. —, 144 Pac. 581; *Americus v. Tower*, 3 Ga. App. 159; *Illinois, etc. R. Co. v. Humiston*, 208 Ill. 100; *New Jersey, etc. R. Co. v. Tutt*, 168 Ind. 205; *Consolidated T. Co. v. Jordan*, 36 Ind. App. 156; *Board of Levee Com'rs v. Nehms*, 82 Miss. 416; *St. Louis, etc. R. Co. v. Continental B. Co.*, 198 Mo. 698; *Brown v. New Jersey, etc. R. Co.*, 76 N. J. L. 795; *Myers v. Charlotte*, 146 N. C. 246; *Creighton v. Water Com'rs*, 143 N. C. 171; *Smith v. Pennsylvania R. Co.*, 205 Pa. 645; *Jeffery v. Osborne*, 145 Wis. 351; *Cincinnati G. T. Co. v. Wilson*, 70 W. Va. 157; *Idaho-W. R.*

Co. v. Columbia Conference, etc., 20 Idaho 568; *Snyder v. Western Union R. Co.*, 25 Wis. 60; *Central Pac. R. Co. v. Pearson*, 35 Cal. 261; *Parks v. Wisconsin, etc. R. Co.*, 33 Wis. 413; *Searle v. Lackawanna, etc. R. Co.*, 33 Pa. 57; *Brown v. Corey*, 43 id. 495; *Hewitt v. Pittsburgh, etc. R. Co.*, 19 Pa. Super. Ct. 304; *Kay v. Glade Creek & R. R. Co.*, 47 W. Va. 467, 8 Am. Neg. Rep. 636; *Snow v. Boston, etc. R. Co.*, 65 Me. 230; *Grand Rapids, etc. R. Co. v. Horn*, 41 Ind. 479; *East Pennsylvania R. Co. v. Hiester*, 40 Pa. 53; *Whitman v. Boston, etc. R. Co.*, 7 Allen, 313; *Pennsylvania, etc. R. Co. v. Bunnell*, 81 Pa. 414; *Pittsburgh, etc. R. Co. v. Rose*, 74 id. 362; *Curtin v. Nittany Valley R. Co.*, 135 id. 20; *Orr v. Carnegie N. G. Co.*, 2 Pa. Super. Ct. 401.

The knowledge of the witness may be derived from buying, selling, valuing and managing similar real estate, but it is not necessary that he be in the real estate business, to render his testimony competent on the question of market value. The value of the testimony will depend on the intelligence and knowledge and experience possessed by the witness in regard to such matters. *Geohegan v. Union El. R. Co.*, 266 Ill. 482.

Farmers may testify as experts of the value of realty as farm land; but not as to its value for some

owner holds his land—notwithstanding those transactions may constitute the source of their knowledge. If this was allowed the other side would have the right to controvert each transaction instanced by the witnesses and investigate its merits, which would lead to as many side issues as transactions and render the investigation interminable. Upon cross-examination, however, the knowledge of witnesses, and, therefore, the value of their opinions, may be tested in that mode if desired by the party in whose interest the examination is conducted.⁴² In some states evidence of *bona fide* offers to sell or purchase the

other natural or artificial charm or peculiarity which adds nothing to it for agricultural purposes. *Brown v. Providence & S. R. Co.*, 12 R. I. 238, 34 Am. Rep. 631.

⁴² *United States v. Beaty*, 198 Fed. 284; *In re New York, W. & B. R. Co.*, 151 App. Div. (N. Y.), 50; *Wadsworth Land Co. v. Piedmont Traction Co.*, 162 N. C. 503; *Roberts v. Philadelphia*, 239 Pa. 339; *Sharp v. United States*, 191 U. S. 341; *Enterprise L. Co., v. Porter*, 155 Ala. 426; *Eldorado, etc. R. Co. v. Everett*, 225 Ill. 529; *Watkins v. Wabash R. Co.*, 137 Iowa 441; *Kansas City, etc. R. Co. v. Weidenmann*, 77 Kan. 300; *Board v. Nelms, supra*; *Helena P. T. Co. v. McLean*, 38 Mont. 388; *Yellowstone Park R. Co. v. Bridger C. Co.*, 34 Mont. 545, 115 Am. St. 546; *Robinson v. New York E. R. Co.*, 175 N. Y. 219; *Blincoe v. Choctaw, etc. R. Co.*, 16 Okla. 286, 4 L.R.A.(N.S.) 890; *Rea v. Pittsburg & C. R. Co.*, 229 Pa. 106; *Gorgas v. Philadelphia, etc. R. Co.*, 215 Pa. 501, 114 Am. St. 974; *State v. Superior Court*, 55 Wash. 64; *Chicago, etc. R. Co. v. Alexander*, 47 Wash. 131; *Port Townsend S. R. Co. v. Barbare*, 46 Wash. 275; *Pacific R. & N. Co. v. Elmore P. Co.*, 60 Ore. 534; *Cleveland, etc. R. Co. v. Smith*, 177 Ind. 524; *Eutaw v. Bot-*

nick, 150 Ala. 429; *Central Pac. R. Co. v. Pearson*, 35 Cal. 261; *Brunswick, etc. R. Co. v. McLaren*, 47 Ga. 546; *Dickenson v. Fitchburg*, 13 Gray 546; *Tufts v. Charlestown*, 4 Gray 537; *Pennsylvania, etc. R. Co. v. Bunnell*, 81 Pa. 414; *Pinkham v. Chelmsford*, 109 Mass. 225; *Davis v. Charles River Branch R. Co.*, 11 Cush. 506; *West Newbury v. Chase*, 5 Gray 421; *Whitman v. Boston R. Co.*, 7 Allen, 313; *Swan v. Middlesex*, 101 Mass. 173; *Shattuck v. Stoneham R. Co.*, 6 Allen, 115; *Fall River Works v. Fall River*, 110 Mass. 428; *Cobb v. Boston*, 112 id. 181; *Hewitt v. Pittsburg, etc. R. Co.*, *supra*; *Lehmieck v. St. Paul*, etc. R. Co., 19 Minn. 464; *Stinson v. Chicago, etc. R. Co.*, 27 Minn. 284; *Curtin v. Nittany Valley R. Co.*, 135 Pa. 20; *Kerr v. South Park Com'rs*, 117 U. S. 379, 29 L. ed. 924; *Lyon v. Hammond, etc. R. Co.*, 167 Ill. 527; *Schuster v. Sanitary Dist.*, 177 Ill. 626; *Springfield v. Schmoock*, 68 Mo. 394; *Becker v. Philadelphia & R. T. R. Co.*, 177 Pa. 252, 35 L.R.A. 583; *In re Thompson*, 127 N. Y. 463, 14 L.R.A. 52. See *Langdon v. Mayor, etc.*, 133 N. Y. 628. *Contra*, as to sales of lots three blocks distant, *Portland v. Investment Co.*, 64 Ore. 410, and as to cross-examination if the other property is

land in question is admissible.⁴³ Such offers must be confined to a period near the time at which the value is to be ascertained.⁴⁴ In Wisconsin, Illinois, Iowa, Maryland, New Hampshire, New Jersey, Maine, Kentucky, Texas, Washington, Arkansas, Massachusetts and Missouri evidence of sales of similar lands in the vicinity, if made about or before the time of the taking, may be received in the discretion of the court or as a right.⁴⁵ A contrary rule obtains in New York, but prices

wholly unlike the plaintiff's, of higher value and not near it. *Drexler v. Braddock*, 238 Pa. 376. Prices at which sales of other property were made cannot be shown on cross-examination. *Roberts v. Philadelphia*, *supra*.

⁴³ *Sanitary Dist. of Chicago v. Boening*, 267 Ill. 118; *Illinois Cent. R. Co. v. Roskemmer*, 264 Ill. 103; *East Brandywine & W. R. Co. v. Ranck*, 78 Pa. 454; *Springfield v. Selmoock*, 68 Mo. 394; *Muller v. Southern Pac. Branch R. Co.*, 83 Cal. 240; *Johnson v. Freeport*, etc. R. Co., 111 Ill. 413; *Springer v. Chicago*, 135 id. 552, 12 L.R.A. 609. *Contra*, *Sharpe v. United States*, 50 C. C. A. 597, 112 Fed. 893, 57 L.R.A. 932.

It is said in *Santa Ana v. Harlin*, 99 Cal. 538, that the general rule is that it is not competent for the owner to prove what he has been offered for his property (*Central Pac. R. Co. v. Pearson*, 35 Cal. 247), or what persons who have been looking for similar property were willing to give for it. *Selma*, etc. R. Co. v. *Keith*, 53 Ga. 178; *Lewis on Eminent Domain*, § 446. *Muller v. R. Co.*, *supra*, it is intimated, was inadvertently decided in opposition to the general rule.

They may be inquired into on cross-examination to test the accuracy of the witness' knowledge, the reasonableness of his estimate and

credibility of his testimony. *Eutaw v. Botnick*, 150 Ala. 429.

In Massachusetts unaccepted offers to purchase lands are not competent on market value. *Suburban Land Co. v. Arlington*, 219 Mass. 539.

⁴⁴ *Santa Ana v. Harlin*; *Eastern Texas R. Co. v. Eddings*, 30 Tex. Civ. App. 170.

⁴⁵ *Sanitary Dist. of Chicago v. Boening*, 267 Ill. 118; *Hubbell v. City of Des Moines*, 166 Iowa 581; *West Kentucky Coal Co. v. Dyer*, 161 Ky. 407; *David v. Louisville & I. R. Co.*, 158 Ky. 721; *Suburban Land Co. v. Arlington*, 219 Mass. 539; *Burley v. Old Colony R. Co.*, 219 Mass. 483; *Bagnall v. City of Milwaukee*, 156 Wis. 642; *Lambert v. Giffin*, 257 Ill. 152; *St. Louis, etc. R. Co. v. Maxfield*, 94 Ark. 135, 26 L.R.A.(N.S.) 1111; *St. Louis, etc. R. Co. v. Guswelle*, 236 Ill. 214; *Chicago, etc. R. Co. v. Mines*, 221 Ill. 448; *Hadley v. Freeholders*, 73 N. J. L. 197; *Union R. Co. v. Hunton*, 114 Tenn. 609; *Kirby v. Panhandle & G. R. Co.*, 39 Tex. Civ. App. 252; *American States S. Co. v. Milwaukee N. R. Co.*, 139 Wis. 199. See *Tacoma v. Wetherby*, 57 Wash. 295; *Fourth Nat. Bank v. Commonwealth*, 212 Mass. 66; *Watson v. Milwaukee & M. R. Co.*, 57 Wis. 332; *Washburn v. Milwaukee, etc. R. Co.*, 59 Wis. 364; *Laflin v. Chicago, etc. R. Co.*, 33 Fed. 415; *Concordia C.*

received on such sales may be brought out on cross-examination and may outweigh opinion evidence contrary to the general

Ass'n v. Minnesota & N. R. Co., 121 Ill. 199; *Chandler v. Jamaica Pond A. Co.*, 122 Mass. 305, and cases cited; *St. Louis, etc. R. Co. v. Clark*, 121 Mo. 169, 26 L.R.A. 751; *In the Matter of Forsyth Boulevard*, 127 Mo. 417; *Mayor v. Smith & S. B. Co.*, 80 Md. 458; *Concord R. v. Greeley*, 27 N. H. 237; *Laing v. United Jersey R. & C. Co.*, 54 N. J. L. 576, 33 Am. St. 682; *Norton v. Willis*, 75 Me. 80; *Paducah v. Allen*, 111 Ky. 361; *Sullivan v. Missouri, etc. R. Co.*, 29 Tex. Civ. App. 429, citing the text; *Seattle & M. R. Co. v. Gilchrist*, 4 Wash. 509. *Contra*, *Loloff v. Sterling*, 31 Colo. 102; *Wichita Falls & W. R. Co. v. Wyrick*, — Tex. Civ. App. —, 147 S. W. 730. Compare *Ft. Worth Imp. Dist. v. Weathered*, — Tex. Civ. App. —, 149 S. W. 550.

The rule is well stated by an able Massachusetts judge as follows: "When the value of land is in issue, evidence of actual sales of other lands and prices for which they were sold is competent if such lands so taken are so similar in their situation, relative position, and other circumstances relating to value, as to make the price paid evidence competent for the consideration of the jury in estimating the market value of the land in question." *Crosby, J.*, in *Burley v. Old Colony R. Co.*, 219 Mass. 483.

Such sales must be actual, and hence mere agreements for sales, by which the buyer is to pay by installments, and get a deed if and when he fully pays the purchase price, are not competent on the question of market value of similar land in the vicinity, especially where the prices in such agreements are established artificially, by boom-

ing methods, and not by the operation of the laws of supply and demand. *Suburban Land Co. v. Arlington*, 219 Mass. 539.

Such sales to be competent, must be for a consideration in money, for which reason evidence of sales of which the consideration is the exchange of other property, in whole or in part, is incompetent as tending to show market value of other lands in the vicinity. *Sanitary Dist. of Chicago v. Boening*, 267 Ill. 118.

A similar rule prevails where the sale price of two parcels is arbitrarily divided between them, without regard to the value of each. *Sanitary Dist. of Chicago v. Boening*, *supra*.

But where the taking destroyed a ferry which rendered the land more accessible to a particular market, and the condemnor offered in evidence a bond of the owner to sell part of the land in question at a price named therein, it was held competent for the condemnor to show in rebuttal that the bond was on condition that the obligee in the bond was to have, as part of the consideration of the proposed deed, the privilege of using the ferry. *Central Georgia Power Co. v. Cornwell*, 141 Ga. 643.

Deeds to local lands are not admissible though they recite the considerations paid. *Board v. Nelms*, 82 Miss. 416.

⁴⁶ *In re East 161st St.*, 159 App. Div. (N. Y.) 662. But on cross-examination of an expert who has testified as to market value, such value may be shown as indicated by such sales, and it is said that opinion evidence, when in conflict

trend.⁴⁶ In Illinois the asking price of such sales is incompetent.⁴⁷ In order that the price paid for other local lands may be shown the sale must have been made voluntarily,⁴⁸ and it must appear what their relative situation to the land in question was,⁴⁹ that there was substantial similarity in locality and character,⁵⁰ and that the seller had no interest in the purchase.⁵¹ The price paid for other local lands by the party seeking to condemn may not be shown.⁵² The borrowing power of land is probably not

with the general trend of such sales in the vicinity is of little value.

⁴⁷ *Illinois Cent. R. Co. v. Roskemer*, 264 Ill. 103.

⁴⁸ *West Skokie D. Dist. v. Dawson*, 243 Ill. 175; *Sanitary Dist. of Chicago v. Boening*, 267 Ill. 118; *Suburban Land Co. v. Arlington*, 219 Mass. 539; *Burley v. Old Colony R. Co.*, 219 Mass. 483.

A non-compulsory sale of similar land in the vicinity of that taken is regarded as a good test of the market value of land taken. *Suburban Land Co. v. Arlington*, 219 Mass. 539.

⁴⁹ *Ranck v. Cedar Rapids*, 134 Iowa 563.

⁵⁰ *Chicago, etc. R. Co. v. Kline*, 220 Ill. 334.

So where the land taken was marsh land, and the land of which the sale was sought to be shown was partly upland, the evidence was properly excluded. *Burley v. Old Colony R. Co.*, 219 Mass. 483.

And where the land taken was bottom land, and the remainder hill land, evidence is competent as to the value of other bottom lands in the neighborhood, as well as of bottom lands apart from hill lands. Where plaintiff's land had a greater value than other similar lands in the neighborhood, the fact may be shown in rebuttal. *Musie v. Big Sandy & K. R. Co.*, 163 Ky. 628.

⁵¹ *Burley v. Old Colony R. Co.*, 219 Mass. 483 (where the sale sought to be proved as evidence of the land taken was to a corporation of which the seller was an officer).

⁵² *Metropolitan St. R. Co. v. Walsh*, 197 Mo. 392; *Illinois, etc. R. Co. v. Humiston*, 208 Ill. 100 (and so of the compensation paid for damage thereto); *Eldorado, etc. R. Co. v. Everett*, 225 Ill. 529; *Chicago & A. R. Co. v. Scott*, 225 Ill. 352; *Simons v. Mason City, etc. R. Co.*, 128 Iowa 139 (if the other lands were dissimilar and the consequences of the taking were different); *Chicago, etc. R. Co. v. Reisch*, 247 Ill. 350; *Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.*, — W. Va. —, 83 S. E. 1031.

"The property owner, realizing the power of the petitioner to take his property, may prefer to take less than the real value rather than incur the expense of a litigation where he can in no event obtain more than its actual value. As is said by the authorities, such a sale is in the nature of a compromise, and for that reason is not a fair measure of value." *South Park Com'rs v. Ayer*, 237 Ill. 211. To a similar effect see *Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.*, — W. Va. —, 83 S. E. 1031.

evidence of its value; at least neither an offer nor a refusal by strangers to it to lend a given sum upon a mortgage of it can be shown as evidence of such power.⁵³ A witness may not testify as to what he would pay for the land in question.⁵⁴ Numerous courts hold that opinions of witnesses are not admissible as to the amount of damages, nor as to the future effect of taking part of a tract of land for a public improvement.⁵⁵ In Massachusetts, Illinois, Arkansas, South Carolina, Pennsylvania, Colorado, Iowa, Missouri, Georgia, North Carolina, Wisconsin, Texas, Oregon, and, it seems, Minnesota, and Washington, a different rule prevails.⁵⁶ Such opinions must not include the

⁵³ *Peirson v. Boston E. R. Co.*, 191 Mass. 223.

But there is at least doubt of the soundness of the rule stated in the text. It has been plainly intimated, though not decided, that where a taking will bring land within a statute forbidding savings banks and others to loan on incumbered property, as where an easement affecting the value of the fee is taken, such damage to the mortgageable quality of the fee may be an element of damage. In *re Tunnel St.*, 160 App. Div. (N. Y.) 29 (where the taking was of an easement for a tunnel under the surface of the owner's property at such depth that it was held that the easement would not affect the value of the fee).

⁵⁴ *Chicago, etc. R. Co. v. Kelly*, 221 Ill. 498.

Opinion evidence as to value of land taken, to be competent, must be of the market value of the land, and not its value to the witness. *Rule v. Sioux County*, 94 Neb. 736.

⁵⁵ *City of Lexington v. Chenault*, 151 Ky. 774, 44 L.R.A.(N.S.) 301; *Bragan v. Birmingham R., L. & P. Co.*, 163 Ala. 93; *Eutaw v. Botnick*, 150 Ala. 429; *Georgia R. & B. Co. v. Decatur*, 129 Ga. 502;

Pichon v. Martin, 35 Ind. App. 167; *Pacific R. & N. Co. v. Elmore P. Co.*, 60 Ore. 534; *Atlantic, etc. R. Co. v. Campbell*, 4 Ohio St. 583, 64 Am. Dec. 607; *Rockford, etc. R. Co. v. McKinley*, 64 Ill. 338; *Covill v. St. Paul, etc. R. Co.*, 19 Minn. 283; *Curtis v. Same*, 20 Minn. 28; *Dalzell v. Davenport*, 12 Iowa 437; *Tingley v. Providence, etc. R. Co.*, 8 R. I. 493; *Hagaman v. Moore*, 84 Ind. 496; *Leroy & W. R. Co. v. Ross*, 40 Kan. 598 (correcting former intimations to the contrary); *Omaha v. Kramer*, 25 Neb. 489, 13 Am. St. 504; *Sixth Ave. R. Co. v. Metropolitan E. R. Co.*, 138 N. Y. 548.

⁵⁶ In *re Bremerton*, 73 Wash. 565; *Portland v. Tigard*, 64 Ore. 404; *Ft. Collins D. R. Co. v. France*, 41 Colo. 512; *St. Louis, etc. R. Co. v. Barnsback*, 234 Ill. 344; *Peoria, etc. T. Co. v. Vance*, 234 Ill. 36; *Lewis v. Englewood E. R. Co.*, 223 Ill. 223; *Richardson v. Sioux City*, 136 Iowa 436; *Cutler v. Boston*, 200 Mass. 400 (effect of the change upon the estate and percentage of lessened value); *Knapheide v. Jackson County*, 215 Mo. 516; *Southern Missouri & A. R. Co. v. Woodard*, 193 Mo. 656; *Wade v. Carolina Tel. & T. Co.*, 147 N. C. 219; *Leiby v.*

damage done to other land.⁵⁷ An exception to the rule that opinions as to the amount of damage are not admissible is made where the subject of the injury is so indefinite and general in its nature as not to be susceptible of direct proof. In such a case if the witness has personally observed the facts and circumstances upon which he bases his conclusions he may give his opinion.⁵⁸ The effect of an improvement upon the value of land may be shown by expert testimony,⁵⁹ independently of the value of the land.⁶⁰ An expert who testifies to the damages done may give the reasons for his opinion.⁶¹ Testimony as to what the value of land would have been if a railroad had not been laid across or near it is inadmissible;⁶² but it may be shown that there had been a general appreciation in value in other localities and that, but for its construction, the same would be true of the property in the locality in question.⁶³ In

Clear Spring W. Co., 205 Pa. 634; Mason v. Postal Tel.-C. Co., 74 S. C. 557; International, etc. R. Co. v. Bell (Tex. Civ. App.), 130 S. W. 634; Wolf v. Green Bay, etc. R. Co., 140 Wis. 337 (it seems); Weinschenk v. Western Allegheny R. Co., 233 Pa. 432; Swan v. Middlesex, 101 Mass. 173; Brainard v. Boston, etc. R. Co., 12 Gray 407; Springfield & M. R. v. Rhea, 44 Ark. 285; Little Rock Junction R. v. Woodruff, 49 id. 381, 4 Am. St. 51; Springfield & S. R. Co. v. Calkins, 90 Mo. 538; Bowen v. Atlantic, etc. R. Co., 17 S. C. 574; Keithsburg, etc. R. Co. v. Henry, 79 Ill. 290; Beck v. Pennsylvania, etc. R. Co., 148 Pa. 271, 33 Am. St. 822; Lehmicke v. St. Paul, etc. R. Co., 19 Minn. 464, 481; Sewell v. Chicago T. T. R. Co., 177 Ill. 93. See § 444.

In Missouri there are conflicting decisions on the question. See Union E. Co. v. Kansas City S. B. R. Co., 135 Mo. 353; Spencer v. Metropolitan St. R. Co., 120 Mo. 154, 22 L.R.A. 668.

⁵⁷ Chicago & A. R. Co. v. Scott, 232 Ill. 419.

⁵⁸ Taylor v. Jackson, 83 Mo. App. 641.

⁵⁹ Swift v. Newport News, 105 Va. 108, 3 L.R.A.(N.S.) 404; Portland v. Tigard, 64 Ore. 404.

It is held in Georgia that the erection of numerous and valuable buildings along a street affected by a change of grade, or the failure to erect any buildings thereon after the improvement, may tend to show whether the property of an abutter thereon has or has not been enhanced in value thereby. City of Atlanta v. Williams, 15 Ga. App. 654.

⁶⁰ Halstead v. Vandalia R. Co., 48 Ind. App. 96; In re City of New York, 198 N. Y. 84, 41 L.R.A.(N.S.) 411; Levenson v. Boston E. R. Co., 191 Mass. 75.

⁶¹ Logan v. Boston E. R. Co., 188 Mass. 414.

⁶² Roberts v. New York E. R. Co., 128 N. Y. 455, 13 L.R.A. 499.

⁶³ Shaw v. New York E. R. Co., 187 N. Y. 186.

some states the price paid for property does not furnish a basis for estimating its value,⁶⁴ unless the transfer was made recently.⁶⁵ The better view is to the contrary.⁶⁶ Such evidence has been received where the sale was made after the improvement was completed.⁶⁷ In Pennsylvania, Virginia and West Virginia the price demanded by or paid the owner of land as compensation for the damage which might be done may be proved, no element of compromise entering into the demand.⁶⁸ In Louisiana the price others have accepted from the condempnor may be shown;⁶⁹ and the verdict of a jury in a case between other parties where like local lands were involved is admissible.⁷⁰ On appeal from an award of appraisers the amount of the award is incompetent.⁷¹ The price obtainable for land in small parcels is not necessarily the measure of the value of a large tract.⁷² Where the value of land as oil-bearing

But the appreciation in value, to be competent, must be permanent, and hence it has been held that a value due to the World's Fair in Chicago in 1893 was temporary, and incompetent as tending to affect the value of the property injured. *Geohagan v. Union El. R. Co.*, 266 Ill. 482.

⁶⁴ *Chicago, etc. R. Co. v. Griffith*, 44 Neb. 690; *Lanquist v. Chicago*, 200 Ill. 69; *Ft. Worth Imp. Dist. v. Weatherred* (Tex. Civ. App.), 149 S. W. 550 (sale partly on credit and partly on exchange for other property).

⁶⁵ *Portland v. Tigard*, *supra* (two and one-half years before too remote).

Evidence of the value of the land taken at a period 16 years prior to the taking is too remote. *Illinois Cent. R. Co. v. Stewart*, 265 Ill. 35.

⁶⁶ *State v. Superior Court*, 55 Wash. 64; *Halstead v. Vandalia R. Co.*, 48 Ind. App. 96 (if the sale was recent).

⁶⁷ *Peabody v. New York, etc. R. Co.*, 187 Mass. 489.

⁶⁸ *Orr v. Carnegie N. G. Co.*, 2 Pa. Super. Ct. 401; *Seaboard A. L. R. v. Chamblin*, 108 Va. 42 (undivided interest bought by condempnor); *Guyandot Valley R. Co. v. Buskirk*, 57 W. Va. 417, 110 Am. St. 785 (if recent).

⁶⁹ *Louisiana R. & N. Co. v. Kohn*, 116 La. 159; *Same v. Morere*, *infra*.

⁷⁰ *Louisiana R. & N. Co. v. Morere*, 116 La. 997.

⁷¹ *Wichita Falls, etc. R. Co. v. Munsell*, 38 Okla. 253; *In re Judicial Ditch*, No. 14, *Martin Co.*, 119 Minn. 392.

The report of the commissioners may not be read to the jury. *St. Louis, etc. R. Co. v. Pfau*, 212 Mo. 398, noting that *Kansas S. B. R. Co. v. McElroy*, 161 Mo. 584, has been overruled; *Wellington v. Boston & M. R.*, 158 Mass. 185; *Crystal City & U. R. Co. v. Boothe* (Tex. Civ. App.), 126 S. W. 700.

⁷² *In re Starr St.*, 131 N. Y. Supp. 71.

land has been shown it is competent to show a progressive decrease in the productiveness of the field within which the land is situated.⁷³ If the value of land for the purpose of taxation is required to be fixed by the assessor there is no element of an admission therein and the valuation cannot be shown.⁷⁴ And if the valuation by the owner is accepted it is not evidence unless he was required to put a value upon it.⁷⁵ A memorandum made by the owner of land and used by him to secure an abatement of the taxes thereon is admissible on the question of value; and so is evidence of an attempted sale of the land, the attempt being made just after the taking, but without knowledge of it, the owner being permitted to give his reasons for making it.⁷⁶ In determining the value of corporate stock the returns made by the officers under oath to the public authorities for a series of years are admissible.⁷⁷ If the property is without market value it may be compared with other property and its value may be shown by persons who have knowledge thereof.⁷⁸ A divergence of view has been held as to the effect to be

⁷³ *Southern Pac. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 106 Am. St. 36, 70 L.R.A. 221.

⁷⁴ *Lewis v. Englewood E. R. Co.*, 223 Ill. 223; *Mercer County v. Wolff*, 237 Ill. 74.

⁷⁵ *Wray v. Knoxville, etc. R. Co.*, 113 Tenn. 544; *Crystal City & U. R. Co. v. Isbell* (Tex. Civ. App.), 126 S. W. 47. See § 445.

Verified tax returns are admissible as admissions, subject to the right of the owner to show that the assessor made the valuation. *Boyer v. St. Louis, etc. R. Co.*, 97 Tex. 107; *Burton L. Co. v. Houston*, 45 Tex. Civ. App. 363.

In a Maryland case it was held error to allow a witness to use tax bills showing assessments made one and two years after the completion of the improvement in order to fix value, though the court implied that tax bills of a proper date might have been properly so used.

Suth. Dam. Vol. IV.—31.

City of Baltimore v. Kahl, 124 Md. 299.

⁷⁶ *Manning v. Lowell*, 173 Mass. 100.

Similarly evidence of plaintiff's valuation for taxes was held competent, to be given such weight as the jury thought proper, and subject to any explanations the owner might choose to make. It seems to have been thought by the court to be of little weight, and admitted mainly in view of the fact that the owner had in testifying given a higher value than any of the witnesses. The effect of the evidence was limited to value at the time the tax valuation was made. *Trinity & B. V. Ry. Co. v. Orenbaum*, — Tex. Civ. App. —, 173 S. W. 531.

⁷⁷ *In re Chambersburg & B. T. Road*, 20 Pa. Super. Ct. 173; *Mifflin B. Co. v. Juniata County*, 144 Pa. 375, 13 L.R.A. 431.

⁷⁸ *St. Louis, etc. R. Co. v. Chap-*

given by the jury to a view of the premises. In Illinois the facts and circumstances observed may be considered in connection with all the testimony;⁷⁹ but the jury may not base their estimate of value and the compensation to be awarded solely upon it.⁸⁰ In Iowa a view is merely for the purpose of enabling the jury to better understand the testimony; the consideration of what was seen is not proper.⁸¹ A similar rule obtains in New York.⁸² In Maryland it is held that the jury may go on the land to find its value, and not merely in order better to understand the evidence,⁸³ and that where the jury has viewed it considerable weight should be given to the view in assessing damages.⁸⁴ In Nebraska it is said that where a jury goes on the land a line of evidence as to value is thereby presented in addition to that presented in court, to which too much importance should not be given, but which it is nevertheless proper for the jury to consider as a partial basis for the verdict.⁸⁵ In Minnesota it is seemingly contemplated that a jury which views the land shall take what they saw into consideration in fixing the amount of damages.⁸⁶ In Washington it is held that

man, 38 Kan. 307, 5 Am. St. 744; *Kansas City, etc. R. Co. v. Dawley*, 50 Mo. App. 480.

The value of a country church may be ascertained by proof of the value of the land and by adding thereto the reasonable cost of replacing the building, regard being had to their condition. *In re Simmons (Misc.)*, 127 N. Y. Supp. 940.

The effect of the railroad in question upon the comfort of his home and upon the value of his land occasioned by the operation of the road may be shown by one whose property is similarly situated to that in question, he being familiar with such property. *Wichita Falls & W. R. Co. v. Wyrick (Tex. Civ. App.)*, 147 S. W. 730.

⁷⁹ *Chicago, etc. R. Co. v. Rausch*, 245 Ill. 477; *Mercer County v. Wohl*, 237 Ill. 74.

In Virginia the finding of the commissioners is given great weight because of their view of the premises and their ability to apply the evidence and determine the weight to be given it. *Hunter v. Chesapeake & O. R. Co.*, 107 Va. 158, 17 L.R.A.(N.S.) 124.

⁸⁰ *South Park Com'rs v. Ayer*, 237 Ill. 211; *Herrin & S. R. Co. v. Nolte*, 243 Ill. 594. See *Guyer v. Davenport, etc. R. Co.*, 196 Ill. 370.

⁸¹ *Guinn v. Iowa, etc. R. Co.*, 131 Iowa, 680.

⁸² *Burrell v. City of New York*, 164 App. Div. (N. Y.) 245.

⁸³ *Patterson v. Baltimore City*, 124 Md. 153.

⁸⁴ *City of Baltimore v. Megary*, 122 Md. 20.

⁸⁵ *Naysmith v. City of Auburn*, 95 Neb. 582.

⁸⁶ *Otter Tail Power Co. v. Brastad*, 128 Minn. 415.

where the jury view the land taken, while the primary purpose of the view is to enable them better to understand the evidence at the trial,⁸⁷ they may also make use of what they see to assist them in detecting false testimony, and, where the evidence is conflicting, to determine what weight is to be given to the testimony of particular witnesses.⁸⁸ The rental value of property is to be regarded if the lease of it was not made for speculative purposes.⁸⁹ The financial condition of the owner of land may be shown on cross-examination if it is claimed the property has a special value for the purpose of expanding the business conducted on it and that plans were made therefor.⁹⁰ The necessity of erecting a retaining wall is a circumstance going to show whether or not the value of land has been affected;⁹¹ and, by parity of reasoning, the expense of erecting it may be relevant to show the extent of the damage done. As tending to show the value of a leasehold interest the expense incurred by the lessee in removing from the premises, the damage done the removed goods and the value of the fixtures lost may be shown as against the landlord seeking to condemn such interest.⁹² It is also competent to show the market value of the unexpired term, the situation, condition and use made of the premises, and the nature and prosperity of the business done, if those elements affect the value of the leasehold.⁹³ The opinions of experts and of the owner are admissible to show the

⁸⁷ *Northern Pac. R. Co. v. Union Lumber Co.*, 76 Wash. 563.

⁸⁸ *Newell v. Loeb*, 77 Wash. 182.

⁸⁹ *Union R. Co. v. Hunton*, 114 Tenn. 609; *Levenson v. Boston E. R. Co.*, 191 Mass. 75 (in the discretion of the court).

The rental value may be shown when it is the best that can be had. *Kelchner v. Kansas City*, 86 Kan. 762. But may be excluded when competent opinions as to the value are received. *Hall v. Kansas City, etc. E. R. Co.*, 89 Kan. 70.

In fixing the amount of depreciation of the market value of property damaged by an improvement,

evidence of long term leases of the property damaged or other property similarly situated is competent as far as it affects its market value, and as tending to prove what that value is. *Geohegan v. Union E. R. Co.*, 266 Ill. 482.

⁹⁰ *Bradley Mfg. Co. v. Chicago & S. T. Co.*, 229 Ill. 170.

⁹¹ *Eutaw v. Botnick*, 150 Ala. 429.

⁹² *North Coast R. Co. v. Kraft*, 63 Wash. 250.

⁹³ *Bales v. Wichita Midland Val. R. Co.*, 92 Kan. 771. Profits made during the term of a leasehold are only competent as tending to show

probable future damages to land which may result from the seepage of water from a reservoir.⁹⁴ The abandonment by the school authorities of the use of partially condemned premises used for school purposes after the construction of a railroad may not be shown to prove their destruction for school uses.⁹⁵ The price paid for stocks at public sales which attract the notice of investors is ordinarily the best evidence of their value. Evidence of corporate mismanagement cannot be received to affect their value, and evidence that they are taxable in another state is not competent to show that they have a higher value in the local jurisdiction.⁹⁶ The standard mortality tables, together with computations by experts based upon them, are competent, in connection with other evidence, to show the present value of a life estate for the purpose of estimating damages to a remainder-man, whether the issue is being tried before a jury or in equity.⁹⁷ Evidence admissible to show value covers a very large scope. This is as true of evidence to show the value of property with an earning capacity as of any other,⁹⁸ and is especially true as to real estate, concerning which there is usually no open market and no accessible record covering numerous transactions.⁹⁹

§ 1090. Effect of judgment for compensation—Abandonment of proceedings. Such a judgment is a bar only to an action for such injuries as could properly be included in the assessment.¹ These are damages resulting from making the appro-

its market value, and are wholly incompetent if not proved with reasonable certainty.

⁹⁴ *Loloff v. Sterling*, 31 Colo. 102.

⁹⁵ *San Pedro, etc. R. Co. v. Board of Education*, 32 Utah 305, 11 L.R.A.(N.S.) 645.

⁹⁶ *Gregg v. Northern R.*, 67 N. H. 452.

⁹⁷ *Joliet v. Blower*, 155 Ill. 414.

⁹⁸ *State v. Suffield & T. B. Co.*, 82 Conn. 460. Evidence of the net income is competent, but not controlling. In case of a toll bridge, the prospective increase of the local population and resulting use of it

are material; and so of the prospect of the erection of free bridges across the stream; the cost of replacing the bridge if that should be necessary, the par value of the stock of the corporate owner and the dividends paid upon it are to be considered. *Id.* See also *Bray v. Tardy*, 182 Ind. 98, holding that the revenue produced by the property taken is competent as throwing light on its value.

⁹⁹ *Milwaukee T. Co. v. Milwaukee*, 151 Wis. 224.

¹ *Southside R. Co. v. Daniel*, 20 Gratt. 344.

priation in conformity to law and proceeding with the construction of the public improvement and subsequent use of the property in a skilful and proper manner, observing all legal restrictions and fulfilling all legal obligations.² Just compensation does not extend to or embrace injuries to adjoining land not authorized to be taken, nor to damages resulting from carelessness or wilful trespass in the execution of the work.³ It is conclusively presumed after judgment that it embraced all damages and benefits of every kind naturally consequent to the taking; in judgment of law all such were foreseen and compensated for or allowed,⁴ and no others. But this does not

² § 1068; *Dodge v. County Com'rs*, 3 Mete. (Mass.) 380; *Delaware C. Co. v. Lee*, 22 N. J. L. 243; *McCormick v. Kansas City*, etc. R. Co., 57 Mo. 433; *Bailey v. Mayor*, 3 Hill 531; *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643; *Mason v. Kennebee*, etc. R. Co., 31 Me. 215; *Chicago*, etc. R. Co. v. *Loeb*, 118 Ill. 203; *Same v. McAuley*, 121 Ill. 160; *Peck v. Bristol*, 74 Conn. 483; *Port v. Huntingdon*, etc. R. Co., 168 Pa. 19; *Reisner v. Union D. & R. Co.*, 27 Kan. 382; *Leavenworth*, etc. R. Co. v. *Usher*, 42 id. 637; *Kansas City*, etc. R. Co. v. *Lackey*, 72 Miss. 881, 48 Am. St. 589; *Yazoo*, etc. R. Co. v. *Davis*, 73 Miss. 678, 32 L.R.A. 262, 55 Am. St. 562; *Fremont*, etc. R. Co. v. *Harlin*, 50 Neb. 698, 61 Am. St. 578, 36 L.R.A. 417; *Norfolk & W. R. Co. v. Carter*, 91 Va. 587; *Mullen v. Lake Drummond C. & W. Co.*, 130 N. C. 496, 61 L.R.A. 833.

³ *Pine Bluff & W. R. Co. v. Kelly*, 78 Ark. 83; *Coleough v. Nashville*, etc. R. Co., 2 Head 171; *Louisville St. L. & T. R. Co. v. Barrett*, 13 Ky. L. Rep. 232; *Kehoe v. Philadelphia*, 199 Pa. 45; *Sanitary Dist. v. Ray*, 199 Ill. 63.

⁴ *Fleming v. Wilmington & W. R. Co.*, 115 N. C. 676; *Denver City I.*

& W. Co. v. Middaugh, 12 Colo. 434; *White v. Chicago*, etc. R. Co., 122 Ind. 317, 7 L.R.A. 257; *Barnes v. Michigan A. L. R.*, 65 Mich. 251; *Churchill v. Beeche*, 48 Neb. 87, 35 L.R.A. 442, 58 Am. St. 684; *Lynch v. St. Louis, K. C. & C. R. Co.*, 180 Mo. App. 169; *Vansickle v. Drain*. Dist. No. 1, 186 Mo. App. 563; *Furniss v. Hudson River R. Co.*, 5 Sandf. 551; *Chicago*, etc. R. Co. v. *Springfield*, etc. R. Co., 67 Ill. 142; *Pusey v. Allegheny*, 98 Pa. 522; *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. 359; *Chicago*, etc. R. Co. v. *Brinkman*, 47 Ill. App. 287; *Fitzgerald v. Chicago*, etc. R. Co., 48 Kan. 537; *Atchison & N. R. Co. v. Forney*, 35 Neb. 607, 37 Am. St. 450; *Chicago*, etc. R. Co. v. *O'Connor*, 42 Neb. 90; *Opening of Second Ave.*, 7 Pa. Super. Ct. 55; *Welles v. Northern Cent. R. Co.*, 150 Pa. 620; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170; *Reid v. Hanover Branch R.*, 105 Mass. 303; *Guyer v. Davenport*, etc. R. Co., 196 Ill. 370; *Kidder v. Oxford*, 116 Mass. 165; *Hammer-sley v. New York*, 56 N. Y. 533; *Phillips v. South Park Com.*, 119 Ill. 626. Compare *Beronio v. Southern Pac. R. Co.*, 86 Cal. 415, with

preclude a fresh demand if the plan of the public work is changed after the assessment so as to make the effect of the appropriation more injurious,⁵ or if the property taken is applied to a different use.⁶ The judgment is conclusive of the amount due to the person designated to receive it,⁷ and vests a right to the money.⁸ After damages have been ascertained and fixed for taking private property for a highway there can be no abatement of the amount for subsequently vacating a part of such highway,⁹ or for entirely discontinuing it.¹⁰

In Maine it is said ¹¹ that it is settled by the great weight of authority that after condemnation proceedings have been perfected and the damages for the land taken have been finally ascertained and adjudged, the owner thereby acquires a vested right to have and recover the damages awarded. The condemning party cannot evade the payment of damages by revoking the proceedings or by surrendering the land without the consent and agreement of the land-owner. The English courts

Longworth v. Meriden & W. R. Co., 61 Conn. 451.

Where the matter in issue might have been included in the compensation awarded in the former action, plaintiff is concluded as though it had been. *Lynch v. St. Louis, K. C. & C. R. Co.*, 180 Mo. App. 169.

⁵ *Rome, etc. R. Co. v. Gleason*, 42 App. Div. (N. Y.) 530; *American Tel. & T. Co. v. Pearce*, 71 Md. 535, 7 L.R.A. 200; *Ragsdale v. Southern R. Co.*, 60 S. C. 381; *Boyd v. Negley*, 53 Pa. 387; *Bullard v. New York, etc. R. Co.*, 178 Mass. 570; *Carpenter v. Easton R. Co.*, 26 N. J. L. 168; *Wabash, etc. R. Co. v. McDougall*, 118 Ill. 229, 126 Ill. 111, 9 Am. St. 539, 1 L.R.A. 207; *Phillips v. Postal Tel. C. Co.*, 130 N. C. 513; *Chicago, etc. R. Co. v. Cogswell*, 44 Ill. App. 388. See same case, 94 id. 127; *Kotz v. Illinois Cent. R. Co.*, 188 Ill. 578.

⁶ *Foster v. Chicago, etc. R. Co.*, 10 Tex. Civ. App. 476, citing *Muhle v. New York, etc. R. Co.*, 86 Tex. 459;

Lyon v. McDonald, 78 Tex. 71, 9 L.R.A. 295; *Spokane v. Colby*, 16 Wash. 610.

⁷ *Sparhawk v. Walpole*, 20 N. H. 317.

⁸ *People v. Supervisors*, 4 Barb. 64; *Furbish v. County Com'rs*, 93 Me. 117; *Hallock v. Franklin County*, 2 Mete. (Mass.) 559; *Harrington v. County Com'rs*, 22 Pick. 267, 33 Am. Dec. 741; *Myers v. South Bethlehem*, 149 Pa. 85; *Opening of Second Ave.*, *supra*.

⁹ *Reed v. Wall*, 34 N. J. L. 275.

¹⁰ *Clough v. Unity*, 18 N. H. 75.

A judgment in a proceeding to establish a highway rendered more than six years prior to the commencement of another proceeding, such judgment not having been paid nor the highway opened, is not a basis for damages in the later proceeding. *Decker v. Washburn*, 8 Ind. App. 673.

¹¹ *Furbish v. County Com'rs*, 93 Me. 117.

have maintained the doctrine, as well in public street improvements as in railway and other corporations, that where, by act of parliament, street commissioners or the managers of railway or other corporations are authorized to acquire title to land by appraisement, after giving notice to the owner to treat or submit to an appraisement, the mere giving the notice is an election to purchase at an appraisal; and that this election, being binding on the owner of the land, is also binding on the street commissioners or corporation.¹² The American cases generally favor the same doctrine.¹³ In some states the judgment of condemnation is conditional and does not affect the title before payment is made.¹⁴ There a municipality may abandon the improvement in aid of which it has obtained condemnation, and will be considered to have done so unless, within a reasonable time, it pays the award and takes possession of the property.¹⁵ But it must act in good faith or the abandonment will not be effectual. Where proceedings have been begun by a municipality it cannot ignore the assessment of damages and judgment of condemnation and, by filing a new petition, obtain a re-assessment by another jury.¹⁶ Where condemnation proceedings are dismissed before a final award is made, if there has been an entry on the land affected, on the abandonment of

¹² *King v. Com'rs of Manchester*, 4 B. & A. 335; *King v. Hungerford M. Co.*, 4 B. & A. 327; *Stone v. Commercial R. Co.*, 4 Mylne & C. 122; *Walker v. Eastern Counties R.*, 6 Hare 594.

¹³ *Myers v. South Bethlehem*, 149 Pa. 85; *People v. Common Council*, etc., 78 N. Y. 56; *In re Commissioners of Washington Park*, 56 id. 148; *Dilts v. Plumville R. Co.*, 222 Pa. 516; *Imbescheid v. Old Colony R. Co.*, 171 Mass. 209, and local cases cited; *People v. Gas Light Co.*, 78 N. Y. 56; *Butler v. Sewer Com'rs*, 39 N. J. L. 665; *Matter of Water Com'rs*, 31 N. J. L. 72.

¹⁴ *Chandler v. Morey*, 195 Ill.

596; *Rice v. Chicago*, 57 Ill. App. 558; *McClellan v. Graves*, 19 Md. 351; *Graff v. Mayor*, etc., 10 id. 544; *Baltimore, etc. R. Co. v. Nesbit*, 10 How. 395. These cases are affected by statutes; the last case is rested on a statute similar to that on which the Maryland cases are based.

¹⁵ *Chicago v. Barbain*, 80 Ill. 482.

¹⁶ *Chicago, etc. R. Co. v. Chicago*, 143 Ill. 641; *Hupert v. Anderson*, 35 Iowa 578; *St. Joseph v. Hamilton*, 43 Mo. 282; *Rogers v. St. Charles*, 3 Mo. App. 41; *Leopold v. Chicago*, 150 Ill. 568; *Pearce v. Chicago*, 169 Ill. 631.

the proceedings the entry will be regarded as tortious from the beginning and if the delay has been long and is unexplained a *prima facie* case is made for the plaintiff.¹⁷ He is entitled to recover all his costs, including counsel fees incurred in contesting the condemnation proceedings.¹⁸ Where they have been dismissed the same liability has been imposed.¹⁹ But such liability has been denied the case being considered a clear one of *damnum absque injuria*.²⁰ By failing to take possession of land after an award and the delay caused by an appeal or promptly abandoning the proceedings the party seeking condemnation becomes liable for resulting damages; but without the aid of a statute there cannot be a recovery of attorney's fees and other expenses caused by the litigation.²¹ Where the proceedings begun in 1871 were continued until 1877 when they were discontinued by a statute authorizing the ascertainment of the loss and damages, legal or equitable, sustained by the owners of the land affected, they were entitled to recover the difference between the market value of the property when the maps were filed in the proceedings and such value when the repealing act went into effect; in estimating that difference allowance was made because the value of the property in 1871 was made up largely of an appreciation caused by the proceedings: no allowance was made because of taxes paid while the proceedings were pending; but it was otherwise as to the

¹⁷ *Simpson v. Kansas City*, 111 Mo. 237.

¹⁸ *Kira v. Cape Girardeau & C. R. Co.*, 124 Mo. App. 271; *Sterrett v. Delmar Ave. & C. R. Co.*, 108 Mo. App. 650; *St. Louis R. Co. v. Southern R. Co.*, 138 Mo. 591; *Matter of Waverly W. Works Co.*, 85 N. Y. 478; *Toledo v. Jacobson*, 11 Ohio C. C. 220.

A drainage district may be liable for costs, but is not liable for attorney's fees unless the proceedings have been needlessly and vexatiously delayed and the landowner thereby injured. *Nauman v. Big Tarkio D. Dist.*, 113 Mo. App. 575.

¹⁹ *Owen v. Springfield*, 83 Mo. App. 557; *Dence v. Unverzagt*, 225 Ill. 378 (under a statute); *Chicago & S. T. Co. v. Flaherty*, 222 Ill. 67 (the recovery must not exceed the amount agreed upon if a contract was made; if the contract was implied the amount recoverable is the reasonable value of the services).

²⁰ *District of Columbia v. Hess*, 35 App. (D. C.) 38, 28 L.R.A. (N.S.) 91; *Stevens v. Danbury*, 53 Conn. 9; *Andrus v. Bay Creek R. Co.*, 60 N. J. L. 10. See § 3.

²¹ *Winkelman v. Chicago*, 213 Ill. 360.

vacation of regularly laid out streets over the land in question, but not for streets not completely laid out nor for those dedicated to the public use, these not having been closed by the proceedings.²² Under a statute providing that a person whose land has been taken for a street shall recover "full indemnity therefor" for the "trouble and expense" incurred in consequence of the proceedings, on the failure to complete them there may be a recovery for labor, expenditure of time or inconvenience to the owner in the occupation and use of the premises, trouble and expense in visiting the officers of the condemnor, and the expense of employing counsel. But it was otherwise as to vexation, disquietude, annoyance and uncertainty.²³ In New Hampshire only the actual damage sustained can be recovered if the proceeding is discontinued before judgment.²⁴ In Massachusetts, under a statute giving a right of action for "loss and damage" occasioned to an owner by the abandonment of condemnation proceedings, the court held that damages were to be limited to material and pecuniary losses, and upheld a ruling of the trial court allowing recovery for loss of time and amounts paid counsel and real estate men on account of the taking, and excluding expenses incurred in contemplated improvements of the property.²⁵

§ 1091. **Interest.** It being an accepted principle that land taken for public use should be valued and damages ascertained as of the date of the taking, payment is then legally due unless a statute designates some other time;²⁶ and on general principles interest should be given from the time when the principal should be paid,²⁷ or, in other words, from the time the land-owner was entitled to compensation,²⁸ unless the obliga-

²² *In re Munson*, 29 Hun 325.

²³ *Whitney v. Lynn*, 122 Mass. 338.

²⁴ *Clark v. Hampstead*, 19 N. H. 365.

²⁵ *Munroe v. City of Woburn*, 220 Mass. 116.

²⁶ *Hamersley v. New York*, 56 N. Y. 533; *Phillips v. Pease*, 39 Cal. 582; *Cohen v. St. Louis, etc. R. Co.*,

34 Kan. 158, 55 Am. Rep. 242; *Drury v. Midland R.*, 127 Mass. 571.

²⁷ *Norris v. Philadelphia*, 70 Pa. 332; *Getz v. Philadelphia, & R. R. Co.*, 105 id. 547; *Pennsylvania, etc. R. Co. v. Ziemer*, 124 id. 560; *Reed v. Chicago, etc. R. Co.*, 25 Fed. 886.

²⁸ *Old Colony R. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194; *In re*

tion to pay it then is qualified by some required preliminary act to liquidate the amount or a demand of payment.²⁹ In some states the taking is by legal proceedings to condemn; and there, as a general rule, interest is charged only from the date of award.³⁰ It is given, not strictly as damages, but in the dis-

Grote St., 150 App. Div. (N. Y.) 215; *Abernathy v. South & W. R. Co.*, 159 N. C. 340; *Moll v. Sanitary Dist.*, 228 Ill. 633; *Gulf, etc. R. Co. v. Moseley*, 6 Indian T. 369 (from date of injury, that being analogous to a taking of the property); *Wright v. Pemigewasset P. Co.*, 75 N. H. 3; *In re Seybei* (App. Div.), 105 N. Y. Supp. 145; *Hempstead v. Salt Lake City*, 32 Utah 261; *In re Pine St.*, 57 Wash. 178; *Fox v. South Norwalk*, 85 Conn. 237; *Delaware, etc. R. Co. v. Burson*, 61 Pa. 369; *Alloway v. Nashville*, 88 Tenn. 510, 8 L.R.A. 123; *Miller v. St. Louis, etc. R. Co.*, 162 Mo. 424; *Lough v. Minneapolis, etc. R. Co.*, 116 Iowa 31; *East Tennessee, etc. R. Co. v. Burnett*, 11 Lea 525; *Cincinnati v. Whetstone*, 47 Ohio St. 196, quoting the three preceding propositions of the text; *New Haven Steam S. M. Co. v. New Haven*, 72 Conn. 276; *Imbescheid v. Old Colony R. Co.*, 171 Mass. 209; *Weide v. St. Paul*, 62 Minn. 67; *Martin v. St. Louis*, 139 Mo. 246; *In re Belfast W. Com'rs*, 15 L. R. Ir. 13; *Stolze v. Milwaukee, etc. R. Co.*, 113 Wis. 44. See *Matter of Trustees of New York & B. B.*, 137 N. Y. 95; *People v. Coler*, 60 App. Div. (N. Y.) 77.

In New Zealand interest on the sum awarded by a compensation court under the public works act is not to be computed from a time anterior to that at which the award acquires the effect of a judgment of the supreme court. *Walker v. Wellington & M. R. Co.*, 5 New Zeal. L.

R. (Sup. Ct.) 193. The rule in England is probably to the contrary. See § 1090.

The principle which exempts the government from liability for interest upon accounts or claims does not extend to proceedings instituted by it to condemn property; interest runs from the time of the commissioners' report. *United States v. Sargent*, 89 C. C. A. 81, 162 Fed. 81.

²⁹ *People v. Canal Com'rs*, 5 Denio 401. See *Burrage v. Boston*, 198 Mass. 580.

In *Clough v. Unity*, 18 N. H. 75, it was considered that by the adjudication of damages on laying out a highway a right to the money is vested, and is not affected by a subsequent discontinuance of the highway. But after such adjudication no duty is imposed on the town except to pay before making the road. If the owner sues for the money before the town proceeds to open the highway he does so before there is any active duty to pay.

³⁰ *Hingham v. United States*, 161 Fed. 295; *New Haven County v. Trinity Parish*, 82 Conn. 378; *North Coast R. Co. v. Ann Miller*, 61 Wash. 271; *Metler v. Easton, etc. R. Co.*, 37 N. J. L. 222; *Warren v. First Division, etc. R. Co.*, 21 Minn. 424.

In New Jersey interest is computed from the entry of judgment, and not from the rendition of verdict. *National Docks, etc. R. Co. v. Pennsylvania R.*, 54 N. J. Eq. 142.

In Pennsylvania the date of the location of a railroad, and not the

cretion of the jury,³¹ as an equitable mode of compensating the owner for the unnecessary delay in ultimately ascertaining the amount he is entitled to be paid when the final judgment is postponed for any re-examination by appeal or otherwise.³² The general rule, therefore, is liable to be controlled by the circumstances of the particular case,³³ or the statute under which the proceedings may be taken.³⁴ If the owner has had the profitable use of the premises or received rents during such intermediate period these circumstances are generally taken into account and the interest abated accordingly. Advantage should be taken of such facts on the trial finally had.³⁵ In Massachusetts because the statute makes no provision that interest shall be reduced by the owner's occupation of the premises after the taking, his right to interest from the time of the taking until verdict is not affected by his occupation. The claim based thereon or upon any injury done the premises must be settled in some other pro-

date of the bond, is the time from which interest is to be computed. *Gilmore v. Pittsburg, etc. R. Co.*, 104 Pa. 275; *Myers v. Schuylkill River East Side R. Co.*, 19 Phila. 468.

³¹ *Kerr v. New York E. R. Co.*, 49 N. Y. Misc. 331; *Shevalier v. Postal Tel. Co.*, 22 Pa. Super. Ct. 506 (the amount may be such as the jury see fit, not exceeding the legal rate); *Provident Life & T. Co. v. Philadelphia*, 202 Pa. 78; *Hewitt v. Pittsburg, etc. R. Co.*, 19 Pa. Super. Ct. 304.

³² *Rea v. Pittsburg & C. R. Co.*, 229 Pa. 106; *Mengell v. Mohnsville W. Co.*, 224 Pa. 120; *Klages v. Philadelphia & R. T. Co.*, 160 Pa. 386; *Becker v. Same*, 177 Pa. 252, 35 L.R.A. 583.

³³ *Rawlins v. Murphy*, 19 Wyo. 238.

³⁴ *In re Mott Haven C. Docks*, 196 N. Y. 175; *Brunn v. Kansas City*, 216 Mo. 108; *Oregon S. L. R. Co. v. Jones*, 29 Utah 147.

Under a statute giving a remedy for loss of business interest on the award is not recoverable, the act being silent respecting it. *Hudson River Tel. Co. v. New York*, 132 N. Y. Supp. 294; *People v. Stillings*, 136 App. Div. (N. Y.) 439.

If the damages are not payable until the land has been entered upon and possession taken, interest is not payable until the amount is fixed by a judgment terminating the litigation. *Hingham v. United States*, *supra*; *Norcross v. Cambridge*, 166 Mass. 508, 33 L.R.A. 843.

³⁵ *In re Grote St.*, 150 App. Div. (N. Y.) 215; *In re Post Office Site*, 127 C. C. A. 382, 210 Fed. 832; *United States v. Nahant*, 82 C. C. A. 470, 153 Fed. 520; *Los Angeles v. Gayer*, 10 Cal. App. 378; *Bishop v. New Haven*, 82 Conn. 51; *Lake Koen Nav. R. & I. Co. v. McLain L. & I. Co.*, 69 Kan. 334; *State v. Humes*, 34 Wash. 347; *Metler v. Easton, etc. R. Co.*, 37 N. J. L. 222; *Warren v. First Di-*

ceeding.³⁶ In Pennsylvania delay in payment is not the less an injury because the owner of the land continues in possession of it or has not been incommoded by the operation of the improvement,³⁷ and though interest *eo nomine* cannot be allowed on an award, yet it is proper for the jury to allow such sum as will compensate the owner for the delay in payment.³⁸ In Wisconsin damages for a taking carry interest from the time such damages accrue till verdict, being allowed as compensation for delay which is occasioned by the condemnor's wrong.³⁹ In New York interest cannot be recovered in the absence of express statutory authority.⁴⁰ In Louisiana, where the land is appropriated without formal taking, the taking is deemed to be made when the condemnor actually enters upon and appropriates the land for the purposes desired, and interest is allowed from such date.⁴¹ In Missouri interest cannot be offset by rents received by the land-owner after the taking unless their receipt is pleaded.⁴² If such delay after the assessment by commissioners is by the unnecessary act or litigious conduct of the owner he will not be entitled to interest during its continuance.⁴³ Thus, if he is the sole appellant and the verdict should not be in

vision, etc. R. Co., 21 Minn. 424; West v. Milwaukee, etc. R. Co., 56 Wis. 318; Miller v. Asheville, 112 N. C. 759; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170.

But in Commonwealth v. Boston, etc. R. Co., 3 Cush. 57, the court, by Shaw, C. J., said: "We consider it the plain dictate of justice when money is due on a judgment, or on a verdict in the nature of a judgment, and payment is prevented by the necessary time taken for re-examining the case, if it result in confirming the former judgment and showing that the party was then entitled to his money, that interest should be allowed as a just compensation for the delay." See Detmold v. Drake, 46 N. Y. 318.

³⁶ Imbescheid v. Old Colony R. Co., 171 Mass. 209; Pegler v. Hyde Park, 176 Mass. 101; Hay v. Com-

monwealth, 183 Mass. 294; Dodge v. Rockport, 199 Mass. 274.

³⁷ Philadelphia v. Dyer, 41 Pa. 463; Same v. Miskey, 68 Pa. 49; Wayne v. Pennsylvania R. Co., 231 Pa. 512.

³⁸ Stephens v. Cambria & I. R. Co., 242 Pa. 606.

³⁹ Bagnall v. City of Milwaukee, 156 Wis. 642.

⁴⁰ In re Titus Street, 84 Misc. (N. Y.) 620, [affirmed 163 App. Div. 973].

⁴¹ Jacobs v. Kansas City, S. & G. R. Co., 134 La. 389.

⁴² Ragan v. Kansas City & S. R. Co., 144 Mo. 623.

⁴³ Cook v. South Park Com'rs, 61 Ill. 115; Mengell v. Mohnsville W. Co., 224 Pa. 120; Burns v. Reynoldsville, 48 Pa. Super. Ct. 122 (excessive and unreasonable demands).

excess of the appraisement of the commissioners interest should be disallowed. In that event the postponement of the receipt of compensation adjudged by the commissioners and decided by the judge to have been adequate would be due to his own act. To allow him indemnity for such delay in the form of interest would be unreasonable and unjust.⁴⁴ But if the condemning party also appeal interest will not be denied the owner because he appealed.⁴⁵ In New Hampshire, where the amount of damages has been fixed by award of commissioners and the owner appeals, interest will be allowed unless the money has been tendered or deposited.⁴⁶ Then if he appeals and gets a larger sum allowed he is entitled to interest only on such additional sum, for he could receive the tendered or deposited sum without prejudice to his right to appeal.⁴⁷ Upon an appeal in a highway proceeding the plaintiff is entitled to interest from the time of filing the report of the referee until judgment is rendered thereon. If the land was in fact taken before the report was filed it is presumed that it included interest up to the time it was filed.⁴⁸ A tender of the amount originally awarded does not affect the plaintiff's right to interest on the whole sum finally assessed in his favor if the latter is larger than the former.⁴⁹ A deposit made with an officer who holds the amount until the parties' rights are finally determined does not affect the land-owner's right to interest on the entire sum when the award is increased on his appeal;⁵⁰ but if the deposit is with-

⁴⁴ *Reisner v. Union D. & R. Co.*, 27 Kan. 382.

The landowner has been awarded interest from the date of the order of condemnation and the appointment of a jury where on his appeal the judgment was for the same sum as was originally awarded him. *Snowden v. Shelby County*, 118 Tenn. 725.

⁴⁵ *Warren v. First Division, etc. R. Co.*, 21 Minn. 424.

⁴⁶ *Concord R. v. Greeley*, 23 N. H. 237.

⁴⁷ *Shattuck v. Wilton R. Co.*, 23 N. H. 269; *Wichita & W. R. Co.*

v. Kuhn, 38 Kan. 104; *In re Board of W. Com'rs*, 195 N. Y. 502; *Baldwin v. San Antonio* (Tex. Civ. App.), 125 S. W. 596.

Interest is due as matter of law if the award has been increased on the appeal of the owner of the land. *St. Louis, etc. R. Co. v. Oliver*, 17 Okla. 589.

⁴⁸ *Wentworth v. Portsmouth*, 68 N. H. 392; *Bridgeman v. Hardwick*, 67 Vt. 653.

⁴⁹ *Moll v. Sanitary Dist.*, 228 Ill. 633; *Alloway v. Nashville*, 88 Tenn. 510, 8 L.R.A. 123.

⁵⁰ *Sioux City, etc. R. Co. v. Brown*,

drawn by him pending an appeal and the final award is less than the sum of the deposit the condemning party is entitled to interest on the difference between the two amounts.⁵¹ In Illinois the right to interest, after judgment of condemnation, rests upon the statute which makes all judgments carry interest from their date. The costs incurred by the land-owner are a part of his judgment.⁵² In another case the right to interest is held to accrue at the time actual possession of the property was taken.⁵³ Under a statute which requires nothing more than the payment of compensation within thirty days after final judgment all other conditions are excluded.⁵⁴ If the money awarded has been paid into court for the benefit of the party entitled to it he can only recover such interest as it earned while in the custody of the court.⁵⁵ Under such circumstances interest cannot be recovered pending the determination of exceptions to the report of the commissioner.⁵⁶ The right to interest earned by such money is not lost by the land-owner's denial of the right to condemn and his refusal to accept the deposit.⁵⁷ If the payment of the award into court is made by statute a legal payment the refusal to accept it stops the running of interest.⁵⁸ In New Jersey interest is due if the award is not paid though *certiorari* proceedings to review

13 Neb. 317; Chicago, etc. R. Co. v. Buel, 56 Neb. 205.

⁵¹ Watson v. Milwaukee & M. R. Co., 57 Wis. 332.

⁵² Geohagan v. Union El. R. Co., 266 Ill. 482; Epling v. Dickson, 170 Ill. 329.

⁵³ Evanston v. Clark, 77 Ill. App. 234, citing Chicago v. Palmer, 93 Ill. 125.

In Illinois in order to entitle the owner to interest from the time of taking until ascertainment of damages by trial the delay in bringing the case to trial must have been unreasonable and vexatious and caused by the condemnor. Geohagan v. Union El. R. Co., 266 Ill. 482.

⁵⁴ St. Louis, etc. R. Co. v. Clark,

121 Mo. 169, 26 L.R.A. 751; Same v. Fowler, 142 Mo. 670.

⁵⁵ In re Board of W. Com'rs, 195 N. Y. 502; Chicago, etc. R. Co. v. Eubanks, 130 Mo. 270.

An award to unknown owners carries interest unless the money is paid into court. In re Cammann, 143 App. Div. (N. Y.) 223.

⁵⁶ San Francisco, etc. R. Co. v. Leviston, 134 Cal. 412.

⁵⁷ Snyder v. Cowan, 50 Mo. App. 430.

⁵⁸ National Docks, etc. R. Co. v. Pennsylvania R., 54 N. J. Eq. 142; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170; In re Belfast W. Com'rs, 15 L. R. Ir. 13.

it are brought by the land-owner.⁵⁹ By making an unreasonable and exorbitant demand and thereby preventing a reasonable settlement, the right to recover interest is lost.⁶⁰

In states where the taking is the actual appropriation, interest is allowed from that time and included in the award,⁶¹ which bears interest after it is made;⁶² but interest on the interest allowed is not recoverable during the time intervening between the award and its payment.⁶³ Where the condemning party is required to procure condemnation of and pay for the property prior to actual appropriation or use of it he is in fault and a trespasser if he takes possession without first acquiring the right. By such delay in instituting proceedings he incurs the hazard of paying an enhanced price as of the date of the assessment, in states where the value and damages are fixed at that date, or interest from the time of taking possession where that fact fixes the date of taking.⁶⁴ In case of appropriations of private property for public use by the state or some municipal division compensation is not unfrequently so provided for that the owner must be the actor to obtain it. Then he must take the necessary steps to entitle himself to the money and to impose the immediate duty to pay it, and until that is done there can be

⁵⁹ *Watson v. Mayor, etc.*, 84 N. J. L. 422.

⁶⁰ *James v. West Chester*, 220 Pa. 490.

⁶¹ *Guinn v. Iowa, etc. R. Co.*, 131 Iowa 680; *Raney v. Drainage Dist.*, 84 Kan. 688; *Raymond v. Commonwealth*, 192 Mass. 486; *Providenece, etc. S. S. Co. v. Fall River*, 187 Mass. 45; *Wayne v. Pennsylvania R. Co.*, 231 Pa. 512; *Gay v. Gardiner*, 54 Me. 447, 92 Am. Dec. 555; *Bangor, etc. R. Co. v. McComb*, 60 Me. 290; *Kidder v. Oxford*, 116 Mass. 165; *Reed v. Hanover Branch R. Co.*, 105 Mass. 303; *Whitman v. Boston, etc. R. Co.*, 7 Allen 313; *Atlantic, etc. R. Co. v. Koblentz*, 21 Ohio St. 334.

Where a verdict fixed the damages at a certain sum "with in-

terest thereon from the time when the said railroad company took possession of the land," it was void for uncertainty. *Connecticut River, etc. R. Co. v. Clapp*, 1 Cush. 559.

⁶² *West v. Milwaukee, etc. R. Co.*, 56 Wis. 318.

⁶³ *Bishop v. New Haven*, 82 Conn. 51. But in New York interest is calculated on the entire amount of the award from its date to confirmation. *In re Dorsett*, 92 App. Div. (N. Y.) 523.

⁶⁴ *Peabody v. New York, etc. R. Co.*, 187 Mass. 489 (at the legal rate or any reasonable rate the jury may fix); *Webster v. Kansas City & S. R. Co.*, 116 Mo. 114; *Bellingham Bay, etc. R. Co. v. Strand*, 14 Wash. 144.

no such default in making payment as will give him a right to interest.⁶⁵ But if the appropriating party takes unauthorized possession before payment and the value and damages are fixed at the date of such appropriation a right to interest arises from such actual taking.⁶⁶ The failure to take possession is immaterial if the moving party has not exercised the right to discontinue the proceedings.⁶⁷ A mortgagee is not entitled to interest beyond the day when the award became payable, if there was no refusal to pay.⁶⁸

In Ontario, though there is no provision in the statute respecting it, interest may be allowed against a city which takes land from the date of the by-law authorizing the taking and entry. This is in analogy to the English rule and is on the basis that the case is that of vendor and purchaser.⁶⁹ But this rule does not govern where land is not taken, but is only "injuriously affected" by a municipal improvement. The damages in the latter case are unliquidated, and are not a debt until they have been assessed by the proper tribunal.⁷⁰

The acceptance of a part of the sum awarded as partial payment, without prejudice to the right to recover the balance and interest, does not bar the right to the latter. If there is no special agreement to that effect the law makes the application so as to satisfy the interest and applies the balance on the principal.⁷¹ In New York interest on the sum awarded is given as damages and can only be recovered with the principal; it does not constitute a debt capable of a distinct claim. Hence acceptance of the principal without bringing an action bars the

⁶⁵ *People v. Canal Com'rs*, 5 Denio 401; *Norris v. Philadelphia*, 70 Pa. 334; *Philadelphia v. Dyer*, 41 id. 469, 470; *In re Second St., Harrisburg*, 66 id. 132; *Edelmuth v. Prendergast*, 202 N. Y. 602 (demand must be made).

⁶⁶ *Moll v. Sanitary Dist.*, 131 Ill. App. 155; *Delaware, etc. R. Co. v. Burson*, 61 Pa. 369; *Fiske v. Chesterfield*, 14 N. H. 240; *Hampton v. Kansas City*, 74 Mo. App. 129.

⁶⁷ *State v. Humes*, 34 Wash. 347.

⁶⁸ *Carpenter v. New York*, 51 App. Div. (N. Y.) 584.

⁶⁹ *In re Macpherson and City of Toronto*, 26 Ont. 558; *In re Leak and City of Toronto*, 26 Ont. App. 351; *In re Cavanagh & Canada Atlantic R. Co.*, 14 Ont. L. R. 523 (from the time the plan was filed and the order of the commission authorizing the taking).

⁷⁰ *In re Leak and City of Toronto*, *supra*, reversing 29 Ont. 685.

⁷¹ *Weide v. St. Paul*, 62 Minn. 67;

recovery of interest.⁷² But it is otherwise if the principal was received under protest, interest being demanded,⁷³ or there is an agreement that the right to interest should not be prejudiced by the payment of the principal.⁷⁴ Interest must be demanded. It will not be allowed where the value of the land is fixed as of the time of the trial of an appeal from the award of the commissioners.⁷⁵ Where condemnation terminates all contracts relating to the land condemned a mortgagee is entitled to such proportion of the sum awarded as will liquidate his mortgage with interest at the legal rate from the time title vested in the condemnor, regardless of the rate stipulated for between him and the mortgagor.⁷⁶ A statute providing for interest on awards made in proceedings to change the grade of streets after its enactment does not cover awards made prior thereto.⁷⁷

Baltimore Extension R. Co., [1895]
1 Irish 169.

⁷² *Cutter v. Mayor*, 92 N. Y. 166.

See *Hudson River Tel. Co. v. City of New York*, 210 N. Y. 394, where a statute providing for the recovery of interests on awards was held to apply to awards for the taking of real estate only, so that the condemnnee of a business could not recover interest.

Suth. Dam. Vol. IV.—32.

⁷³ *Devlin v. Mayor*, 131 N. Y. 123.

⁷⁴ *Martin v. St. Louis*, 139 Mo. 246.

⁷⁵ *Routh v. Texas T. Co.* (Tex. Civ. App.), 148 S. W. 1152.

⁷⁶ *German Sav. Bank v. Dunn*, 75 N. Y. Misc. 251.

⁷⁷ *In re Cauldwell*, 156 App. Div. (N. Y.) 661.

CHAPTER XXVII.

TRESPASS TO PERSONAL PROPERTY.

- § 1092. When damages may exceed compensation.
 1093. Certainty of damages.
 1094. Comprehensiveness of the remedy.
 1095. Aggravations increase damages; injury to feelings; circumstances justifying punitive damages.
 1096. Damages for taking or destroying property; interest; value of use.
 1097. Same subject; quantity of interest.
 1098. Same subject; market value.
 1099. Same subject; non-marketable property.
 1100-1102. Special and consequential damages.
 1103. Expenses to recover, restore and protect property.
 1104. Mitigation of damages.
 1105. Same subject; application of property to owner's benefit.
 1106, 1107. Damages against trespasser from the beginning.

§ 1092. When damages may exceed compensation. The recovery for this wrong is limited to compensation in the absence of aggravations for which punitive damages are allowable. Whether, by the proof adduced, there are such aggravations shown as will justify the jury in considering a claim for such damages is for the court to decide. If there is testimony tending to show and warranting a finding that the trespass was wanton or malicious the court will submit the question of the allowance of such damages and their amount to the jury.¹ When their allowance has been so submitted the amount which

¹ *Tuscaloosa B. R. Co. v. Maxwell*, 171 Ala. 318; *Stowers F. Co. v. Brake*, 158 Ala. 639; *Terry v. Williams*, 148 Ala. 468; *Speth v. Maxwell*, 6 Ga. App. 630; *Chicago Title & T. Co. v. Core*, 223 Ill. 58; *Mills v. Larrance*, 217 Ill. 446; *Keegan v. Harlan*, 134 Ill. App. 363; *Dighera v. Wheat*, 85 Kan. 458; *Duff v. Read*, 74 Kan. 730; *Kentucky H. Co. v. Hood*, 133 Ky. 383, 134 Am. St. 457, citing the text; *Louisville G. Co. v. Kentucky H. Co.*, 132 Ky. 435; *Schulte v. Louis-*

ville & N. R. Co., 128 Ky. 627; *Mc-dairy v. McAllister*, 97 Md. 488; *Carey v. Wolff*, 72 N. J. L. 510; *Smalling v. Jackson*, 133 App. Div. (N. Y.) 382; *Hammond v. Sullivan*, 112 App. Div. (N. Y.) 788; *Kyles v. Southern R. Co.*, 147 N. O. 394, 16 L.R.A.(N.S.) 405; *Senft v. Mellvain*, 43 Pa. Super. Ct. 518; *Jones v. McCreery L. & I. Co.*, 82 S. C. 456; *Sparks v. Ponder*, 42 Tex. Civ. App. 434; *Faroux v. Cornwell*, 40 Tex. Civ. App. 729; *Waggoner v. Snody*, 36

the jury may think proper to award will be accepted by the court unless it is so exorbitant as to indicate that they have been influenced by passion, prejudice or a perverted judgment.² A corporation may recover exemplary damages for a malicious and oppressive trespass.³

Statutes which impose treble damages for trespasses receive the strictest construction. Hence the imposition of that measure of liability for carrying off, using or destroying any wood, timber, lumber, hay, grass or other personal property applies only to things *ejusdem generis* with those enumerated—such as are produced and grown upon land; a yoke of oxen is not included.⁴ Such a statute is not to be extended to a person who has not actually committed the trespass complained of.⁵

Tex. Civ. App. 514; *Selden v. Cushman*, 20 Cal. 56, 81 Am. Dec. 93; *Ives v. Humphreys*, 1 E. D. Smith 196; *Pacific Ins. Co. v. Conrad*, Baldw. 138; *Moore v. Schultz*, 31 Md. 423; *Rose v. Story*, 1 Pa. 190, 44 Am. Dec. 121; *Wylie v. Smitherman*, 8 Ired. 236; *Morris v. Shew*, 29 Kan. 661; *Wellman v. Dickey*, 78 Me. 29; *Willis v. Miller*, 29 Fed. 238; *Ten Hopen v. Walker*, 96 Mich. 236, 35 Am. St. 598; *Matteson v. Munro*, 80 Minn. 340; *Chappell v. Ellis*, 123 N. C. 259, 68 Am. St. 822; *Farr v. Swigart*, 13 Utah 150; *Vogel v. McAuliffe*, 18 R. I. 791; *Henson v. Taylor*, 108 Ga. 567; *Shores v. Brooks*, 81 Ga. 468, 12 Am. St. 332; *Deleshaw v. Edelen*, 31 Tex. Civ. App. 416; § 392.

² *Yazoo, etc. R. Co. v. Williams*, 87 Miss. 344, citing the text; *Rogers v. Henry*, 32 Wis. 327; *Belknap v. Boston, etc. R. Co.*, 49 N. H. 358; *McCarthy v. Niskern*, 22 Minn. 90; *McConnell v. Hampton*, 12 Johns. 234. See *Stilson v. Gibbs*, 53 Mich. 280.

³ *International, etc. R. Co., v. Telephone & T. Co.*, 69 Tex. 277, 5 Am. St. 45.

⁴ *Berg v. Baldwin*, 31 Minn. 541.

The plaintiff's right of recovery is predicated upon good faith in fixing the amount of his claim. *Binder v. Chicago & N. W. R. Co.*, 162 Iowa 550. So that where want of good faith is apparent, recovery will be defeated by way of making a check on extravagant, unwarranted and unreasonable claims for such damage. *Kansas City Southern R. Co. v. Anderson*, 104 Ark. 500 [aff'd 233 U. S. 325, 58 L. ed. 983].

One is not prevented from recovering treble damages under a statute providing such damages for destroying hedges, etc., by the fact that another statute provided a criminal penalty for the same offense. *Fezler v. Gibson*, 183 Mo App. 385.

Where a sheriff making an attachment of standing grain harvests, threshes and markets it, under authority from the owner given after the attachment, he cannot be held liable for treble damages though the attachment be wrongful. *Tuttle v. Bell*, 92 Kan. 725 [rehearing denied 93 Kan. 234].

⁵ *Potulni v. Saunders*, 37 Minn.

§ 1093. **Certainty of damages.** Trespass is a wrong committed with force, actual or constructive; it is more or less aggressive; therefore the damages necessary to complete compensation usually include reparation for pecuniary items capable of clear proof and precise computation, and may include reparation for other injuries equally deserving recompense though they cannot be proved with certainty nor estimated by any precise standard, and possibly by no money standard. The former must be proved in actions for trespass as in any other action and if, when they are compensated, the plaintiff has adequate redress for the wrong suffered they constitute the basis of his entire recovery and are the measure of damages; in other words, where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured such rule should be applied in actions of tort as well as in those upon contract.⁶ If such rule exists as to a part of the damages only it is available and obligatory to that extent. And if the wrong produce other injury also, not capable of such certain proof and pecuniary estimate, it is not necessarily excluded from the consideration of the jury. If the general facts can be proved they will be submitted to the jury for a finding of compensation according to their best judgment.⁷ But they must tend to establish a damage in legal contemplation; that is to say, a recoverable damage according to the elementary requisites which have been considered at large in another place; a damage which is the natural and proximate consequence of the trespass, and of a nature susceptible of appreciation upon practicable proof,—neither remote nor speculative.⁸ In this action, as in all others where no proof laying ground for exemplary damages is given compensation to the

517. See *Board v. Luigart*, 150 Ky. 791.

⁶ *Allison v. Chandler*, 11 Mich. 542; *Warren v. Cole*, 15 id. 265; *Gilbert v. Kennedy*, 22 id. 117.

All the law requires is that damages be such that they may be ascertained with reasonable certainty *Burr's Ferry, B. & C. Ry. Co. v.*

Allen, — Tex. Civ. App. —, 164 S. W. 878.

⁷ *Id.*: *Ogden v. Lucas*, 48 Ill. 492; *Dennison v. Hyde*, 6 Conn. 507. See *Canadian C. Co. v. Fagan*, 12 Brit. Col. 23.

⁸ A recovery of the profits which might have been made from the use of a boat between the time of its

plaintiff for his loss is the general rule.⁹ The maxim *de minimis non curat lex* does not apply where there has been a positive and wrongful invasion of another's property. The right to recover the value of property of which the owner has been wrongfully deprived is never denied.¹⁰

§ 1094. **Comprehensiveness of the remedy.** In trespass the possessor of a chattel may recover in respect of the taking and its circumstances; not only for any actual loss or injury suffered therefrom, but also some damages, not necessarily nominal,¹¹ even if no real injury ensued from the taking and the property is not removed nor the plaintiff's enjoyment materially interfered with. In this respect the action of trespass reaches an element of the wrong which would be waived in trover.¹² Where the taking was attended with injurious aggravations it was held that a plea which alleged an assignment in bankruptcy after the commencement of the suit by which the right to recover for the property taken passed to the assignee was not an answer to the whole action; the plaintiff still had a right to recover in respect of the taking.¹³ Where the taking diminishes the value by severing fixtures their value in place, rather than as chattels severed, may be recovered.¹⁴ Where a plank sidewalk was wrongfully removed the owner recovered not merely the value of the plank, but their value laid in the

loss and the date of the trial was denied though evidence was offered of its earnings for four months previous to its loss. *Gossage v. Philadelphia, etc. R. Co.*, 101 Md. 698. See *Parks v. Sullivan*, 46 Colo. 340, 25 L.R.A. (N.S.) 625.

⁹ *Hopple v. Higbee*, 23 N. J. L. 342.

¹⁰ *Wartman v. Swindell*, 54 N. J. L. 589, 18 L.R.A. 44.

¹¹ *Alabama State Land Co. v. Slaton*, 120 Ala. 259. See *Rowe v. Crutchfield*, — Tex. Civ. App. —, 168 S. W. 444, holding that actual damage of some sort must be shown

as a result of an attachment, and that it is not enough that the attachment was wrongful. And see § 1093.

¹² *Hite v. Long*, 6 Rand. 437, 18 Am. Dec. 719; *Bayliss v. Fisher*, 7 Bing. 153; *Doss v. Doss*, 14 Week. Rep. 590; *Chamberlain v. Shaw*, 18 Pick. 219.

¹³ *Brewer v. Dew*, 11 M. & W. 625. See *Gregory v. Cotterell*, 1 El. & B. 360.

¹⁴ *Moore v. Drinkwater*, 1 F. & F. 144; *Thompson v. Pettitt*, 10 Q. B. 101.

walk.¹⁵ In trover the plaintiff could recover only the value of fixtures as mere chattels.¹⁶

§ 1095. **Aggravations increase damages; injury to feelings; circumstances justifying punitive damages.** In this action the plaintiff is entitled to give evidence, for the purpose of enhancing damages, of the circumstances which accompanied and gave character to the wrong, and to show any inconvenience, discomfort, insult or injury attending it or resulting therefrom.¹⁷ Where the defendant, by artifice, obtained entrance into the plaintiff's dwelling-house and thence removed furniture, lately sold and delivered, because it had not been paid for the court said the pecuniary loss to the plaintiff is not necessarily the rule of damages. The jury are to determine the extent of the injury and the equivalent damages in view of all the circumstances of injury, insult, invasion of the privacy and interference with the plaintiff and his family.¹⁸ In New Hampshire nothing but compensatory damages can be awarded in a civil action based on a tort. Where trespass was brought for beating and injuring a horse, the act being accompanied with malicious insults, substantial damages were sustained though the animal was previously lame and of small value. The court said: "In some cases compensation for the actual material damage sustained will be full compensation. In other cases the material damage may be trivial and the principal injury be to the wounded feelings from the insult, degradation and other aggravating circumstances attending the act. * * * The award, as we construe it, compensates the plaintiff for the damage he has sustained by the injury to his property, and for his mental damage by reason of the defendant's malice."¹⁹ In that

¹⁵ Rogers v. Randall, 29 Mich. 41.

¹⁶ Clarke v. Halford, 2 C. & K. 540.

¹⁷ Bracegirdle v. Orford, 2 M. & S. 77; Sniveley v. Fahnstock, 18 Md. 391; Brown v. Bridges, 70 Tex. 661; Mitchell v. Mitchell, 54 Minn. 301; Vogel v. McAuliffe, 18 R. I. 791.

¹⁸ Ives v. Humphreys, 1 E. D.

Smith 196; People v. Schwartz, 151 Ill. App. 190.

The illness of the plaintiff and the defendant's knowledge of it may be shown. Mardis v. Sims, 140 Ala. 388.

¹⁹ Kimball v. Holmes, 60 N. H. 163.

state there may be a recovery for mental suffering caused by the malicious attachment of exempt inanimate property.²⁰

An emphatic declaration of the right to recover for mental suffering is given in a Minnesota decision, which has been approved in New York and elsewhere. The body of the plaintiff's deceased husband was unlawfully mutilated and dissected. It was ruled that the right to its possession for the purposes of preservation and burial, in the absence of any testamentary disposition of it, belonged to the wife and that the law will protect such right; for an infraction of it there may be a recovery for injury to the feelings directly and proximately resulting although no pecuniary loss was sustained.²¹ In an Illinois case household furniture valued at \$90 was wrongfully removed by a person who claimed authority to do so by virtue of a mortgage. In passing upon the case, a verdict for \$900 having been returned in favor of the plaintiff, the appellate court, while admitting that it would have been better satisfied if the verdict had been less, remarked: The actual loss to a man temporarily absent from his home, who returns and finds his home stripped of every vestige of household goods and his wife and little children cast out, without warrant of law, cannot be fairly said to consist in the mere market value of his goods taken away. It has been held that, in addition to the property of the plaintiff, he was entitled to compensation for any bodily or mental anguish or suffering, for injury to his pride and social position and for the sense of shame and humiliation at having his family turned out of their home.²²

The circumstances attending a trespass are thus allowed to be proved with a view to compensation for general as well as special damages; and also to show the evil motive, if such there be, with a view to exemplary damages. Where the trespass

²⁰ *Friel v. Plumer*, 69 N. H. 498, 76 Am. St. 189; *Ahearn v. Connell*, 72 N. H. 238.

²¹ *Larson v. Chase*, 47 Minn. 307, 28 Am. St. 370, 14 L.R.A. 85; *Medical College v. Rushing*, 1 Ga. App. 468; *Darcy v. Presbyterian Hospital*, 202 N. Y. 259; *Kyles v. South-*

ern R. Co., 147 N. C. 394, 16 L.R.A. (N.S.) 405; *Wall v. St. Louis & S. F. R. Co.*, 184 Mo. App. 127; *Wilson v. St. Louis & S. F. R. Co.*, 160 Mo. App. 649. See *Jackson v. Savage*, 109 App. Div. (N. Y.) 556.

²² *Richardson v. O'Brien*, 44 Ill. App. 243, citing *Moyer v. Gordon*,

is committed in a wanton, rude and aggravating manner, indicating malice or a desire to injure, "a jury," said Baldwin, J., in a charge afterwards approved by the federal court of last resort, "ought to be liberal in compensating the party injured for all he has lost in property, in expenses for the recovery of his rights, in feelings or in reputation; and even this may be extended by setting a public example to prevent a repetition of the act. In such cases there is no certain fixed standard, for the jury may not only take into view what is due to the party complaining, but to the public, inflicting what are called in law speculative, exemplary or vindictive damages."²³ The defendant, in the wrongful act of taking goods, used language which wounded the owner's feelings; it was allowed to be proved and considered as one of the circumstances accompanying and giving character to the trespass for the purpose of increasing the damages for the malice and insult.²⁴ Exemplary damages are not allowable in an action based on a trespass which, though unlawful, was not malicious; malice is not implied from the mere unlawfulness of the act.²⁵ But such damages may be imposed where a trespass is wantonly or recklessly committed, though there is no proof of actual malice toward the plaintiff,²⁶

113 Ind. 282, stated in the text of § 865. To the same effect is *Perkins v. Ogilvie*, 148 Ky. 309.

²³ *Pacific Ins. Co. v. Conard*, Baldw. 138; *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 8 L. ed. 392.

Johnson v. Camp, 51 Ill. 219, is to the effect that where a party takes away a crop, raised and harvested by another, stacked upon premises the taker had bought at a foreclosure sale he is a trespasser and is chargeable with knowledge that he did not acquire the crop by his purchase, and is liable to punitive damages. *Robinson v. Goings*, 63 Miss. 500.

²⁴ *Treat v. Barber*, 7 Conn. 279; *Bracegirdle v. Orford*, 2 M. & S. 77; *Edwards v. Beach*, 3 Day 44, 3 Am. Dec. 255; *Nichols v. Bronson*, 2 Day

211; *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79.

²⁵ *Brown v. Allen*, 35 Iowa 306; *Heidenheimer v. Sides*, 67 Tex. 32; *Mansur-T. I. Co. v. Smith*, 65 Ill. App. 319; *Wormald v. Hill*, 4 Ky. L. Rep. 723; *Burns v. Campbell*, *infra*.

Where a sheriff making an attachment of standing grain harvests, threshes and markets it with the consent of the owner given after the attachment, although the attachment is wrongful he will be liable only for the amount received for the grain less his reasonable expenses in preparing it for and getting it to market. *Tuttle v. Bell*, 92 Kan. 725 [rehearing denied 93 Kan. 234.]

²⁶ *Carlson S. Co. v. Schmidt*, 21

and where it is accompanied by circumstances of aggravation,²⁷ or very gross and reprehensible negligence.²⁸ But in no case can they be recovered on anything less than gross negligence in the strictest definition of the term—"such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness and indifferent or worse to the danger of injury to the persons or property of others."²⁹ A mere wrongful taking of property under circumstances showing a disregard of the rights of plaintiff does not warrant an award of exemplary damages.³⁰ But in Minnesota the making of a wilful levy upon exempt property, knowing it

Wyo. 498; *Chicago T. & T. Co. v. Core*, 223 Ill. 58; *Central C. & S. Co. v. Welborn*, 153 Mo. App. 647; *First Bank v. Steffens*, 51 Tex. Civ. App. 211; *Devaughn v. Heath*, 37 Ala. 595; *Kemmitt v. Adamson*, 44 Minn. 121; *Ten Hopen v. Walker*, 96 Mich. 236, 35 Am. St. 598; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496. See *Hemsteger v. Nelson*, 181 Ill. App. 377, where defendant having a contract to purchase a building, but not having taken possession, and desiring to lay a cement floor in a basement in which there was a locked room where plaintiff stored goods, broke the lock and removed the goods to a porch where they were damaged, without notifying plaintiff of such intention, it was held that the jury was warranted in assessing punitive damages, although there was no affirmative evidence of malice. *Wright v. Bentley Lumber Co.*, 186 Ala. 616, where it was held that the fact that plaintiff's husband went with defendant's servant and pointed out certain trees which were to be cut, and the lines, where defendant had a right to cut all "merchantable" trees, was admissible on the question of malice in cutting unmer-

chantable timber, although plaintiff was not bound by her husband's action nor could it give defendant a right to cut such trees.

"Where the trespass is wilfully or intentionally committed, the damages should be measured by the value of the substance severed or moved at the time and place of conversion, or the highest market price of such substance at any time between the severance and the conversion, deducting nothing on account of labor and expense." *American Sand & Gravel Co. v. Spencer*, 55 Ind. App. 523.

²⁷ *Bailey v. Walton*, 24 S. D. 118; *Parker v. Mize*, 27 Ala. 480, 62 Am. Dec. 776; *Frank v. Curtis*, 58 Mo. App. 349; *Milburn v. Beach*, 14 Mo. 104, 55 Am. Dec. 91; *Avakian v. Noble*, 121 Cal. 216.

²⁸ *Burns v. Campbell*, 71 Ala. 271; *Rhodes v. Roberts*, 1 Stew. 145.

²⁹ *Lienkauf v. Morris*, 66 Ala. 413.

³⁰ *Wilkinson v. Searcy*, 76 Ala. 176; *Sullivan v. Dee*, 8 Ill. App. 263; *Crymble v. Mulvaney*, 21 Colo. 203; *Willis v. Chowning*, 18 Tex. Civ. App. 625. But compare *Van Storch v. Winslow*, 13 R. I. 23, 43 Am. Rep. 10.

to be such, is an aggravating circumstance of the strongest character and justifies the conclusion that it was done for the purpose of annoying or harassing the debtor, and supports the imposition of exemplary damages.³¹ In Texas the consequences of the trespass may be shown as bearing upon the issue of exemplary damages, as that the plaintiff lost time in consequence of the seizure of his property.³² This makes the situation of the plaintiff, and not the conduct of the defendant, the touchstone as to the right to such damages; a proposition which admits of very grave question if it is open to question.

In Arkansas the rule is that such damages ought not to be given unless in case of intentional violation of another's right, or when a proper act is done with an excess of force or violence, or with malicious intent to injure another in his person or property.³³ If it is not proper to show that the plaintiff had a wife and children, nor to show their condition while away from home as to clothing, bedding, furniture, etc., unless the defendant knew, when he seized the property in question, which included such articles, had knowledge of the facts or notice charging him with it.³⁴ They cannot be recovered for the seizure and sale of a wife's goods under process against her husband, the officer believing them to be his, in the absence of malice or use of excess of force.³⁵ It has been ruled in Georgia that if the attorney of the plaintiff was present when a levy was made and did nothing to disapprove the act of the officer in making the levy such act will be considered as having been made by the direction of the attorney and with authority from his client. If the attorney knew or had reasonable grounds for believing that the property levied on did not belong to the defendant he is chargeable with notice of the owner's title, and that notice was imputable to the client. Hence, the latter would be liable to the owner of the property for the actual dam-

³¹ *Lynd v. Pickett*, 7 Minn. 128;

Gardner v. Minea, 47 Minn. 295;

Cronfeldt v. Arrol, 50 Minn. 327,

36 Am. St. 648; *Matteson v. Munro*,

80 Minn. 340.

³² *Watson v. Boswell*, 25 Tex. Civ. App. 379.

³³ *Kelly v. McDonald*, 39 Ark. 393.

³⁴ *Burns v. Campbell*, 71 Ala. 271.

³⁵ *Brown v. Allen*, 67 Ark. 386.

ages resulting from the levy and might, in the discretion of the jury, be subject to exemplary damages if either, in the act or the intention, the tort was attended with circumstances of aggravation.³⁶ It is said in Alabama that if an officer seizes exempt property knowing it to be such the fact is indicative of malice or a degree of recklessness equivalent thereto, and authorizes the imposition of such damages. But if he proceeds under a statutory bond of indemnity his discretion to execute the process is gone and if he executes it without improper conduct the mere possession of such knowledge does not have that effect.³⁷ While the makers of such a bond, given to induce an officer to levy on goods in the possession of one not a party to the process, may be liable for compensatory damages as co-trespassers,³⁸ their liability does not extend beyond that unless they authorized him to act wantonly, recklessly or maliciously, or such acts on his part were probably consequent on the making of the levy or were ratified by them.³⁹ In Illinois the subsequent ratification of a trespass does not subject the ratifying party to vindictive damages;⁴⁰ but this is not the rule in Texas or California.⁴¹ The acts relied upon as a ratification of the conduct of an agent must be done by the principal before suit was brought; hence the latter may not be made a party to a suit originally brought against the agent alone.⁴² Where the plaintiff does not complain of injury to his person or his feelings, where no malice is shown, where no right is involved beyond a mere question of property, where there is a clear standard for the measure of damages and no difficulty in applying it the measure is a question of law and is necessarily under the control of the court.⁴³ Such damages are the same in all

³⁶ *Jones v. Lamon*, 92 Ga. 529.
See *Ewton v. McCracken*, 9 Ala. App. 619, where it was held not error to instruct the jury that for any intentional lack of care in the custody of goods under attachment punitive damages might be awarded.

³⁷ *Alley v. Daniel*, 76 Ala. 403.

³⁸ *Screws v. Watson*, 48 Ala. 628;
Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129.

³⁹ *Lienkauf v. Morris*, 66 Ala. 406.

⁴⁰ *Grand v. Van Vleck*, 60 Ill. 487; *Pardridge v. Brady*, 7 Ill. App. 639; *Douglas v. Hoffman*, 72 id. 110.

⁴¹ *Brown v. Bridges*, 70 Tex. 661;
Avakian v. Noble, 121 Cal. 216.

⁴² *Barns v. Campbell*, 71 Ala. 271.

⁴³ *Berry v. Vreeland*, 21 N. J. L. 187.

actions; they do not depend on the form of the action and are not affected by it.⁴⁴ Where the trespass is not accompanied by any circumstances tending to aggravate the wrong and sufficient to justify exemplary damages the law applies in all cases the same uniform measure of relief for the property taken or injured.⁴⁵ It may be shown in mitigation of exemplary damages that the defendant in good faith used the property in the performance of an existing contract with the plaintiff, carefully cared for it and kept a correct account in the premises, and that a verbal agreement was made between them to continue a satisfied mortgage on the property.⁴⁶ In some states a trespasser who may be punished under the criminal law is not liable for exemplary damages.⁴⁷

§ 1096. **Damages for taking or destroying property; interest; value of use.** For the asportation or destruction of personal property, whereby the owner is wholly deprived of it, he is entitled to recover its value at the time of the trespass and interest thereon from that time.⁴⁸ This is the minimum measure for an entire loss of the property. For any injury to it there is a right to a proportional recovery,⁴⁹ or for the cost of

⁴⁴ *McInvoy v. Dyer*, 47 Pa. 118; *Parrott v. Housatonic R. Co.*, 47 Conn. 575.

⁴⁵ *Dorsey v. Manlove*, 14 Cal. 553; *Kelly v. McDonald*, 39 Ark. 387; *Black v. Robinson*, 61 Miss. 54; *Motley v. Southern F. & W. Co.*, 122 N. C. 347; *Brown v. Leath*, 17 Tex. Civ. App. 262; *Stephenson v. Wright*, 111 Ala. 579.

⁴⁶ *Interstate L. Co. v. Duke*, 183 Ala. 484.

⁴⁷ *Moyer v. Gordon*, 113 Ind. 282. See § 402.

⁴⁸ *Texas & P. Ry. Co. v. Crowder*, — Tex. Civ. App. —, 165 S. W. 116; *Union Stone Co. v. Wilmington Transfer Co.*, — Del. —, 90 Atl. 407; *Fisher v. Scherer*, — Tex. Civ. App. —, 169 S. W. 1133; *Neel v. Smith*, — Iowa —, 147 N. W. 183.

⁴⁹ *Slattery v. Rhud*, 23 N. D. 274;

Latham v. Cleveland, etc. R. Co., 164 Ill. App. 559; *Louisville & N. R. Co. v. Mertz*, 149 Ala. 561 (not the actual cost of repairs, but their reasonable cost); *McGuire v. Post Falls L. & Mfg. Co.*, 23 Idaho 608; *Sterling v. Marine Bank*, 120 Md. 396; *Clark v. Green*, 37 New Bruns. 525; *Board v. Luigart*, 150 Ky. 791; *Fail v. Presley*, 50 Ala. 342; *Burns v. Campbell*, 71 Ala. 271; *Southern H. & S. Co. v. Standard E. Co.*, 158 Ala. 596; *Koosa v. Warten*, 158 Ala. 496; *Parks v. Sullivan*, 46 Colo. 340, 25 L.R.A.(N.S.) 625; *Farmers' & T's Nat. Bank v. Allen*, 122 Ga. 67; *Telfair County v. Webb*, 119 Ga. 916; *Southern R. Co. v. Stearnes*, 8 Ga. App. 111; *Crossen v. Chicago & J. E. R. Co.*, 158 Ill. App. 42; *People v. Crowe*, 130 id. 349; *Chicago, etc. R. Co. v. Willard*, 111 id. 225;

repairing it, tested by the reasonable worth of the materials used and the time expended, rather than what was actually expended

Burleigh v. Hines, 124 Iowa 199; *Kentucky H. Co. v. Hood*, 133 Ky. 383, 134 Am. St. 457; *Gossage v. Philadelphia, etc. R. Co.*, 101 Md. 698; *Gilliam v. Globe T. Co.*, 152 Mo. App. 464; *Doty v. Quincy, etc. R. Co.*, 136 Mo. App. 254; *Smith v. Chicago & A. R. Co.*, 127 Mo. App. 160; *Klein v. St. Louis T. Co.*, 117 Mo. App. 691; *Hespen v. Union Pac. R. Co.*, 82 Neb. 495; *Ives v. Freisinger*, 70 N. J. L. 257; *Hammond v. Sullivan*, 112 App. Div. (N. Y.) 788; *Barber v. Dewes*, 101 App. Div. (N. Y.) 432; *Sullivan v. Anderson*, 81 S. C. 478; *Kopplin v. Quade*, 145 Wis. 454; *Steffens v. Fisher*, 161 Mo. App. 386; *Pannell v. Allen*, 160 Mo. App. 714; *Loomis v. Besse*, 148 Wis. 647; *State v. Smith*, 31 Mo. 566; *Morris v. Williford* (Tex. Civ. App.) 70 S. W. 228; *Tootle v. Kent*, 12 Okla. 674, 17 Am. Neg. Rep. 276; *Walker v. Borland*, 21 Mo. 289; *Gray v. Stevens*, 28 Vt. 1, 65 Am. Dec. 216; *Clapp v. Thomas*, 7 Allen 188; *Coolidge v. Choate*, 11 Mete. (Mass.) 79; *Garretson v. Brown*, 26 N. J. L. 425; *Campbell v. Woodworth*, 26 Barb. 648; *Dorsey v. Manlove*, 14 Cal. 553; *Gilson v. Wood*, 20 Ill. 37; *Josey v. Wilmington, etc. R. Co.*, 11 Rich. 399; *Thomas v. Isett*, 1 G. Greene, 470; *Scott v. Bryson*, 74 Ill. 420; *Brannim v. Johnson*, 19 Me. 361; *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 8 L. ed. 392; *Pacific Ins. Co. v. Conard*, Baldw. 138; *Kennedy v. Whitwell*, 4 Pick. 466; *Lillard v. Whittaker*, 3 Bibb 92; *Watts v. Potter*, 2 Mason 77; *Dillenback v. Jerome*, 7 Cow. 294; *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762; *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507; *Briscoe v. McElween*, 43 Miss. 556;

Lienkauf v. Morris, 66 Ala. 406; *Stix v. Keith*, 85 id. 465; *Kelly v. McDonald*, 39 Ark. 387; *Parrott v. Housatonic R. Co.*, 47 Conn. 575; *Black v. Robinson*, 61 Miss. 54; *Block v. Sweeney*, 63 Tex. 419; *St. L., I. M. & S. R. v. Biggs*, 50 Ark. 169; *Smith v. Zent*, 83 Ind. 86, 43 Am. Rep. 61; *Georgia Pac. R. Co. v. Fullerton*, 79 Ala. 298; *Harrison v. Missouri Pac. R. Co.*, 88 Mo. 625; *Keith v. Haggart*, 4 Dak. 438; *Atchison, etc. R. Co. v. Huitt*, 1 Kan. App. 788; *Louisville & N. R. Co. v. Schweitzer*, 11 Ky. L. Rep. 310; *Ludlow v. Steffen*, 19 Ky. L. Rep. 1671; *Murray v. Mace*, 41 Neb. 60; *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154; *Jacksonville, etc. R. Co. v. Peninsular L., T. & M. Co.*, 27 Fla. 1, 119, 17 L.R.A. 33, 65; *C., C. & St. L. R. Co. v. McKelvey*, 12 Ohio C. C. 426; *Chicago, etc. R. Co. v. Gitchell*, 95 Ill. App. 1; *Burchinell v. Butters*, 7 Colo. App. 294; *Hoffman v. Metropolitan St. R. Co.*, 51 Mo. App. 273; *La Page v. Hill*, 87 Me. 158; *Fish v. Nethercutt*, 14 Wash. 582, 53 Am. St. 892.

In *Macias v. Sheriff*, 43 La. Ann. 289, it not appearing that there was wantonness or malice on the part of the defendant in executing a writ of attachment, the goods were appraised at \$1,200, afterwards at \$1,100, and sold at auction for \$850. The court accepted the last sum as the value of the property, and made that, with interest, govern the recovery. *Texas & P. R. Co. v. Payne*, 15 Tex. Civ. App. 58, is to the contrary and in harmony with the weight of authority.

A change in the disposition of a horse is actual damage. *Montgom-*

for that purpose.⁵⁰ The value of destroyed property must be fixed as of the time and at the place where it was when destroyed.⁵¹ But if injured property has any value after the injury the measure of damages is the difference between such value and its value before the injury.⁵² Interest is not always mentioned in the cases as part of the rule, and is, perhaps, not always intended. In England, and to some extent in this country, the allowance of it is left to the discretion of the jury; and they have been allowed to decide whether the value should be fixed at the date of the taking or conversion or at some later date before or at the time of the trial.⁵³ The discretion of the jury

ery St. R. Co. v. Hastings, 138 Ala. 432.

Where chattels became worthless in consequence of the owner's voluntarily, but innocently, permitting their use by a person afflicted with smallpox and they were destroyed, their value was fixed as of the time of their destruction. Knightstown v. Homer, 36 Ind. App. 139.

⁵⁰ Galveston, etc. R. Co. v. Levy, 45 Tex. Civ. App. 373.

⁵¹ Hart v. Atlantic C. L. R. Co., 144 N. C. 91.

Where shocked grain standing in a field is destroyed by trespassing animals, the measure of damages is the value of the grain as it stands in the field. Kelley v. St. Louis, I. M. & S. R. Co., 180 Mo. App. 637.

⁵² Chicago, R. I. & G. Ry. Co. v. Bell, — Tex. Civ. App. —, 168 S. W. 396; Thompson v. Field, — Tex. Civ. App. —, 164 S. W. 1115; Union Stone Co. v. Wilmington Transfer Co., — Del. —, 90 Atl. 407; Robinson v. Great Northern R. Co., 123 Minn. 495; Ballanger v. Shumate, 10 Ala. App. 329; Gibson v. Inman Packet Co., 111 Ark. 521.

Where there is a valid contractual limit of liability, recovery cannot be had in excess of such limit. Galveston, etc. R. Co. v. Sparks, —

Tex. Civ. App. —, 162 S. D. 943; Wilson v. Illinois, etc. R. Co., 130 Tenn. 92. But where plaintiff recovered the full amount of the difference in value of the animals before and after the injury, the verdict was allowed to stand although the contract limited such recovery to an amount less than the verdict, because it appeared that the provision in the contract as to such limit had not been called to the attention of the court during the trial. Robinson v. Great Northern R. Co., 123 Minn. 495.

Where a contract for the shipment of cattle provided for delivery at "St. Louis, Mo.," where there was no market for cattle, the court took judicial notice that the shipment of beef cattle was to the stockyards at East St. Louis, where there was such a market, and held that market value at such stockyards was the test. St. Louis & S. F. R. Co. v. Rich, — Tex. Civ. App. —, 162 S. W. 1194.

⁵³ Atwood v. Boston & F. & T. Co., 185 Mass. 557; Reece v. Rodgers, 40 Pa. Super. Ct. 171 (the jury should be instructed that they may add not to exceed legal interest or a less amount); Woodland v. Union Pac. R. Co., 27 Utah 543

as to interest may not be exercised if punitive damages have been awarded.⁵⁴ In a New Hampshire case, brought for negligently poisoning a horse, the court said that the market value of goods which have been destroyed is not the measure of the injured party's damages, but only evidence to be considered on that question, for a party may be greatly injured by the loss of goods which he cannot sell. The plaintiff was entitled to recover the money paid for the care of the horse when it was of no use to him, and, it being without market value, such sum as would replace it by another as serviceable.⁵⁵ The Rhode Island court also holds the view that the market value of personalty is not necessarily the measure of damages.⁵⁶ There cannot be a recovery, in addition to the value of the thing destroyed, of the value of its use during such time as might be necessary to

(from time suit was begun); *Chapman v. Chicago & N. R. Co.*, 26 Wis. 295 (from commencement of action); *Dean v. Same*, 43 Wis. 305 (interest was allowed from the time of the injury; but for lack of an exception the propriety of it was not determined).

Interest is not allowable where the value of the goods cannot be ascertained definitely from market value or otherwise, and rests on an estimate by the jury, so that as the allowance of interest is discretionary with the jury, it was held error to add interest to a verdict which did not allow it. *Davison v. Guardian Storage & Transfer Co. (Misc.)*, 144 N. Y. Supp. 601.

Greening v. Wilkinson, 1 C. & P. 625; *Reiss v. New York S. Co.*, 12 N. Y. Supp. 557; *Mairs v. Manhattan R. E. Ass'n*, 89 N. Y. 498; *Eddy v. Lafayette*, 1 C. C. A. 441, 49 Fed. 807.

Toledo, etc. R. Co. v. Johnston, 74 Ill. 83, was for killing animals on a railroad. The court instructed the jury to add interest to the sum they should find as the value of the

property from the date of the killing. This was held error, and the jury having found interest, the judgment was reversed. The court say, in such cases the damages must be compensatory only, unless circumstances of aggravation are shown.

If property held for sale is wrongfully seized under an attachment its owner is not entitled to interest on its value unless he shows some loss other than merely being deprived of its possession. *Fullerton L. Co. v. Spencer*, 81 Iowa 549.

⁵⁴ *Schulte v. Louisville & N. R. Co.*, 128 Ky. 627.

⁵⁵ *Seavey v. Dennett*, 69 N. H. 479.

⁵⁶ *Shibley v. Gendron*, 25 R. I. 519. See *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154; *Burke v. Louisville & N. R. Co.*, 7 Heisk. 456, 19 Am. Rep. 618; *Wylie v. Smitherman*, 7 Ired. 236; *Jacksonville, etc. R. Co. v. Peninsular L. T. & M. Co.*, 27 Fla. 1, 135, 17 L.R.A. 33, 65; *C., C. & St. L. R. Co. v. McKelvey*, 12 Ohio C. C. 422.

replace it,⁵⁷ though the usable value of damaged property may be shown.⁵⁸ There cannot be a recovery for the loss of use of property if interest is allowed; and the loss of the use must be specially pleaded.⁵⁹ If property is returned after being detained the damages are measured by its market value at the time and place of seizure, less such value when it was returned. "This value at time of seizure was not determinable alone by the price paid by plaintiff for the goods. That was merely one element of proof of value. The real value was what the goods were reasonably worth in the market at the time and in the condition that they were. If the plaintiff had obtained them for less than their market value he was entitled to the advantage of his purchase. But their value to him could not be ascertained by evidence of what, in the opinion of witnesses, he might have sold the goods for at auction if the contemplated sales had not been interrupted."⁶⁰ It is not essential to the right to recover the value of the goods that they be removed from the premises of the plaintiff if the selling officer exercised undisclaimed authority over them.⁶¹ Interest may be recovered on money and securities withheld under a wrongful attachment, and likewise the expense necessarily incurred in obtaining possession of them.⁶² There may be added to the cost of repairing damaged property the difference in its market value after the repairs were made and such value prior to the trespass.⁶³ Where property is so injured that it cannot be repaired and its restoration is necessary the cost thereof may be recovered though the new article may be more valuable than the old one, allowance being

⁵⁷ *Ft. Pitt G. Co. v. Evansville C. Co.*, 123 Fed. 63; *Reis v. Long Island R. Co.*, 88 App. Div. (N. Y.) 611; *Page v. Sumpter*, 53 Wis. 652; *Fail v. Presley*, 50 Ala. 342.

The rental value of a damaged article may not be recovered during the time it was being repaired in the absence of evidence of the use of another or of need of it for use. *Murphy v. New York City R. Co.*, 58 N. Y. Misc. 237. See dissenting opinion and cases cited.

⁵⁸ *Buchanan v. Cranford Co.*, 112 App. Div. (N. Y.) 278.

⁵⁹ *Schulte v. Louisville & N. R. Co.*, 128 Ky. 627.

⁶⁰ *Palmer v. Augenstein*, 18 App. Cas. (D. C.) 511.

⁶¹ *Mansfield v. Bell*, 24 Pa. Super. Ct. 447.

⁶² *Dody v. State Bank*, 82 Kan. 406.

⁶³ *Cooper v. Knight* (Tex. Civ. App.), 147 S. W. 349.

made for the value of such materials in the latter as possessed value.⁶⁴ The probable profits which might have been made from the use of damaged property may be shown, not as the measure of damages, but to aid in the estimate of them.⁶⁵

§ 1097. **Same subject; quantity of interest.** The value a party is entitled to recover depends on the quantity of the interest he possesses or represents in the property which was the subject of the trespass. The plaintiff must have the actual possession, or a present right of possession when the trespass was committed in order to maintain this action.⁶⁶ The person in whom the general property is vested may maintain an action against a stranger, although he has never had the possession in fact, because the general property draws after it the right of possession.⁶⁷ One having the actual possession, as by finding,⁶⁸ or for a temporary purpose, as bailee or mortgagee,⁶⁹ or any

⁶⁴ Paxson Co. v. Board of Chosen Freeholders, 201 Fed. 656.

⁶⁵ Wood T. Co. v. Shelton, 180 Ind. 273.

⁶⁶ Waggoner v. Snody, 98 Tex. 512; Scott v. Bryson, 74 Ill. 420; Neely v. McCormick, 25 Pa. 255; Wilson v. Martin, 40 N. H. 88; Hume v. Tufts, 6 Blackf. 136; Weitzel v. Marr, 46 Pa. 463; Muggridge v. Eveleth, 9 Metc. (Mass.) 233; Codman v. Freeman, 3 Cush. 306; Brown v. Thomas, 26 Miss. 335; Howe v. Farrar, 44 Me. 233; Aiken v. Buck, 1 Wend. 466, 19 Am. Dec. 535; Luce v. Hoisington, 54 Vt. 428; Wylie v. Ohio River & C. R., 48 S. C. 405, 1 Am. Neg. Rep. 686.

A wife must sue alone for the seizure of goods belonging to the *corpus* of her separate statutory estate. Burns v. Campbell, 71 Ala. 271.

⁶⁷ Ullman v. Barnard, 7 Gray 558; Beaty v. Gibbons, 16 East 116; Bro. Abb. Trespass, pl. 303, 346; 1 Add. on Torts, ¶ 524.

In an action by a member of the Creek nation to recover for hay cut Suth. Dam. Vol. IV.—33.

by him on Creek lands it will be presumed, nothing being shown to the contrary, to have been lawfully harvested. Eddy v. Lafayette, 49 Fed. 807, 1 C. C. A. 441.

⁶⁸ Amory v. Delamirie, 1 Str. 504.

⁶⁹ Carter v. Fulgham, 134 Ala. 238; Browning v. Skillman, 24 N. J. L. 351; Swire v. Leach, 18 C. B. (N.S.) 479; Heydon and Smith's Case, 13 Coke 69; Burton v. Hughes, 9 Moore, 339; Sutton v. Buck, 2 Taunt. 307; Lyle v. Barker, 5 Bin. 457; White v. Webb, 15 Conn. 302; Harker v. Dement, 9 Gill 7; Faulkner v. Brown, 13 Wend. 63; Outcalt v. Durling, 25 N. J. L. 443; Ullman v. Barnard, 7 Gray 554; Burke v. Savage, 13 Allen 408; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Jones v. McNeil, 2 Bailey 466; Alt v. Weidenburg, 6 Bosw. 176; Warren v. Kelley, 80 Me. 515; Densmore v. Mathews, 58 Mich. 616; St. L., I. M. & S. R. v. Biggs, 50 Ark. 169; Laing v. Nelson, 41 Minn. 522; Dubois v. Spinks, 114 Cal. 289; Gillette v. Goodspeed, 69 Conn. 363, 3 Am.

other special property with possession,⁷⁰ may not only bring this action against a stranger who has taken possession without color of right but may recover the full value of the property. And though the plaintiff's possession be tortious as to the true owner he may recover against a stranger who divests him of it.⁷¹ Such persons, being bound to restore the property to the general owner or to stand responsible to him for its full value have the right to recover by that measure from the stranger who has wrongfully deprived them of it.⁷² The amount which may be

Neg. Rep. 343; *Jones v. Kellogg*, 51 Kan. 263, 37 Am. St. 278; *Howell v. Caryl*, 50 Mo. App. 440; *Pittsburg, etc. R. Co. v. Chicago*, 242 Ill. 178, 134 Am. St. 316; *Bowen v. New York Cent., etc. R. Co.*, 202 Mass. 263; *American S. & M. Co. v. St. Louis T. Co.*, 120 Mo. App. 410; *Waggoner v. Snody*, 98 Tex. 512, 36 Tex. Civ. App. 514; *The Winkfield*, [1902] Prob. 42, disapproving *Claridge v. S. S. Tramway Co.*, [1892] 1 Q. B. 422. In the latter case a divisional court ruled that the bailee of a horse injured while in his possession through the negligence of the defendant, but under circumstances which relieved the former from legal responsibility to the owner, could recover only nominal damages. This view is approved in 2 Beven on Negligence (2d ed.), 887; Clerk & Linsell on Torts (2d ed.), 237. See *Terry v. Williams*, 148 Ala. 468.

⁷⁰ *Wilkes v. Southern R.*, 85 S. C. 346 (mortgagor after condition broken with consent of mortgagee or without it after his refusal to consent); *Cleveland, etc. R. Co. v. Born*, 49 Ind. App. 62; *Luse v. Jones*, 39 N. J. L. 707; *Northern Pac. R. Co. v. Lewis*, 2 C. C. A. 446, 51 Fed. 658; *Anthony v. New York, etc. R. Co.*, 162 Mass. 60.

One who is under contract to

maintain a county bridge may recover of another who destroyed it the outlay incurred in restoring it. *Cue v. Breeland*, 78 Miss. 864.

⁷¹ *Northern Pac. R. Co. v. Lewis, supra*; *Scott v. Bryson*, 74 Ill. 420; *McClure v. Hill*, 36 Ark. 268; *Hoyt v. Gelston*, 13 Johns. 141; *Hendricks v. Decker*, 35 Barb. 298; *Brown v. Ware*, 25 Me. 411; *Potter v. Washburn*, 13 Vt. 558, 37 Am. Dec. 615; *Carson v. Prater*, 6 Cold. 565; *Criner v. Pike*, 2 Head 398; *Fletcher v. Cole*, 26 Vt. 170.

As to the distinction between the possession necessary to maintain an action of trespass *de bonis asportatis* and an action of trespass on the case, see *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366, 40 L. ed. 1002.

⁷² *Temple v. Duran* (Tex. Civ. App.), 121 S. W. 253, citing the text; *Harker v. Dement*, 9 Gill 7; *Story on Bailm.*, § 280; *Warren v. Kelley*, 80 Me. 512; *Densmore v. Mathews*, 58 Mich. 616; *Hamilton v. Lau*, 24 Neb. 59.

If a chattel, while in the possession of a bailee for hire is injured by the negligence of a third person and repaired by the bailor, and the cost of the repair is charged to the bailee at his request the latter, although he has not paid such cost, may maintain an action against the wrongdoer. *Brewster v. Warner*,

recovered by a *bona fide* purchaser, who has paid only a part of the purchase-money before notice of the fraudulent intent of his immediate vendor came to him, where the trespass is committed by an officer who has levied on behalf of creditors is entirely dependent upon the extent of the plaintiff's liability to the vendor.⁷³ It has recently been held in the English court of appeal that a bailee in legal, as contradistinguished from actual, possession may in an action against a stranger for the loss of goods through his negligence recover their value though there would be no liability to the bailor for their loss.⁷⁴ If a mortgagor has surrendered his interest in the property to the mortgagee for no other consideration than the original mortgage the amount due thereon will limit the latter's recovery if the property destroyed was worth it.⁷⁵ If the first mortgagee waives his priority and lets the holder of a second mortgage in on the same footing they become tenants in common of the mortgaged property and can sue jointly for an interference therewith.⁷⁶ The satisfaction of a prior mortgage warrants a recovery by a second mortgagee of an amount equal at least to the extent that the trespass has diminished his security.⁷⁷

The general owner of property in the hands of a bailee at the time of the taking may also maintain trespass if he has a present right to resume possession by the terms of the bailment or in consequence of the wrongful act of the bailee or the defendant.⁷⁸ In either case only one recovery can be had; whether the action is brought by the special or general owner

136 Mass. 57, 49 Am. Rep. 5, 1 Am. Neg. Cas. 144.

A trespasser who does not connect himself with the title to the property cannot question the presumption of ownership which follows possession. *Syson T. Co. v. Dickens*, 146 Ala. 471.

⁷³ *Bridgman v. Robinson*, 7 Ont. L. R. 591; *Riddell v. Munro*, 49 Minn. 532.

⁷⁴ *The Winkfield*, [1902] Prob. 42, overruling *Claridge v. South Staffordshire T. Co.*, [1892] 1 Q. B. 422.

⁷⁵ *Warren v. Kelley*, *supra*.

⁷⁶ *Densmore v. Mathews*, 58 Mich. 616.

⁷⁷ *Taylor v. Hines*, 31 Mo. App. 622.

⁷⁸ 1 Add. on Torts, ¶ 524; *Scott v. Newington*, 1 M. & Rob. 252; *Oehman v. Portmann*, 153 Mo. App. 240; *Palmer v. United States*, 41 App. Cas. (D. C.) 341, a case where the plaintiff had lawful possession of chattels subject to demand of the owner. The court limited recovery in an action for wrongful attach-

the recovery of full value by him ousts the other of his right of action; otherwise the trespasser would be liable to make a second satisfaction for the injury.⁷⁹ One tenant in common is not under such ulterior responsibility to his co-tenant as special owners are to the general owner, and therefore his recovery will be limited to his interest.⁸⁰ The nonjoinder of joint owners need not be pleaded in order to limit the recovery by one of them to the extent of his interest, he not being entitled to the possession of the property as bailee.⁸¹ Where the action is between the general and special owner directly, or between others claiming under or in privity with them; between a plaintiff having a qualified interest and a defendant who owns the residue or has an interest in or a charge upon it the damages will be limited by the value of the plaintiff's interest.⁸² One who

ment to injuries to possession merely, on the ground that the policy of the law was to protect actual and not fictitious rights, and that a different rule would leave the officer liable in another action for the value of the property by the owner, thus allowing a double recovery.

⁷⁹ *Parker-W. Co. v. St. Louis T. Co.*, 165 Mo. App. 302; *Luse v. Jones*, 39 N. J. L. 707.

⁸⁰ *Sedgworth v. Overend*, 7 T. R. 279; *Harker v. Dement*, 9 Gill 7. See *Vivian v. Challenger*, 45 Pa. Super. Ct. 1.

⁸¹ *Waggoner v. Snody*, 98 Tex. 512.

⁸² *Burton v. Dangerfield*, 141 Ala. 285; *Lake Erie & W. R. Co. v. Hobbs*, 40 Ind. App. 511; *Haight v. Turner*, 44 Tex. Civ. App. 595; *Street v. Sinclair*, 71 Ala. 110; *Brierly v. Kendall*, 17 Q. B. 937; *Huntley v. Bacon*, 15 Conn. 267; *Chamberlain v. Shaw*, 18 Pick. 279, 29 Am. Dec. 586; *Schindel v. Schindel*, 12 Md. 108; *Goulet v. Asseler*, 22 N. Y. 225; *Parish v. Wheeler*, id. 494; *Davidson v. Gunsolly*, 1 Mich. 388; *Treadwell v.*

Davis, 34 Cal. 601, 94 Am. Dec. 770; *Spicer v. Waters*, 65 Barb. 227; *Ward v. Henry*, 15 Wis. 239; *Cramer v. Marsh*, 5 Colo. App. 302; *Allen v. Davis*, 53 Mo. App. 15.

In *Noble v. Kelly*, 40 N. Y. 415, a sheriff with three executions of different dates in his hands against one K., levied on and seized at one time, and by a single act, certain gold coin of the value of \$1,000, the property of N. N. brought suit against him, in the nature of trespass, naming him as sheriff, and alleging the wrongful seizure to have been by him claiming to act as sheriff, "and under color of several pretended executions." The sheriff justified under the executions against K., setting them forth particularly. Before the trial N. executed to the sheriff a release, under seal, reciting a consideration of \$10, releasing him as sheriff from all manner of action and actions, causes of action, suits, sums of money, trespasses, damages, claims and demands, whatsoever, he ever had, then had, or might have, "by reason, on account, or in conse-

purchased from a third party property subject to the plaintiff's lien and removed it from the state, thereby destroying the power to effectuate the lien, was liable in an action on the case to the extent to which the lien might have been satisfied out of the property but for the wrongful act. If the property so removed was subject to a mortgage in favor of the defendant, which mortgage was prior to the plaintiff's lien, the recovery should be limited to the extent the property exceeded in value the amount due on the mortgage. But if the plaintiff makes a *prima facie* case for the recovery of the full value of the property the *onus* is on the defendant to show how much of that value was not diverted from the satisfaction of the mortgage lien, but was properly applied to it.⁸³

§ 1098. **Same subject; market value.** If the property of which the owner is deprived is a marketable commodity its market price is the value he is entitled to recover;⁸⁴ and this

quence of any, or all and every, of his acts and proceedings under and by virtue, or in consequence, of the issuance and delivery to him of an execution," describing one of the executions in the sheriff's hands at the time of the levy. This release being pleaded by supplemental answer as a bar to the action, and a release of the whole cause of action, the court held it was neither; that it operated only as a release of the damages sustained by the plaintiff to the amount of the execution specified; and that the plaintiff was nevertheless entitled to recover as damages the value of the coin seized, after deducting the amount so covered by the release.

If an officer seizes mortgaged property without complying with a statute which requires him to pay or tender the mortgagee the amount of his debt and the interest thereon, he is liable for the total amount of those items. *Wood v. Franks*, 56 Cal. 217.

⁸³ *Hamilton v. Phillips*, 120 Ala. 177, 74 Am. St. 29.

⁸⁴ *Slaughter v. American Baptist P. Soc.* (Tex. Civ. App.), 150 S. W. 224; *Galveston, H. & S. A. Ry. Co. v. Sparks*, — Tex. Civ. App. —, 162 S. W. 943; *St. Louis & S. F. R. Co. v. Rich*, — Tex. Civ. App. —, 162 S. W. 1194; *Peabody v. Lynch*, 184 Ill. App. 78; *Hunt v. Chicago, B. & Q. R. Co.*, 95 Neb. 746; *International & G. N. Ry. Co. v. Parke*, — Tex. Civ. App. —, 169 S. W. 397; *Ft. Worth & D. C. Ry. Co. v. Shank*, — Tex. Civ. App. —, 167 S. W. 1093; *Wilson & Co. v. Illinois Cent. R. Co.*, 130 Tenn. 92; *Davison v. Guardian Storage & Transfer Co.*, 114 N. Y. Supp. 601; *Tuttle v. Bell*, 92 Kan. 725 [adhered to on rehearing, 93 Kan. 234]; *Burr's Ferry, V. & C. Ry. Co. v. Allen*, — Tex. Civ. App. —, 164 S. W. 878; *Thompson v. Field*, — Tex. Civ. App. —, 164 S. W. 1115; *Seigliano v. Palmer*, 217 Mass. 555; *Chicago, R. I. & G. Ry. Co. v. Clark*, — Tex.

will govern though it would have been worth more to the plaintiff by reason of a particular contract he had entered into,⁸⁵ or for a purpose for which he had bought it.⁸⁶ One who has destroyed property cannot be exempted from the payment of its value by showing that the plaintiff would subsequently have lost it in some other way.⁸⁷ The retail price of property held for sale is not the standard by which its value is to be determined. Where a quantity of merchandise is sued for, the retail price would be unjust, for the merchant in fixing that price takes into consideration not only the first cost of the goods, but store rent, clerk hire, insurance, and probable amount of bad debts, and adds to all these a percentage of profit.⁸⁸ This must be understood of a considerable quantity, not of a single article. The owner must be entitled to recover at such rate as he would have to pay in the nearest market where a like quantity could be bought to replace the property taken;⁸⁹ added to this, no doubt, should be the expense necessarily incurred in

Civ. App. —, 166 S. W. 129; *St. Louis & S. F. R. Co. v. Smith*, 41 Okla. 163; *Marcus v. Stein* (Mise.), 84 N. Y. Supp. 970; *Missouri, etc. R. Co. v. Crews*, 54 Tex. Civ. App. 548; *Allen v. Chicago & N. R. Co.*, 145 Wis. 263; *Coolidge v. Choate*, 11 Mete. (Mass.) 79; *Gardner v. Field*, 1 Gray 151; *Brown v. Allen*, 35 Iowa 306; *Suydam v. Jenkins*, 3 Sandf. 620; *State v. Smith*, 31 Mo. 566; *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154, citing the text. See § 1096.

The value of secondhand furniture to the owner may not be recovered if there is a regular local market price for it. *Worrall v. Des Moines R. G.'s Ass'n*, 157 Iowa 385.

⁸⁵ *Brown v. Allen*, *Gardner v. Field*, *supra*. But see *France v. Gaudet*, L. R. 6 Q. B. 199.

⁸⁶ *Palmer v. Augenstein*, 18 App. Cas. (D. C.) 511.

There are cases which recognize that the value of the property to its

owner, though it might be sold in the market, measures his recovery, as where an animal is peculiarly adapted to the work his owner puts him to, or does work which is of as much value as could be done by a more valuable one. *Farrel v. Colwell*, 30 N. J. L. 123; *Seavey v. Dennett*, 69 N. H. 479.

⁸⁷ *Hubbard v. New York, etc. R. Co.*, 70 Conn. 563, 4 Am. Neg. Rep. 278; *Bear v. Harris*, 118 N. C. 476.

⁸⁸ *State v. Smith*, 31 Mo. 566; *Butler v. Collins*, 12 Cal. 457; *Nightingale v. Seannell*, 18 Cal. 315; *Heidenheimer v. Schlett*, 63 Tex. 394; *Texas & P. R. Co. v. Payne*, 15 Tex. Civ. App. 58, quoting the text.

⁸⁹ *Cassin v. Marshall*, 18 Cal. 689; *Waters v. Langdon*, 16 Vt. 570; *Starkey v. Kelley*, 50 N. Y. 677; *Baker v. Drake*, 66 N. Y. 524; *Gruman v. Smith*, 81 N. Y. 25; *Chicago, etc. R. Co. v. Gitchell*, 95 Ill. App. 1, citing the text.

getting the property so purchased to the place where the trespass was committed.~ This would make the damages depend upon the value of the property taken at the place where the wrong was done.⁹⁰ The rule is thus expressed in some cases, with the addition that the estimate is to be made as of the time the right of action accrued,⁹¹ and compensation for the time required to obtain other property to replace that destroyed.⁹² In a case in which hay was burned at a place where there was no market value for it and the plaintiff had no immediate, but only a contingent prospective, use for it his recovery was limited to the market value at the nearest place at which there was a market for it, less the cost of putting it on the market.⁹³ The injury done by taking property may be enhanced by depriving the owner of the opportunity or ability to make profits; an established business may thus be destroyed. If he is able to show gains thus prevented with the requisite certainty he is entitled to compensation for them.⁹⁴ Under a general allegation

⁹⁰ *Sears v. Lydon*, 5 Idaho 358, quoting the text; *Texas & P. R. Co. v. Payne*, *supra*.

⁹¹ *Heidenheimer v. Schlett*, 63 Tex. 394; *Block v. Sweeney*, *id.* 419; *Baker v. Drake*, *Gruman v. Smith*, *supra*.

Subsequent changes in the price of property injured do not affect the amount of the recovery. *Lacy v. Winn*, 4 Pa. Dist. 409.

⁹² *Fernwood Masonic Hall Ass'n v. Jones*, 102 Pa. 307.

⁹³ *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154.

Much the same rule is applied in *Gunstone v. Chicago, M. & P. S. R. Co.*, 79 Wash. 629, 52 L.R.A. (N.S.) 392, where in a grant of a right of way to a railroad the plaintiff reserved the timber thereon, which he cut and piled on or near the right of way, and which defendant removed and sold to clear its right of way and remove a menace to safe operation. The trespass was held

not wilful, and the measure of damages to be the value of the logs as they lay on the ground, less the expense of marketing them.

Where cotton damaged in transportation had no market value in its damaged condition at the place of delivery, it was held competent to show the market value at the nearest convenient point where there was a market for such cotton. *Gibson v. Inman Packet Co.*, 111 Ark. 521.

⁹⁴ *Fernwood Masonic Hall Ass'n v. Jones*, *supra*; *Atlanta v. Dooley*, 74 Ga. 702; *Halecomb v. Stubblefield*, 76 Tex. 310; *Albert v. Bleecker St., etc. R. Co.*, 2 Daly 389; *Thomas v. Isett*, 1 G. Greene, 470; *Freidenheit v. Edmundson*, 36 Mo. 226; *Allred v. Bray*, 41 Mo. 484, 97 Am. Dec. 283; *Milburn v. Beach*, 14 Mo. 104, 55 Am. Dec. 91; *Luse v. Jones*, 39 N. J. L. 707; *Strasberger v. Barber*, 38 Md. 103; *Davenport v. Ledger*, 80 Ill. 574; *Oviatt v. Pond*, 29

of damages evidence is admissible to show the value of the property destroyed for the special purpose for which it was used, and the market value in the locality of property fitted for such purpose is the measure of the plaintiff's damages.⁹⁵ The actual or market value of the property measures the liability of the defendant unless he has notice of its special value to the plaintiff.⁹⁶ By this is meant the value of the particular property; if it has a special value because of its qualities the fact is relevant; the value of a mare as a breeder may be shown by the number and qualities of her foals.⁹⁷ If the right to take natural gas exists as a common right and there is no property in it until it is taken, the only restriction being that it must be taken for a lawful purpose and in a reasonable manner, the taking of it otherwise is attended with liability for the difference in money, at the point of taking, between the value of the natural flow and that of the diminished flow attributable to the act of the defendant.⁹⁸

§ 1099. **Same subject; non-marketable property.** Where the property is not marketable its value must be ascertained by such proof as the nature of the case admits of. One criterion of damage may be its actual value to the owner, and this is the rule where it is chiefly or exclusively valuable to him.⁹⁹ Such

Conn. 479; *Tootle v. Kent*, 12 Okla. 674; *Kyd v. Cook*, 56 Neb. 71, 71 Am. St. 661; *McCauley v. Hoek*, 159 Mich. 570. See § 1093 and notes.

In *Wehle v. Butler*, 61 N. Y. 245, on an irregular attachment, the party therein named as creditor caused a stock of goods to be seized; they were the stock of a retail merchant of fancy goods, and her business was thus entirely broken up. The attachment was set aside and trespass brought. It was held that the plaintiff was entitled "to recover as part of her damages the fair retail value of her goods unlawfully taken." *Reynolds, C.*, for the court, remarked: "That was

the nature of her business as a merchant, and the goods were, doubtless, purchased with reference to it." See *Wehle v. Haviland*, 69 N. Y. 448; § 1102.

⁹⁵ *Loesch v. Koehler*, 144 Ind. 278, 35 L.R.A. 682; *Hoover v. Baltimore, etc. R. Co.*, 158 Ill. App. 292.

⁹⁶ *Patton v. Madison Nat. Bank*, 126 Ky. 469.

⁹⁷ *Campbell v. Iowa Cent. R. Co.*, 124 Iowa 248. It may be shown that a mare killed was with foal. *Boyer v. Chicago, etc. R. Co.*, 123 Iowa 248.

⁹⁸ *Louisville G. Co. v. Kentucky H. Co.*, 132 Ky. 435.

⁹⁹ *McCabe v. Knapp*, 23 Iowa 308.

articles as family pictures, plate and heirlooms should be valued with reasonable consideration of, and sympathy with the feelings of the owner.¹ Where the portrait of the owner's father was lost by the negligence of a carrier this rule was applied, the court adding that in its application the jury should take into account its cost, the practicability and expense of replacing it and such other considerations as in the particular case affect its value to the owner.² The testimony of the plaintiff that he had no other portrait of his father bore on the question of the actual value to him and was competent. In an action for the conversion of plates for printing labels and advertisements of great value to the owner, but of very trifling value to others, the measure of damages was held to be the value to him, and that in estimating this the cost of replacing the plates might be considered.³ Where a display advertisement was obliterated the wrong-doer was liable for the expense of restoring it.⁴ On the destruction of a sign board the plaintiff cannot recover for loss of rents for advertising space thereon, for he could have

¹ *Laubough v. Pennsylvania R. Co.*, 28 Pa. Super. Ct. 247; *Snydam v. Jenkins*, 3 Sandf. 620; *Spicer v. Waters*, 65 Barb. 227; *Bateman v. Ryder*, 106 Tenn. 712, quoting the text and applying the doctrine to an action for conversion. See *Thomason v. Hackney & Moale Co.*, 159 N. C. 299; see § 1117.

If an article has neither market nor real value and cannot be replaced its worth to the owner may be shown, that is the actual money loss he has sustained by being deprived of it, not including a fanciful price because of sentiment. *Missouri, etc. R. Co. v. Crews*, 54 Tex. Civ. App. 548.

In a case where there was no market for property injured in transportation at the place of delivery, it was held that the measure of damages was its intrinsic value at such point, and that evidence of market value at a point 20 miles

from the place of delivery was competent as evidence of such intrinsic value. *International & G. N. Ry. Co. v. Parke*, — Tex. Civ. App. —, 169 S. W. 397. But before such actual value can be made the measure of damages, it must appear that there was no market value for the article injured or destroyed, and without affirmative proof of such want of market value, it is error to admit evidence of the cost of the article when new. *Continental Oil & Cotton Co. v. Wristen*, — Tex. Civ. App. —, 168 S. W. 395.

² *Green v. Boston, etc. R. Co.*, 128 Mass. 221, 35 Am. Rep. 370. See § 919.

³ *Stickney v. Allen*, 10 Gray 352; *Sell v. Ward*, 81 Ill. App. 675, citing the text.

⁴ *Shiverick v. Gunning*, 58 Neb. 29; *Missouri, etc. R. Co. v. Crews*, *supra*.

replaced the board at once. The defendant may show that the right to maintain the board would soon expire.⁵ Where trespass was brought for destroying a picture on exhibition and it appeared it was libelous to the defendant and his sister, under the general issue the plaintiff was only allowed to recover for the canvas and paint. Lord Ellenborough held that because it was libelous it could not be valued as a work of art.⁶ Unless it is shown that the holder of a check has sustained substantial damages for its destruction his recovery cannot exceed a nominal sum.⁷ The fair cost of repairs to non-marketable property, less the increased value of the article above its value before the injury, is evidence of the damage done it.⁸ The devisees and legatees under a will wrongfully spoliated after the testator's death may recover as part of the damages the reasonable fees paid for attorneys' services in having it admitted to probate.⁹ The recovery measured by the value and interest is not peculiar to trespass, and requires no further elucidation in this connection.¹⁰

§ 1100. Special and consequential damages. The value and interest are not always a compensation for the injury; as if one takes from his neighbor the beasts of the plow in seed time, or the implements of husbandry in harvest, whereby he is prevented from sowing his seed or reaping his corn, it is obvious that the value of the thing taken may be the smallest part of the injury.¹¹ It is intimated in New Jersey that there may be liability for the loss of crops if a trespass prevents the sowing of seed or the reaping of grain.¹² But in Alabama and Ver-

⁵ Ludlow v. Steffen, 19 Ky. L. Rep. 1671.

⁶ Du Bost v. Beresford, 2 Camp. 511.

⁷ Freeman v. Strobehn, 122 Iowa 157.

⁸ Cadwell v. Canton, 81 Conn. 288.

⁹ Taylor v. Bennett, 1 Ohio C. C. 95.

Testimony that the plaintiff was put to some loss of time, expense

of board, etc., by reason of the destruction of legal papers does not authorize a recovery of damages for their destruction; the reasonable value of the papers is the measure of damages. Bourke v. Whiting, 19 Colo. 1.

¹⁰ See § 105.

¹¹ Woolley v. Carter, 7 N. J. L. 85.

¹² Id.

mont such damages are too remote when they result from the seizure of animals used for the purpose of husbandry.¹³ One who sells his horses at a sacrifice because he had no place in which to keep them after the destruction of his barn and could get no place cannot recover for his loss in that respect. The law takes no notice of the pecuniary conditions of litigants; the sale was not the natural and proximate result of the wrong done.¹⁴ The damages resulting from a party's inability to continue business because of the taking away of part of his stock, in consequence of which he sold the remainder for less than its value, are too remote, at least where there is no proof of malice or bad faith justifying exemplary damages.¹⁵ But in New Jersey it is held that when personal property in use by its owner is injured so that he is deprived of its use the special damage necessarily and proximately attendant upon such privation may be proven to augment the damages beyond the diminution in value of the article injured. It was proper to show that the plaintiff was on his way to market to get goods for which he had orders, and that his customers refused to take them because they were not delivered on time, and the profits lost by reason of the delay.¹⁶ If a recovery is not sought for injury to the plaintiff's business the fact that he is a dairyman cannot affect his recovery for the loss of cows.¹⁷ Where a husband and wife sued for a wrongful attachment of merchandise she failed to recover for loss caused him by being thrown out of employment.¹⁸ Where the plaintiff who owned a fishery and net on a river, had men employed to assist him in fishing, and while his net was in the river the defendant ran his vessel through and injured it so as to delay the use of it, it was held that in addition to the damage to the net he was entitled to show these facts and

¹³ *Street v. Sinclair*, 71 Ala. 110; *Luce v. Hoisington*, 56 Vt. 436.

¹⁴ *Chandler v. Smith*, 70 Ill. App. 658; *Louisville & N. R. Co. v. Tippenhauer*, 10 Ky. L. Rep. 401; *Sims v. Glazeneer*, 14 Ala. 695.

¹⁵ *Caspar v. Klippen*, 61 Minn. 353, 52 Am. St. 604; *Weick v.*

Dougherty, 139 Ky. 528, 3 L.R.A. (N.S.) 348.

¹⁶ *Graves v. Baltimore, etc. R. Co.*, 76 N. J. L. 362; *Albert v. Bleecker St., etc. R. Co.*, 2 Daly 389, is in accord.

¹⁷ *Parrin v. Montana Cent. R. Co.*, 22 Mont. 290.

¹⁸ *Rains v. Herring*, 68 Tex. 468.

also the facts concerning the running of shad and the number caught on the preceding day, with a view to compensation for the loss of the benefits of the use. "The whole loss sustained," said the court, "is to be taken into view; and this depends on its use, its profits, the particular season or time, or occasion of the injury done, and the benefits or advantages lost thereby. And if so, all these must necessarily be proven and submitted to the consideration of the jury."¹⁹ The profits lost by the destruction of a going business may be recovered.²⁰ The defendant stopped the plaintiff's team and took out one horse, thereby not only depriving him of the service of that animal, but subjecting him to delay and trouble in respect to the others in the team and his journey. The court held he could recover not only for the force and breach of the peace, but for stopping his team in order to take the horse.²¹ In estimating the damages for a wrongful seizure of the furniture of a boarding-house it is proper to prove there were guests in the house, and that applicants for board had to be turned away before, with reasonable diligence, the house could be refurnished, with a view to showing annoyance and injury to business to increase damages.²² If a place of business is closed the time during which it remained so pending a motion to quash the execution and levy may be considered in assessing damages.²³ And the rent for which the plaintiff is liable may be recovered.²⁴ Where property used by a railroad contractor for sheltering his men

¹⁹ *Post v. Munn*, 4 N. J. L. 61, 5 Am. Dec. 570; *Sniveley v. Fahnestock*, 18 Md. 391; *Graves v. Baltimore, etc. R. Co.*, 76 N. J. L. 362. See *Wright v. Mulvaney*, 78 Wis. 89, 23 Am. St. 393, 9 L.R.A. 807, denying recovery of profits.

²⁰ *Keegan v. Harlan*, 134 Ill. App. 363. Compare *Dody v. State Bank*, 82 Kan. 406.

²¹ *Shafer v. Smith*, 7 Har. & J. 67.

Where animals are lost the loss of time resulting therefrom is not an element of damage. *Churchman v. Kansas City*, 44 Mo. App. 665.

²² *Luse v. Jones*, 39 N. J. L. 707; *Davenport v. Ledger*, 80 Ill. 574; *Kentucky H. Co. v. Hood*, 133 Ky. 383, 22 L.R.A.(N.S.) 588, 134 Am. St. 457.

²³ *MacVeagh v. Bailey*, 29 Ill. App. 606.

Generally the loss of credit and injury to business are not elements of damage in such cases. See § 55, and *Marqueze v. Sontheimer*, 59 Miss. 430.

²⁴ *Hough v. Dickinson*, 58 Mich. 89.

and horses was seized, the loss of men for the want of a place to shelter them, the expense of providing another shelter and the protraction of the time required to perform the work contracted to be done were elements of damage.²⁵ Where the plaintiff's furnace was destroyed and the defendant refused to replace it testimony was admissible to show the ill health of the plaintiff's child at the time of and immediately after the wrong was done, and the inconvenience to which the plaintiff was put in taking care of the child as the result of the wrong.²⁶ The destroyer of feed for animals must answer for their shrinkage in weight and failure to grow as the result of the substitution of another kind of feed.²⁷

§ 1101. **Same subject.** The defendant will be liable for such consequential damages resulting from his interference with the plaintiff's property as might reasonably be expected in the usual and natural course of things to ensue from his act, whether his interference be to take and carry away or to injure or destroy it.²⁸ Where a horse was injured by a collision the damage was held to include the diminution of his market value, sums paid and the value of services performed in a reasonable attempt to cure him and the loss of his use while he was under treatment, up to the limit of his value;²⁹ the last limitation is

²⁵ Carlisle v. Callahan, 78 Ga. 320.

²⁶ Vogel v. McAuliffe, 18 R. I. 791.

²⁷ Enlow v. Hawkins, 71 Kan. 633.

²⁸ See § 43; McAfee v. Crofford, 13 How. 447, 14 L. ed. 217; Johnson v. Courts, 3 Har. & McHen. 510; Oleson v. Brown, 41 Wis. 413; Metallic C. C. Co. v. Fitchburg R. Co., 109 Mass. 277, 12 Am. Rep. 689; Bishop v. Williamson, 11 Me. 495; Atchison v. Steamboat, 14 Mo. 63; Murray v. Mace, 41 Neb. 60; Alaska S. S. Co. v. Collins, 62 C. C. A. 569, 127 Fed. 937; Sparks v. McCreary, 156 Ala. 382, 22 L.R.A. (N.S.) 1224; Tregre & S. v. Carter

P. Co., 132 La. 293, 45 L.R.A. (N.S.) 189.

²⁹ Latham v. Cleveland, etc. R. Co., 164 Ill. App. 559; Louisville & N. R. Co. v. Gormley, 33 Ky. L. Rep. 802; Powell v. Hill, *infra*; Southern H. & S. Co. v. Standard E. Co., 158 Ala. 596; Southern R. Co. v. Gilmer, 143 Ala. 490; Telfair County v. Webb, 119 Ga. 916; Southern R. Co. v. Stearnes, 8 Ga. App. 111; Telfair County v. Clements, 1 Ga. App. 437; Hoover v. Baltimore, etc. R. Co., 158 Ill. App. 292; Hey v. Hawkins, 120 id. 483; Jones v. Texas & P. R. Co., 125 La. 542, 136 Am. St. 339; Atwood v. Boston F. & T. Co., 185 Mass. 557; Smith v. Chicago & A. R. Co., 127 Mo. App.

not everywhere recognized.³⁰ From the value of the lost use is to be deducted the cost of maintenance.³¹ It has been held that the hire of another animal to take the place of the one disabled cannot be included.³² But we see no reason why, under proper pleadings, such expense is not recoverable if the owner has acted judiciously.³³ It has been held otherwise as

160 (loss of use not involved); *Hax v. Quincy, etc. R. Co.*, 123 Mo. App. 172 (loss of use not involved; value of animal after treatment not material); *Cunningham v. Dickerson*, 104 Mo. App. 410 (silent as to loss of use); *Sullivan v. Anderson*, 81 S. C. 478 (value of use not mentioned); *Wilson v. Seattle, etc. R. Co.*, 55 Wash. 656; *Gillett v. Western R. Co.*, 8 Allen 560; *Atlantic R. Co. v. Hudson*, 62 Ga. 679; *Johnson v. Holyoke*, 105 Mass. 80; *Keyes v. Minneapolis, etc. R. Co.*, 36 Minn. 290; *Wheeler v. Townshend*, 42 Vt. 15; *Street v. Laumier*, 34 Mo. 469; *Shelbyville, etc. R. Co. v. Lewark*, 4 Ind. 471; *New Haven S. & T. Co. v. Vanderbilt*, 16 Conn. 420; *Williamson v. Barrett*, 13 How. 101, 14 L. ed. 68; *I. & G. N. R. Co. v. Cocke*, 64 Tex. 151; *Central R. & E. Co. v. Warren*, 84 Ga. 329 (expense of feed and cure). *Contra*, *McLaughlin v. Bangor*, 58 Me. 398 (as to loss of use).

While the owner of property which is employed in an illegal business may recover its value he is not entitled to special damages because the taking of it resulted in breaking up his business. *Smith v. Dinkelspiel*, 91 Ala. 528.

³⁰ *Ulit v. Biggs*, 53 Tex. Civ. App. 529; *Hax v. Quincy, etc. R. Co.*, *supra*.

³¹ *Gould v. Merrill R. & L. Co.*, 139 Wis. 433.

³² *Hughes v. Quentin*, 8 C. & P. 703; *Barrow v. Arnaud*, 8 Q. B.

595; *Edwards v. Beebe*, 48 Barb. 106.

³³ *McGuire v. Post Falls L. & Mfg. Co.*, 23 Idaho 608; *Peters v. Streep* (Misc.) 138 N. Y. Supp. 146; *Andries v. Everett*, 177 Mich. 110; *Powell v. Hill* (Tex. Civ. App.), 152 S. W. 1125; *Georgia R. & E. Co. v. Wallace*, 122 Ga. 547 (if the aggregate does not exceed the value of the animal); *Telfair County v. Clements*; *Same v. Webb*, 119 Ga. 916; *Garfield & P. Co. v. Rockland-R. L. Co.*, 184 Mass. 60, 61 L.R.A. 946, 100 Am. St. 543; *Moore v. Metropolitan St. R. Co.*, 84 App. Div. (N. Y.) 613; *Rogers v. Interurban St. R. Co.* (Misc.), 84 N. Y. Supp. 974; *Hutton v. Murphy*, 9 N. Y. Misc. 151; *Layton v. Brady*, 1 N. Y. Misc. 519; *Smith v. Consumers' I. Co.*, 52 N. Y. Super. Ct. 430, 857; *Schalscha v. Third Ave. R. Co.*, 19 N. Y. Misc. 141, 1 Am. Neg. Rep. 330; *Volkmar v. Same*, 28 N. Y. Misc. 141; *Wellman v. Miner*, 19 N. Y. Misc. 644, 2 Am. Neg. Rep. 218; *Hoffman v. Metropolitan St. R. Co.*, 51 Mo. App. 273.

The value of the use of property which is unused because of the orders of the officer who levies upon it may be recovered up to the time the owner has notice of the release of the levy. *Parlin I. Co. v. Clements* (Tex. Civ. App.), 156 S. W. 368.

There cannot be a recovery for the loss of the use of property while

to the pay of the driver of an injured horse and the expense of keeping the latter while repairs are being made to the wagon.³⁴ Expenses incurred in removing damaged property from the place of injury and storing it pending arrangements for its repair may be recovered.³⁵ Where four horses, used for plantation purposes, were injured, one to its full value and one but slightly, the others being harmed to an intermediate extent, the owner could not keep them grouped as a team and charge for the loss of their use, especially if he had other horses with which to supply their places. The cost of making a change in the make-up of the team would be a proper item of damages. As to the horse fatally injured the loss of the use was not recoverable on any basis.³⁶ There may be a recovery for an injury to a horse which affects his disposition for steadiness and gentleness; depreciation in value from such cause is not too remote and uncertain.³⁷ Where horses attached to a sleigh were struck and thereby caused to run, so as to throw off a load on the sleigh, break the harness, etc., the labor and trouble of reloading, the delay in getting to the place of destination, the time and expense lost in making repairs and the injury done to the horses by causing them to run away, though they were not physically injured, were elements of damage.³⁸ The extra care and atten-

it is being repaired unless it is shown it was used for a business purpose or that other property was hired to take its place, though other property of the plaintiff was used to take its place. *Donnelly v. Poliakoff*, 79 N. Y. Misc. 250.

³⁴ *Newell v. Smith*, 28 N. Y. Misc. 182. It is otherwise as to the expense of keeping the injured animal in Louisiana. *Fusch v. Egan*, 48 La. Ann. 60.

³⁵ *Moore v. Metropolitan Co., supra*.

But it has been held that the measure of damages for injury of an automobile would not include the amount paid for storage or the wages of a chauffeur between the

time of the injury and the time when the owner disposed of it. *Dillon v. Mundet* (Misc.), 145 N. Y. Supp. 975.

³⁶ *Tift v. Towns*, 63 Ga. 237.

³⁷ *Oliphan v. Brearley*, 54 N. J. L. 521; *Oleson v. Brown*, 41 Wis. 413; *United States Exp. Co. v. Taylor* (Tex. Civ. App.), 156 S. W. 617.

³⁸ *Oleson v. Brown*, 41 Wis. 413, approved in *Hughes v. Austin*, 12 Tex. Civ. App. 178; *Gillam v. Hogue*, 39 Pa. Super. Ct. 547.

A change for the worse in the disposition of a horse is actual damage. *Montgomery St. R. Co. v. Hastings*, 138 Ala. 432.

Negligently causing the death of a horse by fright is attended with

tion required to raise the increase of animals wrongfully killed may be recovered if such killing was the proximate cause thereof.³⁹ Inability to fill racing engagements with an injured horse is not a ground for damages.⁴⁰

In Michigan the rule of damages where animals are injured is their reduced value. It is said: "There may be peculiar and exceptional circumstances which would possibly sometimes justify a different rule, but they must be very peculiar. But there is no difficulty in replacing beasts by others adapted to similar service, and the difference between the value before and after the accident will enable the owner to be fully indemnified,"⁴¹ or after the cure,⁴² including the expense thereof.⁴³ The fact that the care and expense bestowed upon an injured animal proves ineffectual does not affect the right to recover therefor, it having been given in good faith.⁴⁴ Where the defendant's rams escaped from his premises and entered upon those of the plaintiff and got his ewes with lamb out of season so that the lambs were dropped during cold weather, the damages were not measured by the value of the lambs which perished because of the inclemency of the season, but by the difference between the value of the ewes as they were at the time of the trespass and thereafter.⁴⁵ The owner of a thoroughbred heifer

liability though no physical injury was inflicted. *Louisville & N. R. Co. v. Melton*, 158 Ala. 509, 23 L.R.A. (N.S.) 183.

³⁹ *McDonnell v. Minneapolis, etc. R. Co.*, 17 N. D. 606; *St. Louis, etc. R. Co. v. Steele*, 37 Okla. 536; *McDonnell v. Minneapolis, etc. R. Co.*, 17 N. D. 606.

⁴⁰ *Nashville & N. R. Co. v. Gormley*, 33 Ky. L. Rep. 802.

⁴¹ *Davidson v. Michigan Cent. R. Co.*, 49 Mich. 428; *Hoffman v. Metropolitan St. R. Co.*, 51 Mo. App. 273; *Laughren v. Barnard*, 115 Minn. 276, citing the text; *Robinson v. Great Northern R. Co.*, 123 Minn. 495; *Hunt v. Chicago, B. & Q. R. Co.*, 95 Neb. 746; *Ft. Worth*

& D. C. Ry. Co. v. Shank, — Tex. Civ. App. —, 167 S. W. 1093; *Wilson & Co. v. Illinois Cent. R. Co.*, 130 Tenn. 92.

⁴² *Shaw v. Missouri & K. D. Co.*, 56 Mo. App. 521.

⁴³ *Cookman v. Nill*, 81 Mo. App. 297.

⁴⁴ *Gulf, C. & S. F. R. Co. v. Keith*, 74 Tex. 287, 12 Am. Neg. Cas. 600; *Chicago, R. I. & G. Ry. Co. v. Clark*, — Tex. Civ. App. —, 166 S. W. 129; *Williams v. Pedigo*, 158 Ky. 509; *Atwood v. Boston F. Co.*, 185 Mass. 557; *Douglass v. Seattle E. Co.*, 73 Wash. 561; *Watson v. Lisbon Bridge*, 14 Me. 201.

⁴⁵ *Stearns v. McGinty*, 55 Hun 101; *Baker v. Mims*, 14 Tex.

delivered of a calf gotten by a common bull may recover, in addition to her diminished value by reason of the trespass, in view of the fact that she was being kept for breeding purposes, the difference between the value of the calf dropped and the value of one which would have been dropped if the heifer had been bred to a thoroughbred bull.⁴⁶

On principles which are elsewhere fully stated,⁴⁷ the owner of property which is damaged cannot, if it possesses elements of value which it is practicable for him to utilize, abandon it and claim its full value from the wrong-doer. He must use reasonable exertions to realize whatever of value it might have.⁴⁸ Hence the cost of repairing a damaged chattel and the value of its use while that is being done measures the recovery if repairs can be made.⁴⁹ Experiments in making repairs are not justified if the cost of the article will be more than the value of the article after they are made.⁵⁰

Generally no allowance can be made for the expenses of the litigation to procure redress for the injury by trespass beyond taxable costs; they are regarded as full compensation.⁵¹ Such

Civ. App. 413; New York, etc. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292.

⁴⁶ Kopplin v. Quade, 145 Wis. 454.

⁴⁷ § 157.

⁴⁸ Latham v. Cleveland, etc. R. Co., 164 Ill. App. 559; Harrison v. Missouri Pac. R. Co., 88 Mo. 625; Illinois Cent. R. Co. v. Finnigan, 21 Ill. 646; Dean v. Chicago & N. R. Co., 43 Wis. 305; Georgia Pac. R. Co. v. Fullerton, 70 Ala. 298; Chicago, etc. R. Co. v. Metcalf, 44 Neb. 848, 12 Am. Neg. Cas. 237, 28 L.R.A. 824.

⁴⁹ Fitz Simons v. Braun, 199 Ill. 390, 59 L.R.A. 421; Berry v. Campbell, 118 Ill. App. 646; Cue v. Breeland, 78 Miss. 864; West v. Martin, 51 Wash. 85, 21 L.R.A. (N.S.) 324. See Peabody v. Lynch, 184 Ill. App. 78, where it was held that the measure of damages for

injury to an automobile was the reasonable cost of repair, which was what an automobile repair man would charge in accordance with the market and usual rates for such work and materials, and that the actual price paid was only admissible as tending to show the amount of such reasonable cost. The question of the value of the use of the automobile while being repaired seems not to have been raised.

⁵⁰ Crossen v. Chicago & J. E. R. Co., 158 Ill. App. 42.

A person deprived of an article used in his employment may not remain idle and recover the value of his time unless he makes a *bona fide* effort to find employment he can engage in without such article. Parks v. Sullivan, 46 Colo. 340, 25 L.R.A. (N.S.) 625.

⁵¹ Slaughter v. American Baptist

expenses have been disallowed even in cases where exemplary damages may be assessed; ⁵² but it is otherwise in some states. ⁵³

P. Soc., *infra*; Cottrell v. Russell, 21 Mo. App. 1; Mix v. Kepner, 81 Mo. 96; Jacobus v. Monongahela Nat. Bank, 35 Fed. 395; Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Falk v. Waterman, 49 Cal. 224; St. Peter's Church v. Beach, 26 Conn. 355; Fairbanks v. Witter, 18 Wis. 287, 86 Am. Dec. 765; Park v. McDaniels, 37 Vt. 594; Barnard v. Poor, 21 Pick. 378; Rutland, etc. R. Co. v. Bank, 32 Vt. 639; Kelly v. Rogers, 21 Minn. 146; Harris v. Eldred, 42 Vt. 39; Earl v. Tupper, 45 Vt. 275; Good v. Mylin, 8 Pa. 51, 49 Am. Dec. 493; Howell v. Scoggins, 48 Cal. 355; Stopp v. Smith, 71 Pa. 285; Hatch v. Hart, 2 Mich. 289; Warren v. Cole, 15 Mich. 265; Worthington v. Morris, 98 Ky. 54; Manning v. Grinstead, 121 Ky. 802.

In *Harris v. Eldred*, 42 Vt. 39, the owner of property which had been wrongfully taken from him sought in an action for the tort to recover, among other damages, the expenses of a legal proceeding in New York, by which he regained possession. They were disallowed: not on the assumption that they were recovered or recoverable in the suit in New York. They were deemed not allowable equally whether the laws of New York provided for costs to the prevailing party in such proceedings or not; because the costs of another action are not allowable. It is difficult to reconcile the reasoning on which this conclusion was reached with the doctrine of *Greenfield Bank v. Leavitt*, 17 Pick. 1, 28 Am. Dec. 268. That case recognizes the right of the injured party to employ judicious agencies to recover his prop-

erty, and to recover the expenses in an action for the wrongful taking. The law is settled in favor of their allowance. Why discriminate against the expenses of a judicious and appropriate proceeding in court to obtain possession, if they are not measurable by taxation and to be collected as costs in that proceeding?

⁵² *Falk v. Waterman*, 59 Cal. 224; *Earl v. Tupper*, 45 Vt. 275; *Howell v. Scoggins*, 48 Cal. 355.

⁵³ *Anderson v. Sloane*, 72 Wis. 566, 7 Am. St. 885; *Dibble v. Morris*, 26 Conn. 416; *Seeman v. Feeney*, 19 Minn. 79; *Titus v. Corbins*, 21 Kan. 722; *Roberts v. Mason*, 10 Ohio St. 277; *Marshall v. Bitner*, 17 Ala. 832; *Bracken v. Neill*, 15 Tex. 109; *New Orleans, etc. R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98; *Thompson v. Powning*, 15 Nev. 210; *Gilkerson-S. C. Co. v. Yale*, 47 La. Ann. 690; *Perry v. White*, 33 N. B. 41; *Pruett v. Williams*, 156 Ala. 346; *American H. & D. Co. v. Frey*, 127 La. 183; *Watson v. Boswell*, 25 Tex. Civ. App. 379 (time spent and expenses incurred in regaining possession of property illegally distrained).

The expense of recovering attached property has been recovered though there was no malice on the part of the defendant. *Dody v. State Bank*, 82 Kan. 406.

The code of Georgia, § 2942, provides that the expenses of litigation are not generally allowed as part of the damages; but if the defendant has acted in bad faith or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense the jury

Injury done to the plaintiff's credit by wrongfully suing out an attachment against his property is generally considered to be too remote to be a ground of damage,⁵⁴ though it is not so regarded in Nebraska,⁵⁵ Oklahoma⁵⁶ and Louisiana.⁵⁷ The mere wrongful suing out of a writ of sequestration and, without violence to the person of the defendant therein, depriving him of the possession and use of his property was not cause for the recovery of damages for mental suffering unless the circumstances were such as warrant the infliction of exemplary damages,⁵⁸ though the property seized was exempt from execution.⁵⁹ In North Carolina there cannot be a recovery for mental anguish arising out of the wrongful seizure of property though it was attended with circumstances of aggravation; but exemplary damages may be recovered.⁶⁰ In Nebraska such suffering is not an element of damages where the act charged is simply unlawful because in violation of the property rights of the plaintiff. There is a marked distinction between such a case and one in which the unlawful act was inspired by fraud, malice or like motives. As to those last named, it is said the case is free from doubt. In all such cases mental suffering is a legitimate element of damage.⁶¹ Mental anguish, the production of scandal and gossip, and the failure to receive voluntary contributions

may allow them. *Guernsey v. Shellman*, 59 Ga. 797.

⁵⁴ *Sterling v. Marine Bank*, 120 Md. 396; *Slaughter v. American Baptist P. Soc.*, *infra*; *Dody v. State Bank*, 82 Kan. 406, citing the text; *American H. & D. Co. v. Frey*, *supra*; *Landes v. Eichelberger*, 2 Tex. Civ. Cas. 127; *Crymble v. Mulvaney*, 21 Colo. 203; *Union Nat. Bank v. Cross*, 100 Wis. 174; *Manning v. Grinstead*, 121 Ky. 802.

⁵⁵ *Meyer v. Fagan*, 34 Neb. 184; *Kyd v. Cook*, 56 Neb. 71, 71 Am. St. 661.

⁵⁶ *Tootle v. Kent*, 12 Okla. 674.

⁵⁷ *Tregre & S. v. Carter P. Co.*, 132 La. 293, 45 L.R.A. (N.S.) 189.

⁵⁸ *Williams v. Yoe*, 19 Tex. Civ.

App. 281, citing *Trawick v. Martin-B. Co.*, 79 Tex. 460; *Crawford v. Doggett*, 82 Tex. 139, 27 Am. St. 859; *Gulf, etc. R. Co. v. Trott*, 86 Tex. 412, 40 Am. St. 866. But see § 1095.

⁵⁹ *Morris v. Williford* (Tex. Civ. App.), 70 S. W. 228.

⁶⁰ *Chappell v. Ellis*, 123 N. C. 259, 68 Am. St. 822.

A later case seems to make the liability for mental anguish turn upon the wrongdoer's notice of facts showing that it would result from his act. *Thomason v. Hackney & Moale Co.*, 158 N. C. 299.

⁶¹ *Henderson v. Weidman*, 88 Neb. 813; *Murray v. Mace*, 41 Neb. 60, citing *Day v. Woodworth*, 13 How.

are not items of damage arising from the seizure of the property of a missionary society in making an unauthorized levy of execution.⁶²

§ 1102. **Same subject.** In an early Connecticut case trespass was brought for carrying away a spar which the plaintiff had procured to be used as a mast for a vessel he was building. The fact of the taking having been established, the plaintiff offered to prove in aggravation of damages that he was building a cutter and had procured the spar for her mast; that there was no other spar on the Connecticut river suitable for that purpose, and that these facts were known to the defendant; that the taking was malicious and with intent to obstruct the plaintiff, and he was obstructed and delayed in the building for several months. The evidence was erroneously rejected. Smith, J., remarked for the court: "In actions founded on tort the first object of the jury should be to remunerate the injured party for all the real damage he has sustained. In doing this the value of the article taken or destroyed forms one item; there may be others; and in this case I think there were others. The interruption and delay which occurred in the building of a cutter might be, and probably was, a serious injury; and to show that this interruption and delay was a necessary consequence of the trespass it was proper to prove that no other mast could be procured on the river; for if it had been an article easily to be obtained and like many others could be procured at any time in the market, no such interruption or delay could be attributed to the taking of it. * * * I have no doubt that the damages claimed in this case were sufficiently immediate. If a man should with force take the horse of another while from home on a journey the interruption of the journey and the delay occasioned by it would not be too remote to be assessed by way of damages. I can see no difference

363, 14 L. ed. 181; *Cutler v. Smith*, 57 Ill. 252; *Jamison v. Moon*, 43 Miss. 598; *Brown v. Allen*, 35 Iowa 306; *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384; *Zuzuarregui v. Martinez*, 2 Porto Rico Fed. 1 recog-

nizes the rule. *Kimball v. Holmes*, 60 N. H. 163, is in accord. See § 1095.

⁶² *Slaughter v. American Baptist P. Soc.* (Tex. Civ. App.), 150 S. W. 224.

between that case and many others of the same sort which might be put, if further illustrations were necessary, and the present. The damage is the natural and necessary consequence of the trespass and cannot be attributed essentially to any other cause."⁶³ The damage for destroying a pipe line used for the conveyance of oil include the value of oil lost because of inability to market it, as well as the loss due to a decline in the market price of the oil to the extent to which the trespass prevented its being put on the market.⁶⁴

In a decision in Wisconsin a stock of goods was seized under executions based upon invalid judgments. The store was closed and the goods held therein for twenty-six days, after which they were delivered to the plaintiff's assignee, plaintiff in the meantime having made an assignment for the benefit of his creditors. The executions were levied in good faith. The trial court held that damages included: 1. The attorney's fees and commissions carried into the confessed judgments, and paid by the plaintiff in order to get possession of the property levied upon. 2. His expenditures for attorney's services in getting the judgments and execution set aside. 3. The whole expenses of the assignee under the assignment, including a sum claimed to have been paid by him in conducting and closing up the assignment for attorney's fees. 4. The probable profits the plaintiff would have made from the time of the seizure until the end of one year after the remnant of the goods were received by him from the assignee. 5. For loss because the assignee was forced to sell otherwise than in the usual course of trade. 6. For injury to feelings. The appellate court held that the value of the goods, they having been received by the plaintiff before the action for the trespass was begun, was immaterial except so far as it bore upon the other items which were elements of damage. These were: 1. Interest on that value from the time of the seizure until the goods were surrendered or, at least, at the option of

⁶³ *Churchill v. Watson*, 5 Day 140, 5 Am. Dec. 130; *McAfee v. Crofford*, 13 How. 447, 14 L. ed. 217.

⁶⁴ *Brookshire O. Co. v. Casmalia R. O. & D. Co.*, 156 Cal. 211. The

opinion intimates that any loss of oil resulting from the operation of a flowing well on adjacent premises, the oil from which was alleged to have come from the same stratum

the plaintiff, in lieu of such interest, the value of his business during that time. 2. Any depreciation in the value of the goods during the same time.⁶⁵ 3. The expenses incurred in obtaining a return of the goods, including the sum paid for the costs included in the judgments referred to and fees for executing the executions, and any expenses by way of rent of the store and clerk hire while the defendant was in possession; also money necessarily paid for legal services in proceedings to set aside the judgments and executions. There was no liability for lost profits.⁶⁶ The assignment made by the plaintiff was not the legal effect of the defendant's acts, and he was not chargeable with any losses resulting from it.⁶⁷ There being no proof of malice or insult, damages for injury to the feelings were not recoverable.⁶⁸ In Nebraska, Kentucky and Oklahoma

as the plaintiff's, would be so much a matter of conjecture that proof of it would be difficult.

⁶⁵ Depreciation of asported property through the negligence of the defendant is an element of damage. *Bibb v. Jones*, 12 Ky. L. Rep. 605; *Harris v. Davis*, 13 id. 736. And so is a loss resulting from a decline in market value. *Chesmore v. Barker*, 101 Iowa 576.

⁶⁶ The opinion, by Taylor, J., cites as adverse to the allowance of profits, *Beveridge v. Welch*, 7 Wis. 465; *Bierbach v. Goodyear R. Co.*, 54 id. 208, 41 Am. Rep. 19; *Blair v. Milwaukee, etc. R. Co.*, 20 Wis. 262, 10 Am. Neg. Cas. 518; *Masterson v. Mount Vernon*, 58 N. Y. 391, 396; *Higgins v. Mansfield*, 62 Ala. 267; *Holiday v. Cohen*, 34 Ark. 707; *Heath v. Lent*, 1 Cal. 412; *Tobin v. Post*, 3 id. 373; *Oviatt v. Pond*, 29 Conn. 479; *Water Lot Co. v. Leonard*, 30 Ga. 560; *Green v. Williams*, 45 Ill. 206; *Cilley v. Hawkins*, 48 id. 308; *Chicago, etc. R. Co. v. Howison*, 86 Ill. 215; *Glass v. Garber*, 55 Ind. 336; *Campbell v.*

Chamberlain, 10 Iowa 337; *Lowenstein v. Monroe*, 55 id. 82; *Washington I. Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Boyd v. Brown*, 17 Pick. 453; *Brown v. Smith*, 12 Cush. 366; *Simmer v. St. Paul*, 23 Minn. 408; *Cincinnati v. Evans*, 5 Ohio St. 594; *Bates v. Clark*, 95 U. S. 209, 24 L. ed. 473; *Smith v. Condry*, 1 How. 28, 11 L. ed. 35; *Bazon v. Steamship Co.*, 3 Wall. Jr. 229; *Wallace v. Finberg*, 46 Tex. 36; *Miller v. Jannett*, 63 id. 82; *Weeks v. Prescott*, 53 Vt. 73; *Dennis v. Stoughton*, 55 Vt. 371. *Wright v. Mulvaney*, 78 Wis. 89, 23 Am. St. 393, 9 L.R.A. 807; *Casper v. Klippen*, 61 Minn. 353, 52 Am. St. 604, citing several local cases and distinguishing *Goebel v. Hough*, 26 Minn. 252; *Crymble v. Mulvaney*, 21 Colo. 203, are to the same effect.

⁶⁷ Citing *Walker v. Fuller*, 29 Ark. 448; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59.

⁶⁸ *Anderson v. Sloane*, 72 Wis. 566, 7 Am. St. 885, citing *Donnell v. Jones*, *supra*.

lost profits resulting from the wrongful attachment of goods used in conducting a business may be recovered in so far as the loss is such as might ordinarily be expected to follow such act.⁶⁹ If there has been a recovery of lost profits there cannot be a recovery for future injury to business.⁷⁰ The profits which might have been made with a machine while it was being repaired are not recoverable.⁷¹ In the absence of a rental value for such property as is damaged there may be a recovery for the loss of profits of the business in which it was used if they are clearly established.⁷² In Michigan the profits which might have been made by sawing logs are regarded as too uncertain to be a ground of damage; in lieu thereof if logs are destroyed there may be a recovery of their value and of the rental value of the mill in which they were to be sawed.⁷³ The owner of a dog may not recover because of the loss of his company and the amusement he derived from it.⁷⁴

As we have seen, there may be a recovery for the depreciation in the value of goods during the time they have been withheld from the owner.⁷⁵ "The reason," says Justice Winslow, "is plainly because the goods are kept for the purpose of sale, and, had they not been seized, they might have been sold at their value when seized. But when property kept for use, and not for sale, is attached, the reason no longer holds good, because there is no presumption that the property would or could have been sold, but the presumption is to the contrary." Hence, there cannot be a recovery, under the guise of depreciation in value, of damages for injuries to business, credit and reputation resulting from the stoppage of business by an attachment. In case of a wrongful attachment there may be a recovery for

⁶⁹ *Meyer v. Fagan*, 34 Neb. 184; *Kyd v. Cook*, 56 Neb. 71, 71 Am. St. 661; *Tootle v. Kent*, 12 Okla. 674, 17 Am. Neg. Rep. 276; *Manning v. Grinstead*, 121 Ky. 802; *Wellington v. Spencer*, 37 Okla. 461, 46 L.R.A.(N.S.) 469.

⁷⁰ *Manning v. Grinstead*, *supra*.

⁷¹ *Canfield v. Gun Plains*, 175 Mich. 379.

⁷² *Trout Auto L. Co. v. People's G. L. & C. Co.*, 168 Ill. App. 56.

⁷³ *Quay v. Duluth, etc. R. Co.*, 153 Mich. 567, 18 L.R.A.(N.S.) 250.

⁷⁴ *Klein v. St. Louis T. Co.*, 117 Mo. App. 691.

⁷⁵ *Maxwell v. Speth*, 9 Ga. App. 745.

the loss of the use of property held for use, and not for sale, and for any damage done it by wear or tear or negligent care while in the hands of the officer.⁷⁶ There may be a recovery for the loss of profits caused by the wrongful attachment of goods used in an established business conducted for such length of time as to permit its profits to be ascertained with reasonable certainty; but if the attachment defendant conducted two distinct kinds of business the seizure of the goods used in one business will not give the right to recover for the loss of the profits of the other the conduct of which was not interfered with.⁷⁷ The usable value of property while being repaired may be shown by the reasonable expenditure made by hiring like property.⁷⁸

§ 1103. Expenses to recover, restore and protect property. If the owner regains possession or the property is restored to and accepted by him it will go in mitigation; then his claim for damages will be for the taking and detention.⁷⁹ The owner may reasonably exert himself to recapture his property.⁸⁰ He is entitled to compensation for such exertions,⁸¹ and also for moneys expended for the same purpose in a judicious and reasonable manner⁸² in necessary purchases of the property,⁸³ in

⁷⁶ Union Nat. Bank v. Cross, 100 Wis. 174. Compare Tootle v. Kent, *supra*, as to recovery for injury to credit.

⁷⁷ Sterling v. Marine Bank, 120 Md. 396.

⁷⁸ Cardozo v. Bloomingdale, 79 N. Y. Misc. 605, citing local cases in courts of the same authority. But see Peters v. Streep (Misc.), 138 N. Y. Supp. 146, holding that the amount it would cost to hire like property while repairs are being made not a competent legal basis for determining usable value, but allowing as damages the plaintiff's actual outlay for the hire of other property.

⁷⁹ Anderson v. Sloane, 72 Wis. 566, 7 Am. St. 885; Reynolds v. Shuler, 5 Cow. 326; Murray v.

Burling, 10 Johns. 172; Walker v. Fuller, 29 Ark. 448; Jones v. McNeil, 2 Bailey 466; Barrelett v. Bellgard, 71 Ill. 280; Hammer v. Wilsey, 17 Wend. 91; Coffin v. Field, 7 Cush. 355; Kaley v. Shed, 10 Metc. (Mass.) 317; Clapp v. Thomas, 7 Allen 188.

⁸⁰ Bennett v. Lockwood, 20 Wend. 223, 32 Am. Dec. 532.

⁸¹ Keith v. Haggart, 4 Dak. 438; Jones v. Lamon, 92 Ga. 529; Brudi v. Luhrman, 26 Ind. App. 221.

⁸² Henderson v. Weidman, 88 Neb. 813.

⁸³ Keene v. Dilke, 4 Ex. 388; Jones v. Alsbrook, 115 N. C. 46. See Winburne v. Bryan, 73 N. C. 47.

One who buys his own property which is wrongfully sold can re-

satisfying charges thereon,⁸⁴ in offering and paying a reasonable reward for its return,⁸⁵ or in making reasonable repairs on it.⁸⁶ One who wrongfully causes the satisfaction of a judgment to be stricken from the record must answer for the costs and expenses, including counsel fees and printing, in proceedings brought to obtain a reversal of the action of the inferior court and in a writ of restitution.⁸⁷ The owner of property may protect it from threatened danger and resort to reasonable expedients for that purpose, and a tortfeasor who has brought about the situation that requires the owner to do so cannot be heard to say that such consequence is not the natural and proximate result of his conduct.⁸⁸ The owner of an animal killed is entitled to a reasonable allowance for his time and trouble in

cover only the loss sustained in doing so. If he paid more than its value that is his folly, and he can only recover the value of the articles bought. If he paid less than their value he lost no more than he paid. *Sensinger v. Boyer*, 153 Pa. 628.

If the property is bought for the plaintiff by an agent the former cannot ratify the latter's act for his own benefit, to the prejudice of the defendant's rights, by the recovery of the full value of the property. *Hyde v. Kiehl*, 183 Pa. 414.

⁸⁴ *Woodham v. Gelston*, 1 Johns. 134; *Beadle v. Whitlock*, 64 Barb. 287.

⁸⁵ *Greenfield Bank v. Leavitt*, 17 Pick. 1, 28 Am. Dec. 268. In this case it was held that if return of the property is obtained by the offer and payment of a reasonable reward, this amount, with interest from the time of payment, is to be deducted from the mitigating value of the property restored. And the court say: "It is well settled that if property for which an action is brought should be returned to and

received by the plaintiff it shall go in mitigation of damages. But if it become subjected to a charge after the conversion and before it was returned; if, for example, the conversion were of a watch which the defendant threw into a well and the plaintiff hired a man to descend into the well and get it, the expense of reclaiming it should be deducted from the value when returned. It is the charge which regulates the damage. *Murray v. Burling*, 10 Johns. 176. As where one takes another's horse and leaves him at an inn and the owner reclaims him, subject to the charge for his keeping. The damages are for the injury suffered, notwithstanding the owner has regained his property."

⁸⁶ *Thompson v. Field*, — Tex. Civ. App. —, 164 S. W. 1115; *Alaska S. S. Co. v. Collins*, 62 C. C. A. 569, 127 Fed. 937. See § 1101.

⁸⁷ *Stevenson v. Whitesell*, 10 Pa. Super. Ct. 306.

⁸⁸ *Hughes v. Austin*, 12 Tex. Civ. App. 178; *Syson T. Co. v. Dickens*, 146 Ala. 471; *Texas & P. R. Co. v. Levi*, 59 Tex. 674. See § 1101.

disposing of its remains, after deducting such sum as was or might have been realized therefrom.⁸⁹

§ 1104. **Mitigation of damages.** Any appropriation of the property or its proceeds by the owner after the tortious taking is equivalent to a return to the extent that he thus gets the benefit of it. Whatever such benefit, it goes in mitigation. If returned at a different place the loss in value on that account must be compensated.⁹⁰ So if in consequence of the defendant's wrong a sale must be made the net proceeds are deducted by way of mitigation.⁹¹ And if the owner purchase the property at a sale made by the defendant or from his vendee at less than its value the amount paid on such purchase, instead of the value, will be considered in the estimate of damages,⁹² and the application of the amount paid by him on a judgment against him will make no difference with the measure of damages, for the seizure and sale being wrongful his purchase is not a consent to such application.⁹³ One whose property was wrongfully taken from him replevied it; but being nonsuited in the replevin suit the statutory judgment which the defendant in that action was entitled to claim was rendered against him for the value of the property. He thereupon sued in trespass for the taking of the property; and it was held that he was entitled to recover therein not only for its detention while the defendant had it, but also its value as assessed in favor of the defendant in the replevin suit.⁹⁴ After property has been removed from the owner's possession an unaccepted offer to return it in the condition in which it was when taken does not limit the recovery

⁸⁹ *Dean v. Chicago & N. R. Co.*, 43 Wis. 305.

⁹⁰ *Slaughter v. American Baptist P. Soc. (Tex. Civ. App.)*, 150 S. W. 224; *Paxson Co. v. Board of Chosen Freeholders*, 201 Fed. 1656; *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471; *Dennison v. Hyde*, 6 Conn. 507.

⁹¹ *Pacific Ins. Co. v. Conrad*, Bald 137; *Conrad v. Pacific Ins. Co.*, 6 Pet. 262, 8 L. ed. 392.

⁹² *Sprague v. Brown*, 40 Wis. 612; *Parkham v. McMurray*, 32 Ark.

261; *Baker v. Freeman*, 9 Wend. 236; *Hurlburt v. Green*, 41 Vt. 490; *Kline v. McCandless*, 139 Pa. 223; *Mitchell v. Corbin*, 91 Ala. 599. See § 1103.

The expense of repurchasing property is not the full measure of damages in favor of a merchant deprived of his goods. *McCauley v. Hoek*, 159 Mich. 570.

⁹³ *Parkham v. McMurray*, *supra*

⁹⁴ *Haviland v. Parker*, 11 Mich. 103.

to nominal damages. The owner waives nothing by standing on his legal rights.⁹⁵ This is the rule though the property has not been removed. In a recent case an attachment was levied upon goods while the owner was temporarily absent. On his return the officer in charge refused to allow him to exercise any control over them. The following day a tender of them was made to the owner, who refused to accept it. He was entitled to recover the full value of the goods at the time the attachment was made.⁹⁶ The right to refuse a tender is waived by filing a claim whereby the sale of attached property is stopped and an adjudication that it was not subject to attachment is secured; the damages recoverable are limited to the depreciation in the value of it while the suit was pending.⁹⁷

A wrong-doer cannot lessen his liability on account of expense incurred in selling the property of another or in connection with it.⁹⁸ Where the property is valuable for use while in the defendant's possession interest is not necessarily the compensation for the detention; the owner may recover what the use was worth; he is entitled to compensation for the value of such use.⁹⁹ If the defendant has made a profitable use of it he should not have any benefit from his own wrong, but that profit should inure to the owner.¹ The return of property, in whatever way it occurs, only goes in mitigation and no further than it operates to place the injured party in as good condition as before the trespass was committed. If the property has been injured in the taking or while in the defendant's possession, or its market value has declined the loss falls on him.² If the prop-

⁹⁵ *Kelly v. McDonald*, 39 Ark. 387.

⁹⁶ *Carpenter v. Dresser*, 72 Me. 377, 39 Am. Rep. 337.

⁹⁷ *Maxwell v. Speth*, 9 Ga. App. 745.

⁹⁸ *Lienkauf v. Morris*, 66 Ala. 406; *Dallam v. Fitler*, 6 W. & S. 323.

In *Luce v. Hoisington*, 56 Vt. 436, an ox unlawfully taken was returned. The value of its use, less

the expense of keeping it, measured the owner's damages.

⁹⁹ *Fanton v. Boomgaarden*, 111 Ill. App. 37; *Ewing v. Blount*, 20 Ala. 694; *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570; *Farrell v. Colwell*, 30 N. J. L. 123; *Fields v. Williams*, 91 Ala. 502.

¹ *Snydam v. Jenkins*, 3 Sandf. 620; *Beadle v. Whitlock*, 64 Barb. 287.

² *Lucas v. Trumbull*, 15 Gray 306;

erty was wilfully taken or has suffered any injury to affect its value the plaintiff is not bound to accept it in mitigation. If the plaintiff refuses to accept the property the defendant must preserve it so as to be continuously ready to restore it, otherwise he cannot claim in mitigation.³ The actual damages recoverable for the death of a dog are not mitigated because he was committing a trespass at the time he was killed and was, in the opinion of the defendant, then about to kill some of his animals.⁴ The title of property wrongfully taken may be shown to have been in another than the plaintiff in the action to recover for the trespass and that it has been delivered to the owner; but this mitigates the damages merely; it does not bar the action.⁵ The owner of growing crops which have been unlawfully levied upon, in consequence of which he and his children are deprived of profitable enjoyment, is not bound to mitigate the wrongdoer's liability by seeking employment elsewhere.⁶ A tenant whose dwelling has been made uncomfortable by a stranger to the premises is not bound to vacate it during the time he was liable for rent.⁷ Under a statute the conduct and reputation of the owner of chattels destroyed by a mob may be shown in mitigation.⁸ Where the contributory negligence of the plaintiff may diminish his recovery the damages must be apportioned in accordance with the degree thereof.⁹ It is not competent for a trespasser to prove in mitigation of damages that, while he had cut trees he was not entitled to cut, he had left others he was entitled to cut if, under his contract, he still has the right to cut the uncut trees.¹⁰

Ewing v. Blount, 20 Ala. 694; *Perham v. Coney*, 117 Mass. 102; *Barrelett v. Bellgard*, 71 Ill. 280; *McInvoy v. Dyer*, 47 Pa. 118; *Cernahan v. Chrisler*, 107 Wis. 645; *Stephenson v. Wright*, 111 Ala. 579; *People v. Crowe*, 130 Ill. App. 349.

³ *Howell v. Caryl*, 50 Mo. App. 440, 454.

⁴ *Ten Hopen v. Walker*, 96 Mich. 236, 35 Am. St. 598.

⁵ *La Page v. Hill*, 87 Me. 158.

Where liquors had been adjudged

to be forfeited and the defendant seized them in good faith only a nominal sum was recovered. *Plummer v. Harbut*, 5 Iowa 308.

⁶ *Brown v. Leath*, 17 Tex. Civ. App. 262.

⁷ *Vogel v. McAuliffe*, 18 R. I. 791.

⁸ *Stevens v. Anthony*, 82 Kan. 179.

⁹ *Atlantic C. L. R. Co. v. Weir*, 63 Fla. 69, 41 L.R.A.(N.S.) 307.

¹⁰ *Ellerbe v. Marion County Lumber Co.*, 99 S. C. 158.

§ 1105. Same subject; application of property to owner's benefit. The wrong-doer is entitled to no reduction from the damages for applying the property or its proceeds to the owner's benefit without his consent unless by execution of valid legal process or authority, which process must be executed in a legal manner.¹¹ In that case it is said his consent is implied. It would probably be quite as correct to say that in that instance his consent is unnecessary. The law has intervened and disposed of the property; and having rightfully appropriated it to pay a debt of the owner, he has recovered satisfaction for its value and ought not again to recover the same value.¹² If after the wrongful taking the property be seized to pay the owner's tax or debt and is so applied, that application of it will inure to the benefit of the tortious taker in mitigation of damages.¹³ This is the general doctrine, and applies whether the process on which the property is disposed of is for the satisfaction of a debt due the wrong-doer himself or a third person. It also applies where the taking is wrongful but becomes void because of irregularity in the subsequent proceedings.¹⁴ An important exception is made in New York, Michigan, and, perhaps, in Maryland. The wrong-doer cannot there, as the

¹¹ *Welsh v. Wilson*, 34 Minn. 92.

If goods are levied on as perishable and sold as such pursuant to an order of court the levying and selling officer is liable for only nominal damages, the goods not having been disturbed by the levy. *Central Nat. Bank v. Gallagher*, 163 Pa. 456.

¹² *Street v. Sinclair*, 71 Ala. 110; *Bates v. Courtwright*, 86 Ill. 518.

¹³ *Dailey v. Crowley*, 5 Lans. 301; *Pierce v. Benjamin*, 14 Pick. 356; *Lucas v. Trumbull*, 15 Gray 306; *Delano v. Curtis*, 7 Allen 470; *Perham v. Coney*, 117 Mass. 102; *Perkins v. Freeman*, 26 Ill. 477; *Hallett v. Novion*, 14 Johns. 273; *Cook v. Hartle*, 8 C. & P. 568; *Curtis v. Ward*, 20 Conn. 204; *Burn v. Mor-*

ris, 2 Cr. & M. 579; *Hepburn v. Sewell*, 5 Har. & J. 211; *Doolittle v. McCullough*, 7 Ohio St. 299; *Cook v. Loomis*, 26 Conn. 483; *Sprague v. Brown*, 40 Wis. 612; *Johannesson v. Borscheuseni*, 35 Wis. 131; *Cooper v. Newman*, 45 N. H. 339; *Stewart v. Martin*, 16 Vt. 397; *Montgomery v. Wilson*, 48 Vt. 616; *Clark v. Bates*, 1 Dak. 40; *Block v. Sweeney*, 63 Tex. 419; *Mississippi Mills v. Meyer*, 83 Tex. 433, quoting the text; *Grisham v. Bodman*, 111 Ala. 194.

¹⁴ *Cressey v. Parks*, 76 Me. 532; *Pierce v. Benjamin*, 14 Pick. 356. But it is otherwise in Vermont. *Hall v. Ray*, 40 Vt. 576, 94 Am. Dec. 440.

law is also in England, avail himself by way of mitigation of damages of any appropriation to the owner's benefit by seizure under legal process or otherwise without his consent where the process or appropriation is procured for the wrong-doer's benefit or for his debt, or by his agency or procurement for the debt of any other person.¹⁵ The death or disposal of an injured animal after the right of action accrued, but before action was brought, does not bar a recovery to the extent of its depreciation in value.¹⁶

§ 1106. **Damages against trespasser from the beginning.** Void process or any legal authority abused in the taking or subsequent treatment of property will not only afford no justification to the party acting under it, but he will be precluded, according to some courts, by his wrongful action from setting up any application of the property or money so obtained to the owner's benefit, without his consent, by way of mitigation of damages. Thus, in trespass for taking goods under process upon a regular judgment, but in a place to which the process did not run, the owner was permitted to recover the whole value, and not merely the damage sustained by the taking in a wrong place.¹⁷ In another case the defendant, who was landlord to the plaintiff, had, in order to make a distress, forcibly and illegally entered the demised premises and there seized the latter's goods. It was held that the plaintiff was entitled to recover the full value, and not that value minus the rent.¹⁸ Cockburn, C. J., said: "It must be taken that if a man under color of legal authority, as in the case of distress for rent, does that which makes him a trespasser *ab initio* he is in the same position as a stranger who, without any legal authority whatever, breaks into a house and seizes the goods of another.

¹⁵ *Wehle v. Butler*, 61 N. Y. 245; *Ball v. Liney*, 48 id. 6, 8 Am. Rep. 511; *Otis v. Jones*, 21 Wend. 394; *Sherry v. Schuyler*, 2 Hill 204; *Higgins v. Whitney*, 24 Wend. 379; *Wanamaker v. Bowes*, 36 Md. 42. See *Edmondson v. Nuttall*, 17 C. B. (N.S.) 280; *Swire v. Leach*, 18 id. 479; §§ 1138-1141.

¹⁶ *Burleigh v. Hines*, 124 Iowa 199.

¹⁷ *Sowell v. Champion*, 6 Ad. & E. 407. And see § 1240.

¹⁸ *Attack v. Bramwell*, 3 B. & S. 520; *Keen v. Priest*, 4 H. & N. 236; *Crowley v. Apted*, 14 New South Wales, L. R. 146.

* * * The defendant has taken the plaintiff's goods, it may be under color of legal authority, but in point of law he has taken them, not under a distress, but under a trespass, and it does not lie in his mouth to say that by taking them and appropriating a part of them in satisfaction of his rent he has *pro tanto* done good to the plaintiff. The man whose premises are broken into and whose goods have been seized has a right to say, 'Let me be put into the position in which I stood before your illegal act. I will not accept at your hands the benefit you say you have done me by it.' Crompton, J., was of the same opinion, and thus declared his view: "A landlord has by law the special privilege of paying himself his rent by seizing his tenant's goods; and where he takes that proceeding in a way not authorized he becomes a trespasser from the beginning; all the acts he does are trespasses; he is a trespasser, not only in entering, but in seizing and disposing of the goods taken, and the ordinary rule is that the injured party shall recover the full value. * * * This case is a bare tort, under color of which the defendant has helped himself to the plaintiff's goods, and he has no more right to put against their value the rent due to him than he would to put any other debt. The interest of the tenant was the real value of the goods; the plaintiff had no real charge or lien upon them, and therefore that value was the measure of damages."¹⁹

§ 1107. **Same subject.** If a defendant is a trespasser from the beginning his defense wholly fails, and he is liable for the same sum in damages which he would be compelled to pay if

¹⁹ White v. Binstead, 13 C. B. 303, 76 Eng. C. L. 303; Gillard v. Brittan, 8 M. & W. 575. Compare Chinnery v. Viall, 5 H. & N. 288; Mickles v. Miles, 1 Grant 320.

As to what is such an abuse of process as will make one a trespasser from the beginning, see note to Barrett v. White, 11 Am. Dec. 365.

An officer who has acted under regular process in seizing property

will not by reason of his disposition or management of it before sale become a trespasser from the beginning unless he commits a substantial violation of the legal rights of a party in such a way as to show a gross or wanton disregard of duty. Ladd v. Newell, 34 Minn. 107; Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75; Barrett v. White, 3 N. H. 210, 14 Am. Dec. 352.

he had gone on without any precept or pretense of authority and done all the acts proved upon him.²⁰ But an abuse of process only subjects to a loss of the protection of that particular process and of the rights depending on it. If property is lawfully attached no abuse of execution will make the officer chargeable as a trespasser in making the attachment; and hence the damages would be assessed on the basis of the attached property being subject to the lien.²¹ So when a landlord who had a right to distrain growing crops made such a distraint, but subsequently illegally sold them, and they were harvested and taken away by the purchaser, his illegal act of sale did not affect his lien, and as no actual damage resulted from the sale and harvesting the tenant was only entitled to nominal damages.²² If the abuse of authority or process is only an excess as to a separable part of the action under it the person who so acts will be a trespasser from the beginning only as to that part. Where the defendant drew beer out of one of several barrels that he had taken he was a trespasser only as to that barrel.²³ And where six looms were inventoried with other property in a distress for rent and the defendant had no authority to take them, taking them did not affect his authority in respect to the other property.²⁴

A trespasser may also show in mitigation of the damages that the plaintiff was not the owner of the property taken, and that after the taking it was reclaimed by the true owner or has been taken on legal process against him;²⁵ also, that since the taking the right of the plaintiff in the property has ceased.²⁶ The facts and circumstances attending the trespass, as has

²⁰ Per Green, J., *Barrett v. White*, *supra*; *Thornton-T. M. Co. v. Bretherton*, 32 Mont. 80, quoting the text.

²¹ *Heald v. Sargeant*, 15 Vt. 506, 40 Am. Dec. 694. See *Van Brunt v. Schenck*, 11 Johns. 377; *Osgood v. Carver*, 43 Conn. 24.

²² *Proudlove v. Twemlow*, 1 Cr. & M. 326.

²³ *Dod v. Monger*, 6 Mod. 215.

²⁴ *Harvey v. Pocock*, 11 M. & W.

740; *Keen v. Priest*, 4 H. & N. 236; *Rowley v. Rice*, 11 Mete. (Mass.) 337.

²⁵ *Squire v. Hollenbeck*, 9 Pick. 551, 20 Am. Dec. 506; *Hanson v. Herrick*, 100 Mass. 323.

²⁶ *Id.*; *Perry v. Chandler*, 2 Cush. 237; *Borlander v. Gentry*, 36 Cal. 110, 95 Am. Dec. 162; *Wanamaker v. Bowes*, 36 Md. 42; *Brewer v. Dew*, 11 M. & W. 625; *Criner v. Pike*, 2 Head 398.

been stated, may always be proved that the jury may understand its intrinsic character; to enable the plaintiff to show aggravations and bad motive; and to enable the defendant to controvert these; but the defendant, if guilty of the trespass, is bound to make reparation for the actual injury. Absence of bad motive and of all aggravations cannot relieve him from making full compensation for property taken, destroyed or injured.²⁷ An admission of counsel on the trial of an action of trespass that the defendant acted without malice will preclude the plaintiff from claiming vindictive damages; and therefore evidence on the part of the defendant in the nature of justification of his tortious act is inadmissible by way of mitigation.²⁸ Evidence in respect to the motive by which the defendant was influenced is only material on his part when it is introduced to repel an attempt by the plaintiff to recover exemplary damages.²⁹

²⁷ Harker v. Dement, 9. Gill 7.

erton, *supra*, quoting much of this section.

²⁸ Hoyt v. Gelston, 13 Johns. 141, 561; Thornton-T. M. Co. v. Breth-Suth. Dam. Vol. IV.—35.

²⁹ McCombie v. Davies, 6 East 538.

CHAPTER XXVIII.

CONVERSION.

- § 1108. The action of trover; who may bring.
1109. The general rule of damages; exception as to place of conversion.
1110. Same subject; liability of purchaser; effect of wilfulness.
1111. Other rules of damages in particular states.
1112. Time of conversion.
1113. Proof of value.
1114. Same subject; fixtures.
1115. Interest and value of use of property.
1116. Recovery for property subject to sale.
1117. Damages if property without market value.
1118. Damages if property of fluctuating value.
1119. Same subject; criticism and modification of the rule.
1120. Same subject; conflict in New York cases.
1121. Same subject; Pennsylvania rule.
1122. Same subject; Massachusetts rule.
1123. Same subject; English, Canadian and Australian cases.
1124. Same subject; rule in North Carolina.
1125. Departure from general rule sometimes justifiable.
- 1126-1128. Recovery where value of property enhanced by defendant.
1129. Special or consequential damages.
1130. Attorney's fees.
1131. Exemplary damages.
1132. Conversion of money securities.
1133. Conversion of insurance policies.
1134. Conversion of deeds, etc.
1135. Conversion of shares of stock.
- 1136, 1137. Recovery limited to plaintiff's interest.
- 1138-1141. Mitigation of damages.
1142. Plaintiff's duty to mitigate damages.

§ 1108. The action of trover; who may bring. The common-law action of trover may be brought against any person who has had in his possession, by any means whatever, the personal property of another and sold or used the same without the consent of the owner, or refused to deliver it when demanded.¹

¹ Merchants' Nat. Bank v. Williams, 110 Md. 334. See Semon v. Adams, 79 Conn. 81.

Where the conversion consists of

the wrongful assumption of dominion over the property of another in subversion and denial of his rights, the right of action is complete with-

The injury is done by the conversion and by depriving the plaintiff of his property; that is the gist of the action; the statement of the finding or trover is now immaterial and not traversable; the fact of conversion does not necessarily import an acquisition of property by the defendant.² Lord Mansfield thus defined the action: "In *form* it (i. e., the trover) is a fiction; in *substance* it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use; the form supposes that the defendant might have come lawfully by it; and if he did not, yet by bringing this action the plaintiff waives the trespass; no damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *malificium*, and to entitle the plaintiff to recover two things are necessary: first, property in the plaintiff; secondly, a wrongful conversion by the defendant."³

The action lies only for property of a personal nature; not only that which is tangible, but all property of that nature which may be converted; as for paper representatives of value, choses in action and corporate stock and money.⁴ It is based upon title; the plaintiff must be the general owner or have some special property in the subject of the action; he must have

out making a demand. *Boutwell v. Parker*, 124 Ala. 341. It is not affected by the application of the proceeds of the property to the plaintiff's indebtedness. *Smith v. Hilton*, 147 Ala. 642.

² 1 Chitty, Plead. 146; *Roper v. G. Co. v. Faver*, 8 Ga. App. 178.

The owner of realty may elect to recover the value of part of it as personally after it has been removed. *Hunt v. Boston*, 183 Mass. 303.

³ 1 Chitty, Plead. 146; *Southern Exp. Co. v. Sinclair*, 130 Ga. 372; *Merchants & M's T. Co. v. Moore*, 124 Ga. 482; *Byrne v. Weidenfeld*, 113 App. Div. (N. Y.) 451; *Cooper v. Chitty*, 1 Burr. 31.

⁴ *Morrin v. Manning*, 205 Mass.

205; *Thompson v. Carter*, 6 Ga. App. 604; *Jones v. Ortel*, 114 Md. 205; *Herriek v. Humphrey H. Co.*, 73 Neb. 809, 119 Am. St. 917; *Vroom v. Sage*, 100 App. Div. (N. Y.) 285; *Ayres v. French*, 41 Conn. 151; *Payne v. Elliot*, 54 Cal. 341, 35 Am. Rep. 80; *McAllister v. Kuhn*, 96 U. S. 87, 24 L. ed. 615, 1 Utah 273.

The propriety of this form of action for the conversion of shares of stock is denied only in Pennsylvania. *Cook on Stock*, etc. (5th ed.), § 576. And there it lies for the conversion of certificates of stock. *Sewall v. Lancaster Bank*, 17 S. & R. 285; *Neiler v. Kelley*, 69 Pa. 403.

also the actual, or a right to its present possession at the time of the conversion.⁵ The general rule is that one of two tenants in common cannot maintain trover unless the possession of the co-owner results in the destruction of the property or such a hostile appropriation of it as to exclude, destroy or ignore the

⁵ *Dixon C. Co. v. Paul*, 93 C. C. A. 204, 167 Fed. 784; *Zimmerman Mfg. Co. v. Dunn*, 163 Ala. 272; *Holman v. Ketchum*, 153 Ala. 360; *Stafsky v. Southern R. Co.*, 143 Ala. 272; *Himmelman v. Des Moines Ins. Co.*, 132 Iowa 668; *Paine v. British-B. M. Co.*, 41 Mont. 28; *Glass v. Basin, etc. M. Co.*, 31 Mont. 21; *Johnson v. Blaney*, 198 N. Y. 312; *Vinson v. Knight*, 137 N. C. 408; *White v. Bonney*, 110 Va. 864; *Smith v. Plomer*, 15 East 607; *Fairbank v. Phelps*, 22 Pick. 535; *Burton v. Tannehill*, 6 Blackf. 470; *Caldwell v. Cowan*, 9 Yerg. 262; *Lewis v. Mobley*, 4 Dev. & Batt. 323, 34 Am. Dec. 379; *Grant v. King*, 14 Vt. 367; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Curd v. Wunder*, 5 Ohio St. 92; *Thayer v. Hutchinson*, 13 Vt. 507, 37 Am. Dec. 607; 2 Greenlf. Ev., § 640; *Kennett v. Peters*, 54 Kan. 119, 45 Am. St. 274; *Hodge v. Eastern R. Co.*, 70 Minn. 193; *Latussek v. Davies*, 79 Minn. 279; *London v. Miller*, 19 Tex. Civ. App. 446, quoting the text; *Wright v. Skinner*, 34 Fla. 453.

This rule may be varied by an admitted usage among men engaged in a certain occupation. Thus, Judge Lowell held that where a boat's crew from a whale ship pursued and struck a whale in the Arctic ocean, and the harpoon, with the line attached to it, remained in the whale, but became disconnected from the boat, that title to the whale vested in such crew, though the crew from

another ship pursued and captured the whale. The rights of the first-mentioned crew were promptly asserted. *Swift v. Gifford*, 2 Low. 100; *Ghen v. Rich*, 8 Fed. 159 (sustaining a custom prevailing in the eastern part of Massachusetts Bay).

If a whale is killed and left with unequivocal marks of appropriation and all is done that is practicable under the circumstances the possession is sufficient. *Taber v. Jenny*, 1 Sprague 315.

A carrier which has converted property delivered to it for transportation cannot require the tender or payment of charges as a condition of maintaining an action against it. *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 21 L.R.A. 117, 34 Am. St. 579.

A lien upon property or a mere right to charge it under a statute will not support trover; the plaintiff must have title, general or special. *Jordan v. Lindsay*, 132 Ala. 567, overruling *Gardner v. Head*, 108 Ala. 619, and *Ragsdale v. Kinney*, 119 Ala. 454.

The brood of all tame and domestic animals belongs to the owner of the dam; hence where cattle are converted their owner may recover the value of their increase in existence at the time of the demand and conversion. *Arkansas C. Co. v. Mann*, 130 U. S. 69, 32 L. ed. 854, 24 Fed. 261.

A petition brought in the name of one who was agent for the owner

rights of the other tenant therein.⁶ But the rule has no application where the property held in common is alike in quality and value, and divisible by weight, tale or measure if the tenant in possession refuses to divide it or converts it to his own use.⁷ By recovery of the value and satisfaction of the judgment the title is transferred to the defendant as of the date of the conversion.⁸

§ 1109. The general rule of damages; exception as to place of conversion. The general rule of damages in England and in this country is the market value of the property at the time and place of conversion if it had such value; and in America, at least, interest is generally added as matter of law.⁹ This

of the chattels, but who had no general or special property therein, cannot be changed so as to be in the name of the plaintiff for the use of the owner. *Mitchell v. Georgia & A. R. Co.*, 111 Ga. 760, 51 L.R.A. 622.

The right to possession, without title, is enough. *Gordon v. Atlantic C. L. R. Co.*, 7 Ga. App. 354.

⁶ *Osborn v. Schenck*, 83 N. Y. 201; *Hudson v. Swan*, id. 552.

⁷ *Stamps v. Thomas*, 7 Ala. App. 19 L.R.A.(N.S.) 1201; *Gates v. Bowers*, 169 N. Y. 14, 88 Am. St. 622; *Weeks v. Hackett*, 104 Me. 264, 530.

⁸ *Third Nat. Bank v. Rice*, 23 L.R.A.(N.S.) 1167, 88 C. C. A. 640, 161 Fed. 822; *Atchison, etc. R. Co. v. Schriver*, 72 Kan. 550, 4 L.R.A.(N.S.) 1056; *Singer S. M. Co. v. Yaduskie*, 11 Pa. Dist. 571; *Clark v. Clement*, 75 Vt. 417; *Morris v. Robinson*, 3 B. & C. 196; *Hepburn v. Sewell*, 5 Har. & J. 211, 9 Am. Dec. 512; *Arnold v. Kelly*, 4 W. Va. 642; *Osterhout v. Roberts*, 8 Cow. 43; *Stirling v. Garritee*, 18 Md. 468; *Wright v. Walker*, Mart. & Hayw. 167; *Brinsmead v. Harrison*, L. R. 6 C. P. 584; *Johnson v. Dun*, 75 Minn. 533.

Some cases in Maine have laid down the rule that the recovery of judgment vested title in the wrongdoer, but it is said that the overwhelming weight of authority overrules them and declares that nothing short of a satisfaction of the judgment transfers the title. *Jones v. Cobb*, 84 Me. 153, citing *Murray v. Lovejoy*, 2 Cliff. 191.

Settling a trespass committed by cutting trees does not transfer the title to the trees cut. *Betts v. Church*, 5 Johns. 348.

⁹ *Robinson Min. Co. v. Riepe*, 37 Nev. 27; *Torp v. Clemons*, 37 Nev. 474; *Martinez v. Vigil*, 19 N. M. 306, L.R.A. 1915B 291, citing the text; *Gunstone v. Chicago, M. & P. S. R. Co.*, 79 Wash. 629, 52 L.R.A.(N.S.) 392; *Baker v. Spruance*, — Del. Super. Ct. —, 91 Atl. 203; *High v. State Board of Education*, 66 Fla. 175; *O'Neill v. Lindsay Light Co.*, 181 Ill. App. 700; *Northwestern Grain Co. v. Kerr Gifford Warehouse Co.*, 76 Wash. 689 (interest not mentioned in the preceding four cases); *Doyle v. Burns*, 123 Iowa 488; *Whitfield v. Whitfield*, 40 Miss. 352; *Bickell v. Colton*, 41 id. 368; *Hoskins v. Paddock*, 153 Ky. 728 (interest is

rule is based on the assumption that such value is beneficially

discretionary with the jury); *Red Diamond C. Co. v. Steidemann*, 169 Mo. App. 306; *Hautala v. Dover*, 176 Mich. 336; *First Nat'l Bank of Lawton v. Thompson*, 41 Okla. 88; *Kenel v. Atlas Elevator Co.*, 34 S. D. 101; *Texas Warehouse Co. v. Imperial Rice Co.*, — Tex. Civ. App. —, 164 S. W. 396; *First Nat. Bank v. Mineola S. Bank* (Tex. Civ. App.), 155 S. W. 603; *Unfried v. Libert*, 23 Idaho 603; *Leurcy v. Bank*, 131 La. 30; *Fetzer v. South Side L. Co.*, 202 Fed. 878; *Vanderbilt v. Ocean S. S. Co.*, 132 C. C. A. 226, 215 Fed. 886; *Drumm-F. C. Co. v. Edmisson*, 208 U. S. 534, 52 L. ed. 606 (ruled under an Oklahoma statute); *Montana M. Co. v. St. Louis M. & M. Co.*, 105 C. C. A. 343, 183 Fed. 51; *Beechwood I. Co. v. American I. Co.*, 176 Fed. 435; *Massey v. Fain*, 1 Ala. App. 424; *American S. F. Co. v. Futrall*, 73 Ark. 464, 108 Am. St. 64; *Sigel-C. L. S. Co. v. Holly*, 44 Colo. 580; *Woodworth v. Gorsline*, 30 Colo. 186, 58 L.R.A. 417; *Aldrich v. Higgins*, 77 Conn. 370 (interest not mentioned); *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. 314; *Robinson v. Alexander*, 141 Ill. App. 192; *Wenham v. Wilson*, 129 id. 553; *Morley v. Roach*, 116 id. 534; *Reebie v. Brackett*, 109 id. 631 (interest not specified); *Zelenka v. Port Huron Mach. Co.*, 144 Iowa 592; *Missouri Pac. R. Co. v. Peru-Van Zandt I. Co.*, 73 Kan. 295, 6 L.R.A.(N.S.) 1058, 117 Am. St. 468; *Hawkins F. Co. v. Morris*, 143 Ky. 738; *Merriwether v. Bell*, 139 Ky. 402, 139 Am. St. 488; *Davis v. Gott*, 130 Ky. 486; *Aultman v. Mcade*, 121 Ky. 241; *Merchants' Nat. Bank v. Williams*, 110 Md. 334; *Swartz v. Gottlieb*, etc. B. Co., 109 Md. 393; *Seaboard*

A. L. R. Co. v. Phillips, 108 Md. 285; *Pierce v. O'Brien*, 189 Mass. 58; *Lorain S. Co. v. Norfolk & B. St. R. Co.*, 187 Mass. 500; *Hunt v. Boston*, 183 Mass. 303; *Johnson v. Gillen*, 140 Mich. 152; *Sutton v. Great Northern R. Co.*, 99 Minn. 376; *Simpson v. Bantley*, 142 Mo. App. 490; *Meloon v. Read*, 73 N. H. 153; *McIntyre v. Whitney*, 139 App. Div. (N. Y.) 557; *Rosenkranz v. Jacobowitz*, 50 N. Y. Misc. 580; *Corn Exch. Bank v. Peabody*, 111 App. Div. (N. Y.) 553; *Machine Co. v. Chalkley*, 143 N. C. 181; *Singer v. Pearson P. Co.*, 58 Ore. 526; *Durham v. Commercial Nat. Bank*, 45 Ore. 385, citing the text; *Withrow v. Walker*, 41 Pa. Super. Ct. 155 (interest is within the discretion of the jury); *Singer S. M. Co. v. Yaduskie*, 11 Pa. Dist. 571; *McGill v. Chilowee L. Co.*, 111 Tenn. 552; *Baldwin v. Davidson* (Tex. Civ. App.), 127 S. W. 562; *Werner S. Co. v. Pickering*, 55 Tex. Civ. App. 632; *Davidson v. Oberthier*, 42 Tex. Civ. App. 337; *McSorley v. Bullock*, 62 Wash. 140; *Shields v. Doty L. & S. Co.*, 48 Wash. 679; *Kellogg v. Malick*, 125 Wis. 239; *Lamb v. Kincaid*, 38 Can. Sup. Ct. 516 (in the absence of wilfulness); *Clisdell v. Kingston & P. R. Co.*, 18 Ont. L. R. 169 (interest not allowed); *Unfried v. Libert*, 20 Idaho 708; *Dollif v. Robbins*, 83 Minn. 498; *State ex rel. v. Fidelity & D. Co.*, 94 Mo. App. 184; *Woods v. Nichols*, 22 R. I. 225; *Zindorf v. Western American Co.*, 26 Wash. 695; *Robinson v. Hart-ridge*, 13 Fla. 501; *Spencer v. Vance*, 57 Mo. 427; *Cole v. Ross*, 9 B. Mon. 393, 50 Am. Dec. 517; *Silva v. Homen*, 9 Hawaii 14; *Gerrkins v. Kentucky S. Co.*, 23 Ky. L.

equal to the property itself, and that interest compensates for the delay in payment of that value and the value of the use of

Rep. 2415; *Briscoe v. McElween*, 43 Miss. 556; *Dixon v. Caldwell*, 15 Ohio St. 412, 86 Am. Dec. 487; *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736; *Watt v. Potter*, 2 Mason 77; *Bourne v. Ashley*, 1 Low. 27; *Jones v. Allen*, 1 Head 626; *Allen v. Dykers*, 3 Hill 593; *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498; *Moore v. Aldrich*, 25 Tex. Sup. 276; *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *Final v. Backus*, 18 Mich. 218; *Barry v. Bennett*, 7 Metc. (Mass.) 354; *Falk v. Fletcher*, 18 C. B. (N.S.) 403; *Selkirk v. Cobb*, 13 Gray 313; *Agnew v. Johnson*, 22 Pa. 471, 62 Am. Dec. 303; *Phillips v. Speyers*, 49 N. Y. 653; *Tying v. Commercial W. Co.*, 58 id. 308; *Andrews v. Durant*, 18 id. 496; *Ormsby v. Vermont C. M. Co.*, 56 id. 623; *Douglass v. Kraft*, 9 Cal. 562; *Yater v. Mullen*, 24 Ind. 277; *Dillenback v. Jerome*, 7 Cow. 298; *Rensselaer G. F. Co. v. Reid*, 5 Cow. 587; *Dennis v. Barber*, 6 S. & R. 420; *Hurd v. Hubbell*, 26 Conn. 389; *Cook v. Loomis*, id. 483; *Lyon v. Gormly*, 53 Pa. 261; *Stirling v. Garritce*, 18 Md. 468; *O'Meara v. North American M. Co.*, 2 Nev. 112; *Carlyon v. Lannan*, 4 Nev. 156; *Boylan v. Huguet*, 8 Nev. 345; *Homer v. Hathaway*, 33 Cal. 117; *Page v. Fowler*, 39 id. 412, 2 Am. Rep. 462; *Riley v. Martin*, 35 Ga. 136; *Grant v. King*, 14 Vt. 367; *Crumb v. Oaks*, 38 id. 566; *Kennedy v. Strong*, 14 Johns. 128; *Ryburn v. Pryor*, 14 Ark. 505; *Hatcher v. Pelham*, 31 Tex. 201; *Jenkins v. McConico*, 26 Ala. 213; *Robinson v. Barrows*, 48 Me. 186; *Sanders v. Vance*, 7 T. B. Mon. 209, 18 Am. Dec. 167; *Clark v. Whitaker*, 19

Conn. 319, 48 Am. Dec. 160; *Linville v. Black*, 5 Dana 177; *Commercial Bank v. Jones*, 18 Tex. 811; *Davis v. Fairclough*, 63 Mo. 61; *Daniel v. Holland*, 4 J. J. Marsh. 26; *King v. Ham*, 6 Allen 298; *Lillard v. Whitaker*, 3 Bibb 92; *Scully v. Briddle*, 2 Wash. C. C. 150; *Williams v. Crum*, 27 Ala. 468; *Kennedy v. Whitwell*, 4 Pick. 466; *Linam v. Reeves*, 68 Ala. 89; *Jones v. Horn*, 51 Ark. 19, 14 Am. St. 17; *Brasher v. Holtz*, 12 Colo. 201; *Ford v. Roberts*, 14 Colo. 291; *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1; *Brewster v. Van Liew*, 119 Ill. 554, 59 Am. Rep. 823; *First Nat. Bank v. Strong*, 28 Ill. App. 325; *Vancleave v. Beach*, 110 Ind. 269; *Thew v. Miller*, 73 Iowa 742; *Simpson v. Alexander*, 35 Kan. 225; *Chamberlain v. Worrell*, 38 La. Ann. 347; *First Nat. Bank v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198; *Hoopper v. Haines*, 71 Md. 64, 20 id. 159; *Forbes v. Boston & L. R.* 133 Mass. 154; *Brown v. Murdock*, 140 id. 314; *Jellett v. St. Paul, etc. R. Co.*, 30 Minn. 265; *Black v. Robinson*, 62 Miss. 68; *Nance v. Metcalf*, 19 Mo. App. 183; *Barlass v. Braash*, 27 Neb. 212; *Beede v. Lamprey*, 64 N. H. 510, 10 Am. St. 426; *Railroad Co. v. Hutchins*, 37 Ohio St. 282; *Blum v. Merchant*, 58 Tex. 400; *Miller v. Jannett*, 63 id. 82; *Crampton v. Valido M. Co.*, 60 Vt. 291, 1 L.R.A. 120; *Arkansas C. Co. v. Mann*, 130 U. S. 69, 32 L. ed. 854; *Ghen v. Rich*, 8 Fed. 159; *Neiswanger v. Squier*, 73 Mo. 192; *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762; *Perkins v. Marrs*, 15 Colo. 262; *United States v. Pine River L. & I. Co.*, 32 C. C. A. 406,

the property.¹⁰ This assumption is more particularly true where the property converted is marketable goods and commodities which can be readily bought and sold at prices that are easily ascertained and which are subject to but slight fluctuations.¹¹ If there were no fluctuations it would be immaterial to the equivalence of compensation when the value is taken, except as to interest. But there is a logical as well as a legal relation between the conversion and the assessment of value to require them to be coincident; a natural connection between the wrong done and the retributive or compensatory assessment of

89 Fed. 907; Hanlon v. O'Keefe, 55 Mo. App. 528; Hannan v. Connett, 10 Colo. App. 171; Sutton v. Dana, 15 Colo. 98; Sylvester v. Craig, 18 Colo. 44; Wright v. Skinner, 34 Fla. 453, citing the text; Cassidy v. Elk Grove L. & C. Co., 58 Ill. App. 39; Neeb v. McMillan, 98 Iowa 718; Gensburg v. Marshall Field & Co., 104 Iowa 599; Wing v. Milliken, 91 Me. 387, 64 Am. St. 238; Noyes v. Stone, 163 Mass. 490; Thomas Mfg. Co. v. Huff, 62 Mo. App. 124; Baum I. Co. v. Union Sav. Bank, 50 Neb. 387; Maul v. Drexel, 55 Neb. 446; Brooks v. Rogers, 101 Ala. 111; Perkins v. Ewan, 66 Ark. 175; Summers v. Heard, 66 Ark. 550; Craufurd v. Smith, 93 Va. 623; Fleischmann v. Samuel, 18 App. Div. (N. Y.) 97; Robinson v. Peru P. & W. Co., 1 Okla. 140; Drennen v. Charles, 12 Pa. Super. Ct. 476; Blood v. Erie Dime Sav. & L. Co., 164 Pa. 95; Woods v. Nichols, 21 R. I. 537, 48 L.R.A. 773; Gillespie v. Evans, 10 S. D. 234; Norwood v. Interstate Nat. Bank, 92 Tex. 268; Gresham v. Island City Sav. Bank, 2 Tex. Civ. App. 52; Casey v. Chaytor, 5 Tex. Civ. App. 385; Hull v. Davidson, 6 Tex. Civ. App. 588; La Chapelle v. Warehouse & B's S. Co., 95 Wis. 518; Henderson v. Williams, [1895] 1 Q. B. 521; Davey

v. Bank, 9 Vict. L. R. (law) 252; Haddow v. Duke Co., 18 id. 155; Hoyt v. Fuller, 43 C. C. A. 466, 104 Fed. 192, citing the text; Downing v. Outerbridge, 25 C. C. A. 244, 79 Fed. 931; Hand v. Scodeletti, 128 Cal. 674. See Georgia, F. & A. R. Co. v. Blish Milling Co., 15 Ga. App. 142; Spaar v. Slakis, 180 Ill. App. 304; Jackson v. Taylor, — Tex. Civ. App. —, 166 S. W. 413 (interest not mentioned); Metcalf v. Collinson, 95 Minn. 238; § 1115 as to interest.

The highest price at which the property could have been sold at the time it was converted is not the measure of damages. Hamburg Bank v. George, 92 Ark. 472.

¹⁰ Hofreiter v. Schwabland, 72 Wash. 314; Drumm-F. Com. Co. v. Edmisson, 17 Okla. 344; Ewing v. Blount, 20 Ala. 694; Simpson v. Alexander, 35 Kan. 225; Lack v. Brecht, 166 Mo. 242 (compare Meyer v. Phoenix Ins. Co., 95 Mo. App. 721, which decides that interest is not recoverable as matter of right); Cutler v. James Goold Co., 43 Hun 516; § 1115. See Shepard v. Pratt, 16 Kan. 209, as to the rule of pleading which warrants the recovery of interest.

¹¹ Bank v. Reese, 26 Pa. 143.

damages; therefore the value should be ascertained at the time of the conversion. This rule was applied where coin was converted at a time when legal tender notes were far below par; the wrong-doer was answerable in damages for the amount he realized by its sale.¹² The plaintiff's recovery was thus larger than it would have been in an action for money had and received, because if the coin had been regarded as merchandise such an action could not be maintained; if as money, it was so many dollars and no more.¹³ The general rule of damages stated applies where an agent unauthorizedly sells property to himself at the price he was empowered to sell to a third person. The election of the principal to sue the agent on the implied contract of purchase is not a ratification of the latter's act in purchasing so as to limit the recovery to the price at which he was authorized to sell.¹⁴ The fact that the goods converted were sold under a mortgage which provided for their sale does not entitle the wrong-doer to lessen his liability for their value by deducting the expenses of the sale. The value of the goods was that sum of money for which they could be exchanged or sold in bulk, and the owner is not entitled to less because the sale was made at retail; it might be otherwise if he sought to recover the retail price of the goods.¹⁵ Where the conditional sale of chattels amounts to a sale with the mortgage back for the purchase price, and the mortgagee, having lawfully obtained possession of the property, sells it without notice to the mortgagor, he is liable for the actual value of the chattels after deducting the unpaid portion of the purchase money.¹⁶ The plaintiff cannot recover the value of the property to him if that was other than its general value;¹⁷ nor the value of its use in

¹² *Bank v. Burton*, 27 Ind. 426; *Coffey v. National Bank*, 46 Mo. 140, 2 Am. Rep. 488.

¹³ *Frothingham v. Morse*, 45 N. H. 545.

¹⁴ *Anderson v. First Nat. Bank*, 5 N. D. 451.

The recovery for property lost by negligence must be governed by its

value when the loss occurred and interest thereon. *Hattiesburg C. Co. v. Johnson*, 81 Miss. 731.

¹⁵ *Perkins v. Ewan*, 66 Ark. 175.

¹⁶ *Montenegro-Riehm Music Co. v. Beuris*, 160 Ky. 557.

¹⁷ *Endel v. Norris*, 15 Tex. Civ. App. 140. See § 1113,

addition to the value.¹⁸ The value of the converted property is not always determined by its value at the place where the wrong was done. Where a carrier converted coal consigned to the plaintiff the recovery was measured by its value at the place to which it was consigned, less cost of transportation, if the plaintiff was liable therefor.¹⁹ As against a railroad company having a right of way over land and to use materials thereon for the purposes of its road the value of sand excavated from its right of way and loaded on its cars is to be ascertained at the place where it was sold.²⁰ The general rule as to the measure of damages has been varied where the defendant converted a house he had occupied; he was liable for the rent during the time of his occupancy and for its value when it was removed.²¹ Where crops are converted their value, and not the rental value of the land on which they were grown, measures the recovery.²² The general rule of damages applies regardless of whether the action is in tort or on contract.²³

§ 1110. Same subject; liability of purchaser; effect of wilfulness. The conversion may occur, first, by a wrongful taking; second, by a wrongful use or appropriation after obtaining possession lawfully; and third, by a wrongful detention. To be a certain legal measure of damages it should be applied inflexibly to the first act of conversion, especially if there be no subsequent pursuit of the property or assertion of right to it in specie. No change of the property by the wrong-doer should suffice to give the owner a new cause of action, or a new date for the valuation of the property.²⁴ After conversion a sale

¹⁸ McGowan v. Lynch, 151 Ala. 458.

¹⁹ Blackmer v. Cleveland, etc. R. Co., 101 Mo. App. 557.

²⁰ Nashville, etc. R. Co. v. Karthaus, 150 Ala. 633.

²¹ Cavins v. Trice, 55 Tex. Civ. App. 533.

²² Hatch v. Luckman, 118 N. Y. Supp. 689.

²³ McIntyre v. Whitney, 139 App. Div. (N. Y.) 557, affirmed, no opinion, 201 N. Y. 526.

²⁴ See Baltimore M. Ins. Co. v. Dalrymple, 25 Md. 269; Dows v. National Bank, 91 U. S. 618, 23 L. ed. 214; Tome v. Dubois, 6 Wall, 548, 18 L. ed. 943; Newman v. Kane, 9 Nev. 234; Foote v. Merrill, 54 N. H. 490; O'Meara v. North American M. Co., 2 Nev. 112; Robinson v. Barrows, 48 Me. 186.

A departure from this rule has been coincident with or the occasion of the conflict of decision relative to the measure of damages. See

by the defendant at a price greater than the value at the time thereof should not change the rule; and it has been held that it does not.²⁵ And it is equally the rule to take the price at the time of the conversion when there is a subsequent decline in the value.²⁶ It was formerly the rule in Texas that the value of the property is the measure of damages though the owner purchased it at a sale made after the conversion.²⁷ This question came under review in one of the courts of civil appeals, with the result that the rule stated, after a full examination of the authorities, was considered erroneous.²⁸ This view was approved by the supreme court, which overruled the cases to

Ellis v. Wire, 33 Ind. 127, 5 Am. Rep. 189; *Final v. Backus*, 18 Mich. 218. In the latter case trover was brought for saw logs cut from timber on the plaintiff's land and transported to another county where they were sawed into lumber. Cool-ey, C. J., said: "The actual change in the character of the property appears to have taken place when they were manufactured into lumber there; and although the owner of the land from which they were taken might have treated their removal from the land as a conversion, he was not compellable to do so; but might have followed the logs and reclaimed them at Saginaw. This being so, the plaintiff had a right to treat the time of the manufacture of the logs into lumber as the period of conversion, and to recover their value accordingly." This reasoning favors the recovery of an intermediate value and without restriction of time if the wrong-doer changes the property or from time to time exercises some new dominion over it which alone would suffice to constitute a conversion.

If property is placed in the hands of a receiver any damage occurring to it thereafter must be recovered from him. *Tootle v. Kent*, 12 Okla.

674; *Aylesbury M. Co. v. Fitch*, 22 Okla. 475, 23 L.R.A. (N.S.) 573.

²⁵ *Kennedy v. Whitwell*, 4 Pick. 466; *Baker v. Wheeler*, 8 Wend. 508; *Whitehouse v. Atkinson*, 3 C. & P. 344.

²⁶ *Devlin v. Pike*, 5 Daly 85; *Washburn v. Carthage Nat. Bank*, 86 Hun 396, affirmed without opinion, 155 N. Y. 690; *Simpson v. Bantley*, 142 Mo. App. 490. In this case a mortgagee advertised and sold property under his mortgage and sought to limit his liability to the price received. Because he had not made the sale with diligence and denied the rights of the mortgagor he could not thus mitigate his liability.

²⁷ *Schooler v. Hutchings*, 66 Tex. 324; *Hart v. Blum*, 76 Tex. 113; *Casey v. Chator*, 5 Tex. Civ. App. 385.

²⁸ *Field v. Munster*, 11 Tex. Civ. App. 341, citing *Dodson v. Cooper*, 37 Kan. 346; *Baldwin v. Porter*, 12 Conn. 473; *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387; *Sprague v. Brown*, 40 Wis. 620 (the latter case cites *Ford v. Williams*, 24 N. Y. 359; *Murray v. Burling*, 10 Johns. 172; *Baker v. Freeman*, 9 Wend. 36, 24 Am. Dec. 117; *Hurlburt v. Green*, 41 Vt. 490; *McInvoy v. Dyer*,

the contrary, saying that no others could be found which were in harmony with them; that the recovery could not exceed the sum paid for the goods, with interest and such special damages as accrued by depreciation in value while they were withheld.²⁹

In some cases the measure of the owner's recovery against an innocent purchaser from a wilful wrong-doer is the value of the property at the time and place it came into the defendant's possession, and not its value where it was at the time he contracted for it.³⁰ The supreme court of the United States holds that where timber is cut and removed from government land the damages are to be assessed as against a wilful trespasser at the full value of the property at the time and place of demand or of suit brought, with no deduction for his labor or expense; as against an unintentional or mistaken wrong-doer or his innocent vendee, the value at the time of the conversion, less the value added to the property; as against a purchaser without notice of wrong from an intentional trespasser, the value at the time he purchased.³¹ The same principle has been applied where ice was converted in Maine and transported to New York; the trespass being wilful the owner had the right to fix the time of conversion, and, having demanded the ice in New York, was entitled to recover its value there.³² This doctrine has been approved with the modification that if the trespasser is an unintentional or mistaken one the value of the property at the time and place of its conversion should measure his liability;³³ and so, also, in case of an innocent purchaser.³⁴ The defendant may not claim the benefit of this rule without

47 Pa. 118); *Tilton v. Fuller*, 35 N. H. 226; *Long v. Lamkin*, 9 Cush. 361; *Brady v. Whitney*, 24 Mich. 154.

²⁹ *Muenster v. Fields*, 89 Tex. 102. To the same effect are *Kline v. McCandless*, 139 Pa. 223; *Fields v. Williams*, 91 Ala. 502.

³⁰ *Hassam v. Safford L. Co.*, 82 Vt. 444; *Hoxsie v. Empire L. Co.*, 41 Minn. 548; *Glaspy v. Cabot*, 135 Mass. 435. *Contra*, *Railroad Co. v. Hutchins*, 37 Ohio St. 282.

³¹ *Wooden-ware Co. v. United States*, 106 U. S. 432; *Golden Reward M. Co. v. Buxton M. Co.*, 38 C. C. A. 228, 97 Fed. 413. See *State v. Clarke*, 109 Minn. 123.

³² *Beechwood I. Co. v. American I. Co.*, 176 Fed. 435.

³³ *Wright v. Skinner*, 34 Fla. 453; *Werner S. Co. v. Pickering*, 55 Tex. Civ. App. 632.

³⁴ *Texas, etc. R. Co. v. Jones*, 34 Tex. Civ. App. 94.

showing that he acted in good faith.³⁵ A landlord who converts a building erected on his premises by a tenant by refusing to permit him to remove it in accordance with a covenant to that effect is liable for its value to the extent that it enhances the **worth** of the land on which it stands.³⁶ If part of an article is converted the owner is not entitled to recover its entire value because the abstraction of the part renders the article useless for the purpose for which it was intended. In order that there may be such a measure of recovery the part left must be rendered valueless for any purpose whatever.³⁷ It is plain that if depreciation in the value of property not converted results from the conversion of part of it the former should be recovered for.³⁸ The dividends due on converted stock cannot be recovered in the action for the conversion if they became due afterward;³⁹ but dividends earned prior to the conversion, with interest on them, may be recovered.⁴⁰ Where furniture is delivered to a dealer, who has a lien thereon for the purchase price, to be placed in storage, and a purchaser from the dealer resells it such purchaser is liable for the difference between the actual value and the amount of the assigned claim of the dealer against the owner.⁴¹

§ 1111. **Other rules of damages in particular states.** As we shall presently see, the principle stated in the preceding sections is not always applied, the main exceptions being as to property which fluctuates more in value than property usually does. There are a few cases which allow a more flexible standard of compensation than the value of property at the time of its conversion, and this without apparent reference to the nature of

³⁵ *Hassam v. Safford L. Co.*, *supra*.

³⁶ *Neiswanger v. Squier*, 73 Mo. 192; *Deisher v. Gehre*, 45 Kan. 583; *Cabbage v. Youngerman's Estate*, 155 Iowa 39.

³⁷ *Walker v. Johnson*, 28 Minn. 147. See *Northern T. Co. v. Sellick*, 52 Ill. 249.

³⁸ *Teeter v. Cole Mfg. Co.*, 151 N. C. 602.

³⁹ *Ralston v. Bank*, 112 Cal. 208; *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671.

⁴⁰ *Citizens' St. R. Co. v. Robbins*, *supra*; *Doyle v. Burns*, 123 Iowa 488.

⁴¹ *Davis v. Miller's Auction Rooms, Inc.*, 144 N. Y. Supp. 672.

the property. Thus in South Carolina the jury may give the highest value of the property up to the time of trial⁴² with interest, or allow for its hire from the time of the conversion as may be most beneficial to the plaintiff.⁴³ The allowance of this measure is discretionary with the jury,⁴⁴ subject to review by the court.⁴⁵ In Alabama the measure of recovery is the value at conversion or at any time subsequent thereto, with interest.⁴⁶ "The reason for allowing the jury to assess damages according to the increased value is to prevent any benefit to the defendant from his wrongful act. Where there has been no return of the property or other special defense in reduction of damages, the discretion allowed the jury in such case does not extend to taking a lower value than that applying at the time of the conversion."⁴⁷ In New York the highest value intermediate the conversion and the trial, with interest, may be recovered; if the property is returned the highest value and interest intermediate the conversion and the return is recoverable.⁴⁸ In Texas the highest value up to the time of the trial may be recovered if the conversion was obtained by fraud;⁴⁹ as where a trustee misappropriates funds.⁵⁰ In Oklahoma the plaintiff may elect, when the cause is submitted or prior thereto, to take the value at the time of conversion, with interest, or if the action has been prosecuted with reasonable diligence, the highest value up to the time of the rendition of the verdict, without interest.⁵¹ In North Dakota the code provides for the recovery of the highest market value at any time between that of the conversion and the verdict, if the action has been prose-

⁴² *Kid v. Mitchell*, 1 Nott & McC. 334, 9 Am. Dec. 702; *Carter v. Du Pre*, 18 S. C. 179; *Gregg v. Bank*, 72 S. C. 458, 110 Am. St. 633.

⁴³ *Burney v. Pledger*, 3 Rich. 191.

⁴⁴ *Harley v. Platts*, 6 Rich. 318.

⁴⁵ *Davis v. Reynolds*, 91 S. C. 439.

⁴⁶ *Curry v. Wilson*, 48 Ala. 638; *Sharpe v. Barney*, 114 Ala. 361; *Mattingly v. Houston*, 167 Ala. 167; *Craze v. Alabama S. L. Co.*, 155 Ala. 431; *McGowan v. Lynch*, 151 Ala. 458; *Calhoun County v. Art Metal*

Co., 152 Ala. 607; *Ryan v. Young*, 147 Ala. 660.

⁴⁷ *Boutwell v. Parker*, 124 Ala. 341, citing *Burks v. Hubbard*, 69 Ala. 379.

⁴⁸ *Flagler v. Hearst*, 91 App. Div. (N. Y.) 12.

⁴⁹ *Witliff v. Spreen*, 51 Tex. Civ. App. 544.

⁵⁰ *McCord v. Nabours*, 101 Tex. 494.

⁵¹ *Funk v. Hendricks*, 24 Okla. 837.

cuted with reasonable diligence.⁵² In South Dakota the measure is fixed by statute as the value of the property at the time of the conversion, with interest; or, where the action has been prosecuted with reasonable diligence, the highest market value intermediate the conversion and the verdict, without interest, at the option of the plaintiff. This provision is binding upon the federal courts in the state and applies to an action for trespass upon a mining claim, the only demand being for the damage done by the removal of ore from the mine and the conversion thereof, the action being in effect, though not in form, for the conversion of personal property.⁵³ A like provision is in effect in Montana, with the addition that there may be a recovery in either case for the time and money properly expended in pursuit of the property.⁵⁴ The plaintiff is required to elect which clause of the statute he will claim under, and the instructions to the jury must be limited accordingly.⁵⁵ Under the Georgia code if the plaintiff elects to take a money verdict he is entitled to the highest price proven as the value of the property at any time before the trial or the value of the property at the time of the conversion, with interest from that date;⁵⁶ but may not also recover the value of the use of the property.⁵⁷ The value of the use of a machine during the time parts of it were withheld may be recovered.⁵⁸ If the value of the use of the property exceeds the interest on the value of it the former may be recovered.⁵⁹

A comparatively recent Wisconsin case disapproved an instruction which allowed the recovery of the highest market

⁵² *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 319.

⁵³ *Golden Reward M. Co. v. Buxton M. Co.*, 38 C. C. A. 228, 97 Fed. 413.

⁵⁴ *Doll v. Hennessy M. Co.*, 33 Mont. 80.

⁵⁵ *Thornton-T. M. Co. v. Bretherton*, 32 Mont. 80.

⁵⁶ *Mashburn & Co. v. Dannenberg Co.*, 117 Ga. 567; *Klassing v. Pavlovski*, 134 Ga. 815; *Thompson v. Carter*, 6 Ga. App. 604; *Milltown L.*

Co. v. Carter, 5 Ga. App. 344 (except as to interest).

In an action by a vendor who has retained title it is immaterial what the balance due on the purchase price of the property may be. *Moultrie Rep. Co. v. Hill*, 120 Ga. 730.

⁵⁷ *Langdale v. Bowden*, 139 Ga. 324.

⁵⁸ *Ward v. Odem* (Tex. Civ. App.), 153 S. W. 634.

⁵⁹ *Smith v. Duke*, 6 Ga. App. 75.

price intermediate the conversion and the trial. The court said it would adhere to the general rule it had laid down and hold that, in all actions, either upon contract for the non-delivery of goods, or for their tortious taking or conversion, unless the plaintiff is deprived of some special use of the property anticipated by the wrong-doer or the facts warrant the imposition of exemplary damages, the recovery must be measured by the value of the property at the time and place when and where it should have been delivered, or of the wrongful taking or conversion, with interest on that sum to the date of the trial; but if it appears that the defendant in either such case has sold the property the plaintiff may elect to recover the amount for which the sale was made, with interest thereon for such time, and if it appears that the property is in the possession of the defendant at the time of the trial the plaintiff may elect to recover its present value at the place where it was taken or converted in the form it was then in.⁶⁰ In Washington if a sale of the goods attached has been negotiated prior to the levy and the latter prevented the completion of the contract the damages are measured by the contract price, and not by the value of the goods.⁶¹ The same rule was applied where purchases of the principal's property had been made from an agent as if it were the latter's.⁶² Where money was converted and loaned the interest received was recovered though it was in excess of the legal rate.⁶³ Where a carrier conveys live stock to the wrong place the measure of damages is the market value of the stock at the place they were ordered to be shipped at the time they should have been delivered there.⁶⁴

§ 1112. **Time of conversion.** The general rule is that a conversion occurs when a rightful demand for the possession of property is made and not complied with.⁶⁵ If it has been bor-

⁶⁰ *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762; *Paxroski v. Goldberg*, 80 Wis. 339. See §§ 1118-1125.

⁶¹ *Curry v. Catlin*, 12 Wash. 322. See *Murray v. Okanogan L. S., etc. Co.*, 12 Wash. 259.

⁶² *Sage v. Shepard & M. L. Co.*,

4 App. Div. (N. Y.) 290, affirmed without opinion, 158 N. Y. 672.

⁶³ *Black v. Black* (Tex. Civ. App.), 67 S. W. 928.

⁶⁴ *Mills v. Chicago & N. W. Ry. Co.*, 183 Ill. App. 53.

⁶⁵ *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235; *Sturges v.*

rowed the borrower is in default after his failure to return it at the agreed time.⁶⁶ If a bailee becomes dispossessed of property through negligence his liability attaches as of the time it is lost, and not at the time of demand.⁶⁷ Where a broker failed to deliver stocks which his principal had paid for and which were charged against him as delivered on specified dates the conversion was held to have occurred at such dates.⁶⁸ If property is seized on judicial process and subsequently sold the sale constitutes the time of the conversion.⁶⁹ If possession is not disturbed when process is served the rights of the parties are determined as of the time the owner is dispossessed.⁷⁰ A corporation which converts shares of stock issued by it during the existence of a life estate therein is liable to the person who owns the reversion for its value at the time his right accrues.⁷¹ The conversion of logs does not take place until they are removed from the land of the owner because they are considered in law to be in his possession until that event.⁷² One who disposes of the property of another without authority, or puts it out of his power to return it, or deals with it in a manner subversive to the dominion of the owner is guilty of a conversion and a demand is not necessary to fix his liability; that attached upon the denial of the plaintiff's title or the unauthorized delivery of the property.⁷³ The conversion of stock occurs

Keith, 57 Ill. 451, 11 Am. Rep. 28; Hendricks v. Evans, 46 Mo. App. 313; Blair Co. v. Rose, 26 Ind. App. 487, citing the text; Clark v. American Exp. Co., 130 Iowa 254; Lorain S. Co. v. Norfolk & B. St. R. Co., 187 Mass. 500; Prince v. St. Louis C. C. Co., 112 Mo. App. 49; MacDonnell v. Buffalo Loan, etc. Co., 193 N. Y. 92; Tompkins v. Fonda G. L. Co., 188 N. Y. 261; Rosenkranz v. Jacobowitz, 50 N. Y. Misc. 580; Case v. Duffy (Misc.), 86 N. Y. Supp. 778; Smith v. Hurley, 29 R. I. 489; Ryland v. Chesapeake & O. R. Co., 55 W. Va. 181. See Chicago, etc. R. Co. v. Barrett, 190 Fed. 118; Stroup v. Bridger, 124 Iowa 401.

Suth. Dam. Vol. IV.—36.

⁶⁶ McKenney v. Haines, 63 Me. 74; Fosdick v. Greene, 27 Ohio St. 484, 22 Am. Rep. 328.

⁶⁷ Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35; Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 1 Am. Neg. Cas. 599.

⁶⁸ Andrews v. Clark, 72 Md. 396.

⁶⁹ Pond v. Baker, 58 Vt. 293; Paterson v. Gresham, 25 Ark. 380.

⁷⁰ Henshaw v. Bank, 10 Gray 568.

⁷¹ Caulkins v. Gaslight Co., 85 Tenn. 683, 4 Am. St. 786.

⁷² Wright v. Skinner, 34 Fla. 453, 463. See Final v. Backus, 18 Mich. 218, stated in note to § 1010.

⁷³ Stamps v. Thomas, 7 Ala. App. 622; Hogan v. Atlantic E. Co., 66

at the date of the holder's refused demand for recognition as a stockholder.⁷⁴ Nothing appearing to the contrary, the date of conversion is presumed to be that at which the property was taken into the possession of the wrong-doer.⁷⁵ In some cases the conversion occurs when property is seized, and not when it is finally used.⁷⁶ Where the conversion of bonds prevented the plaintiff from bidding upon the sale of the property represented by them or taking other steps to protect his rights the damages were assessed upon the value of such property at the time the initial steps in the conversion were taken, and not upon the price realized at the sale.⁷⁷ The court holds in a Massachusetts case that ordinarily the damages are to be assessed as of the date of the taking; yet when the property taken had no value at that time because it was stock of a corporation not then launched

Minn. 344; *Scarboro v. Goethe*, 118 Ga. 543; *Doyle v. Burns*, 123 Iowa 488; *Goldberger I. Co. v. Cincinnati I. & S. Co.*, 153 Ky. 20; *Corona K. Co. v. Lichtman*, 84 N. J. L. 363; *Union Naval S. Co. v. United States*, 202 Fed. 491; *Peru P. & I. Co. v. Harker*, 75 C. C. A. 475, 144 Fed. 673; *Dixie v. Harrison*, 163 Ala. 304; *Humbert v. Mason*, 46 Colo. 430; *Purcell C. S. Oil Mills v. Bell*, 7 Ind. Ty. 717; *Geneva W. Co. v. Smith*, 188 Mass. 202; *Parker v. Young*, 188 Mass. 600; *Great Western S. & R. Co. v. Evening News Ass'n*, 139 Mich. 55; *Ward v. Morr T. & S. Co.*, 119 Mo. App. 83; *Stevens v. Curran*, 28 Mont. 366; *Gross v. Scheel*, 67 Neb. 223; *Knapp v. Guyer*, 75 N. H. 397; *Mullen v. Quinlan*, 195 N. Y. 109, 24 L.R.A. (N.S.) 511; *MacDonnell v. Buffalo Loan, etc. Co.*, 193 N. Y. 92; *Turner v. Cedar (Misc.)*, 91 N. Y. Supp. 758; *More v. Burger*, 15 N. D. 345; *Clarke v. Chesapeake & O. R. Co.*, 63 W. Va. 423; *Lucas v. Sheridan*, 124 Wis. 567; *Continental G. Co. v. DeBord*, 34 Okla. 66; *Fifth Nat.*

Bank v. Providence W. Co., 17 R. I. 112, 9 L.R.A. 260; *Zindorf v. Western American Co.*, 26 Wash. 695.

⁷⁴*Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52; *Ralston v. Bank*, 112 Cal. 208; *McLaughlin v. Bank*, 20 Vict. L. R. 433; *Dooley v. Gladiator Con. G. M. & M. Co.*, 134 Iowa 468; *Humphreys v. Minnesota C. Co.*, 94 Minn. 469; *Herrick v. Humphrey H. Co.*, 73 Neb. 809, 119 Am. St. 917.

⁷⁵*Parker v. Harden*, 121 N. C. 57; *Anderson v. United States*, 81 O. C. A. 311, 152 Fed. 87; *Aldrich v. Higgins*, 77 Conn. 370; *Quitman N. S. Co. v. Conway*, 63 Fla. 253.

The time of conversion when a loan is made upon pledged stock with knowledge that the pledgee was not authorized to pledge it is, as against the lender, the date of the transaction. *Merchants' Nat. Bank v. Williams*, 110 Md. 334.

⁷⁶*Fleckenstein v. Inman*, 27 Ore. 328.

⁷⁷*Industrial & G. Trust v. Tod*, 52 App. Div. (N. Y.) 195. Reversed on another question, 170 N. Y. 233.

into being, the date must be carried forward to the date when the value of the stock was fixed.⁷⁸ Though a mortgagee may be authorized to take possession of mortgaged property whenever he chose and to sell the same at auction, if he takes it otherwise than for the purpose of sale he will be liable for its value when it was taken.⁷⁹ The time need not always be proved as pleaded.⁸⁰

§ 1113. Proof of value. The same rules govern as in other actions in which the question of value is involved.⁸¹ Some value must be proved or the recovery cannot exceed a nominal sum, as where the only evidence on the subject is the cost of the property,⁸² its value at the time of the trial,⁸³ or at a remote time from that at which liability is to be fixed if there is nothing to show its condition at the respective periods,⁸⁴ or its value at a place remote from where the conversion occurred.⁸⁵ As to an article without market value and made for a particular person it is competent to show the cost of the labor and material put into it.⁸⁶ In case of the exercise by a lienor of dominion over property where neither the date of the conversion nor the condition of the property at that time is shown, the damage may be proved by showing its value when it came into his possession.⁸⁷ If the difficulty of proving value is very great and is the result

⁷⁸ *Hayward v. Leeson*, 176 Mass. 310, 49 L.R.A. 725.

⁷⁹ *Howery v. Hoover*, 97 Iowa 581.

⁸⁰ *Aldrich v. Higgins*, 77 Conn. 370.

⁸¹ §§ 445, 446. See *Cunningham v. O'Connor*, 136 Mich. 293.

The difference in the value of property in different situations may be shown. *Stillwell v. Paepeke-L. Co.*, 73 Ark. 432.

⁸² *Hall v. Nix*, 156 Ala. 423; *Moultrie Rep. Co. v. Hill*, 120 Ga. 730; *Uncle Sam O. Co. v. Forrester*, 79 Kan. 610; *Texarkana, etc. R. Co. v. Neches I. Works*, 57 Tex. Civ. App. 249; *Whitmark v. Lorton*, 15 Daly 548; *Lincoln v. Pack-*

ard, 25 Tex. Civ. App. 22; *Griggs v. Day*, 158 N. Y. 1. See *Mortimer v. Marder*, 93 Cal. 172; *Lines v. Alaska O. Co.*, 29 Wash. 133.

⁸³ *Sonneberg v. Levy*, 12 N. Y. Misc. 154.

The evidence of value must be directed to the condition of the property when the wrong was done. *Craze v. Alabama S. L. Co.*, 155 Ala. 431.

⁸⁴ *Oxford v. Ellis*, 117 Ga. 817.

⁸⁵ *Green v. Macy*, 36 Ind. App. 560.

⁸⁶ *Murray v. Postal Tel. & C. Co.*, 210 Mass. 188; § 448.

⁸⁷ *Lee v. Fidelity S. & T. Co.*, 51 Wash. 208; *Lamb v. O'Reilly*, 13 N. Y. Misc. 212.

of the defendant's act he will not be relieved from liability on account thereof.⁸⁸ In ascertaining value the inquiry may be extended to a reasonable time before or after conversion;⁸⁹ but in order that the intrinsic value of shares of stock may be thus proven it must appear there has been no market price within such time.⁹⁰ Good will is an element in determining the value of corporate stock.⁹¹ The value of stocks never put upon the market may be fixed as of a past period when a sale was made upon the basis of their due proportion of the net value of the corporate assets and of its good will or earning capacity.⁹² The net value of corporate property and business may be shown to establish the value of stocks without market value.⁹³ In the absence of a present market value for privileges which are recognized as valuable under ordinary conditions experienced dealers may testify of their value.⁹⁴

If a bailee's promise is to deliver property valued in his receipt for it at a specified sum he is bound thereby,⁹⁵ and if a portion of it is taken from him by process of law he must account for the difference between the value of the whole and of the remainder, regardless of the actual worth of the latter.⁹⁶ The finder of a jewel took it to a goldsmith to learn what it

⁸⁸ *First Nat. Bank v. San Antonio, etc. R. Co.*, 97 Tex. 201; *Shields v. Doty L. & S. Co.*, 48 Wash. 679; *Markoe v. Tiffany*, 26 App. Div. (N. Y.) 95, affirmed without opinion, 165 N. Y. 565.

⁸⁹ *Campbell v. Park*, 128 Iowa 181 (insolvency of corporation immediately after purchase); *Grant v. Hathaway*, 118 Mo. App. 604; *Singer v. Pearson-P. Co.*, 58 Ore. 526; *Blair Co. v. Rose*, 26 Ind. App. 487, and case cited in next note.

Evidence of the value of the property a week or ten days prior to its conversion is sufficient, there being nothing to show a change in value in the meantime. *McLennan v. Minneapolis & N. E. Co.*, 57 Minn. 317.

⁹⁰ *Douglas v. Merceles*, 25 N. J. Eq. 144.

⁹¹ *Feige v. Burt*, 124 Mich. 565; *Long v. Evening News Ass'n*, 113 Mich. 274; *Washburn v. National W. P. Co.*, 26 C. C. A. 312, 81 Fed. 17; *Freon v. Carriage Co.*, 42 Ohio St. 30, 51 Am. Rep. 794; *Beebe v. Hatfield*, 67 Mo. App. 609.

⁹² *Lenrey v. Bank*, 131 La. 30.

⁹³ *Hetrick v. Smith*, 67 Wash. 664; § 448.

⁹⁴ *Vroom v. Sage*, 100 App. Div (N. Y.) 285.

⁹⁵ *Healy v. Hutchinson*, 66 N. H. 316; *Wakefield v. Stedman*, 12 Pick 562.

⁹⁶ *Healy v. Hutchinson*, *supra*.

was; the latter returned the socket, but retained and refused to deliver the jewel. In trover by the finder, after evidence of the value of the finest jewel which would fit the socket, the court directed the jury that, unless the defendant produced the jewel and showed it was not of the finest water, they should presume the strongest against him and make the value of the best jewel that would fit the socket the measure of damages.⁹⁷ This was by application of the maxim *omnia præsumuntur contra spoliatores*.⁹⁸ Where foreign goods which have passed through a custom-house are in question it has been held in New York that the custom-house valuation may be introduced as evidence of value.⁹⁹ If there is only a distant market to which the goods are destined the value there may be taken, with proper deductions for expenses which must be incurred and are usually incident to make that market available. Thus, in a proceeding in the nature of trover for the conversion of a whale in Okholok sea the value was determined by the market at New Bedford, which was the home port of both vessels involved, by deducting the expense of cutting in, boiling, freight and insurance.¹ So in trover for the capture on the high seas of a cargo bound for New York the value at the time and place of the capture was

⁹⁷ *Armory v. Delamirie*, 1 Str. 505.

⁹⁸ *Gordon v. Atlantic C. L. R. Co.*, 7 Ga. App. 354; *Hargreaves v. Hutchinson*, 2 Ad. & E. 12; *Curry v. Wilson*, 48 Ala. 638; *Kavanaugh v. Taylor*, 2 Ind. App. 502; *Goltra v. Penland*, 42 Ore. 18; *Bailey v. Shaw*, 24 N. H. 297, 55 Am. Dec. 241. See § 439.

Evidence of the value of ore taken from the same vein is admissible to show the value of that removed therefrom at a point not remote from the place whence came that the value of which is shown. *Montana M. Co. v. St. Louis M. & M. Co.*, 105 C. C. A. 343, 183 Fed. 51.

⁹⁹ *Caffe v. Bertrand*, How. App. Cas. 224.

If a creditor having an absolute

deed of land from his debtor as security convey the land to a *bona fide* purchaser he is liable to the debtor for the proceeds of the sale or the value of the land, at the latter's election, less the amount of the debt. *Meehan v. Forrester*, 52 N. Y. 277.

On the sale of land under a judgment in fraud of the bankrupt law the assignee may recover its value; he is not limited to what it sold for. *Clarion Bank v. Jones*, 21 Wall. 325, 22 L. ed. 542. See *Norman v. Cunningham*, 5 Gratt. 63.

¹ *Hassam v. Safford L. Co.*, 82 Vt. 444 (value on cars at natural shipping point); *Bourne v. Ashley*, 1 Low. 27; *Saunders v. Clark*, 106 Mass. 331. See *Cockburn v. Ashland L. Co.*, 54 Wis. 619.

arrived at by adopting New York prices, with deduction of a reasonable premium for insurance, and also adding damages equal to interest.² Where a schooner was converted while lying on a beach where there was no market for her the court ruled that the damages were measurable by her value there, which was ascertainable by her value at some port where such vessels are sold, less the probable cost of getting her off the beach, repairing and getting her to market, less, also, a reasonable allowance for diminution in her value on account of her getting ashore and an allowance for the fair value of the risks in taking her to market. This last item might be measured by the charge for a fair salvage service.³ The value of a canal boat may be determined by evidence of its worth at various ports on the canals which it navigates.⁴ An intermediate consignee who converts the property consigned is liable for its value at the place of destination.⁵

The market value will govern rather than any special value to the owner arising from his having contracted it or otherwise, the defendant not being apprised of such special value.⁶ If there is a market value at the place of conversion it will be adopted though the property is intended to be shipped for sale to another place.⁷ The master of a ship which became disabled on the voyage made an unauthorized sale of his cargo at an intermediate port and it sold low; in trover the jury were directed to give as damages the invoice price and the amount paid for freight.⁸ In an action against an officer for the conversion of property seized by him the inventory, appraisement and return made and signed by him are admissible.⁹ Evidence

² *Hallett v. Novion*, 14 Johns. 273.

³ *Glaspy v. Cabot*, 135 Mass. 435; *Hyde v. Elmer*, 14 N. M. 39.

⁴ *Keller v. Paine*, 34 Hun 167, 177.

⁵ *Farwell v. Price*, 30 Mo. 587.

⁶ *Brown v. Allen*, 35 Iowa 306; *Gardner v. Field*, 1 Gray 151; *Watt v. Potter*, 2 Mason 77; *Endel v. Norris*, 15 Tex. Civ. App. 140. But

see *France v. Gaudet*, L. R. 6 Q. B. 199; § 1117.

⁷ *United S. Mach. Co. v. Holt*, 185 Mass. 97; *Hamer v. Hathaway*, 33 Cal. 117; *Lines v. Alaska C. Co.*, 29 Wash. 133; *Downing v. Outerbridge*, 25 C. C. A. 244, 79 Fed. 931; *Spicer v. Waters*, 65 Barb. 227.

⁸ *Ewbank v. Nutting*, 7 C. B. 797; *Green v. McCracken*, 64 Kan. 330.

⁹ *Maul v. Drexel*, 55 Neb. 446;

of the value put upon property by the parties is competent.¹⁰ In an action for the conversion by the vendor of an article sold on the instalment plan the plaintiff may show that its value at the time of the conversion exceeded the value agreed upon in the contract of sale though the defendant is estopped from showing a less value except as, in accordance with the terms of the contract, such diminution in value resulted from designated causes other than careful use.¹¹

Where the property converted was of a peculiar kind, manufactured for a special market, and there was substantially no demand for it where the conversion occurred, its value at the place where it was to be sold, less the cost of transportation and sale, was considered in ascertaining its value where it was. The defendant's ignorance of the market for which it was designed was immaterial; he was liable for all the direct injury resulting from his act though he did not or could not have contemplated all its results.¹² That measure of liability was imposed upon an officer who seized property in transit under circumstances charging him with knowledge that it was destined for a point beyond that at which he seized it.¹³ The market price for like property, bought and sold in similar quantity, should be shown. Stocks of goods cannot be recovered for at retail prices.¹⁴ Neither is their value to be fixed by what a purchaser would give if obliged to take them as a whole. The most just test is the value of the goods in the packages they were in when the conversion took place, the value of all being aggregated.¹⁵

Shoup v. Marks, 62 C. C. A. 540, 128 Fed. 32.

¹⁰ Castner v. Darby, 128 Mich 241.

¹¹ Smith v. Goff, 29 R. I. 439.

¹² Lathers v. Wyman, 76 Wis. 616.

¹³ Wallingford v. Kaiser, 191 N. Y. 392, 123 Am. St. 600, 15 L.R.A. (N.S.) 1126.

¹⁴ Wehle v. Haviland, 69 N. Y. 448 (overruling on this point Wehle v. Butler, 61 N. Y. 245); State v.

Smith, 31 Mo. 566; Butler v. Collins, 12 Cal. 457; Nightingale v. Scannell, 18 Cal. 315; Miller v. Jannett, 63 Tex. 82; Perkins v. Ewan, 66 Ark. 175; Sears v. Lydon, 5 Idaho 358, § 1098; Cominger v. Louisville T. Co., 128 Ky. 697. See Haskell v. Hunter, 23 Mich. 305.

¹⁵ Pierce v. O'Brien, 189 Mass. 58; Palestine Hebrew W. Co. v. Terminal W. Co., 67 N. Y. Misc. 456; Miller v. Jannett, 63 Tex. 82.

It has been ruled that the price at which goods were sold under process may be shown as proof of their market value.¹⁶ "If the sale was at or near the time of the conversion or if any appreciable time had intervened, it be shown that there had been no change in the goods or in market value, evidence of the prices for which they sold at auction is admissible on the question of their value."¹⁷ A later Nebraska case holds otherwise, it being said that the sum realized by the officer at the attachment sale was no proper criterion for determining the value of the goods at the time of their conversion.¹⁸ In Texas the price received by an officer is not conclusive upon the owner as to the value of the property.¹⁹ Evidence of the price obtained for property at an actual *bona fide* sale, fairly conducted and not forced, whether at private or auction sale, is competent upon the question of value, the sale having taken place within a few months after the conversion.²⁰ In an action for the conversion of shares of stock having no market value the value cannot be fixed by the sum realized from the sale of the corporate assets after the conversion, the personal property having been sold by the officers of the corporation and the real estate having been sold under a mortgage owned by the defendant.²¹ The cost of a machine which had been used several years before it was converted may be proved.²² In the absence of a reason

¹⁶ Perkins v. Ewan, *supra*; Swartz v. Gottlieb, etc. B. Co., 109 Md. 393.

¹⁷ Imhoff v. Richards, 48 Neb. 590, citing Campbell v. Woodworth, 20 N. Y. 499; Brigham v. Evans, 113 Mass. 540; Kent v. Whitney, 9 Allen 62, 85 Am. Dec. 739.

¹⁸ Maul v. Drexel, 55 Neb. 446. No reference is made to Imhoff v. Richards, *supra*. Watson v. Coburn, 35 Neb. 499, is cited.

¹⁹ Werner S. Co. v. Pickering, 55 Tex. Civ. App. 632.

²⁰ Parmenter v. Fitzpatrick, 135 N. Y. 190; Montignam v. E. V. Crandall Co., 34 App. Div. (N. Y.) 228; Wright v. Fickett, 107 Me. 448

(price at which the defendant sold the property in question); Humphreys v. Minnesota C. Co., 94 Minn. 469.

As against one who has knowledge of the claim of another to stocks and bonds without market value the price received for them at an auction sale will be taken as their value regardless of who bought or the terms of payment. Central T. Co. v. Manhattan T. Co., 144 App. Div. (N. Y.) 560.

²¹ Feige v. Burt, 124 Mich. 565.

²² Hawver v. Bell, 141 N. Y. 140; Prior v. Morton B. Stables, 43 App. Div. (N. Y.) 140; Jones v. Morgan, 90 N. Y. 4, 43 Am. Rep. 131. But

for not proving the market value of property at the place of its conversion its cost at a distant locality, with transportation charges added, is not a proper basis for estimating its market value at the former place.²³ There cannot be a valid reason for not admitting evidence of a comparison of prices at different places and of the cost of transportation if the value at the place of conversion will be affected thereby; ²⁴ as, for instance, where prices there are abnormal for any reason.

In trover for a quantity of tallow, there being evidence that it was merchantable, it was held admissible to show its retail price at the time and place of the conversion.²⁵ Where books were converted and the plaintiff showed that copies had been sold to the trade and the price at which the sales were made the defendant was not permitted to prove that the books were of but little value, nor what it would cost to reproduce the number he was charged with taking.²⁶ A purchaser who refuses to abide by a conditional contract of sale and does not return the property as he agreed cannot limit the recovery below its market value by proving the price fixed by him and the vendor.²⁷ In an action to recover for the injury done a newspaper by canceling its membership in a news-gathering association testimony may be received as to the number of proposed purchasers of the membership and the sums offered for it.²⁸ Where the pledgee of stocks had an option to buy them at a specified price his conversion of them was considered, at the election of the pledgor, as an exercise of the option and the damages were measured by the price fixed. The plaintiff could not recover more than that sum, and it would have been inequitable to

see *O'Neill v. Patterson*, 26 N. Y. Misc. 3. In accord with the text are *McMahon v. Dubuque*, 107 Iowa 62, 70 Am. St. 143; *Hannan v. Connett*, 10 Colo. App. 171.

²³ *Gensburg v. Marshall Field & Co.*, 104 Iowa 599.

²⁴ *Zimmerman Mfg. Co. v. Dunn*, 151 Ala. 435.

If the value of property at a particular place is to be ascertained, less the cost of getting it there, and

such cost varies during the year, the average cost may be shown there being uncertainty when all of it was moved. *Hennes v. Hebard*, 169 Mich. 670.

²⁵ *Waters v. Langdon*, 16 Vt. 570.

²⁶ *Gunn v. Burghart*, 47 N. Y. Super. Ct. 370.

²⁷ *Fox v. Jones*, 39 La. Ann. 929.

²⁸ *Republican N. Co. v. North Western Associated Press*, 2 C. C. A. 282, 51 Fed. 377.

permit the defendant to reduce the damages to any less sum.²⁹ Where ore was taken from the plaintiff's mine without his knowledge until after the work had ceased the testimony of a mining engineer who was familiar with local ore deposits as to his opinion, based upon the assay of samples taken by him from the worked mine and upon the testimony of miners who worked therein as to the character of the ore taken therefrom and the average value of that removed, was admissible.³⁰ If the market value does not furnish the true measure of damages the plaintiff may show, by any appropriate evidence, the actual injury sustained; and evidence of the value of the property prior or subsequent to the conversion is admissible to prove actual value at the time of the conversion.³¹ A fair average of the prices obtained for like goods at sales made near the time and place in question, both before and after the taking, is a good basis on which to award damages.³² The proof of value must be in the medium in which the judgment may be discharged.³³ A defendant is not estopped from showing the actual value of converted stock.³⁴ Common carriers may not limit their liability for the conversion of goods entrusted to them by any agreement as to their value entered into with the shippers.³⁵

§ 1114. **Same subject; fixtures.** If fixtures are severed from the freehold and trover is brought for them their value as chattels only, and not as fixtures, can be recovered.³⁶ In the

²⁹ Upham v. Barbour, 65 Minn. 364.

³⁰ Golden Reward M. Co. v. Buxton M. Co., 38 C. C. A. 228, 97 Fed. 413.

³¹ Rivinus v. Langford, 33 L.R.A. 250, 21 C. C. A. 581, 75 Fed. 959, citing Suydam v. Jenkins, 3 Sandf. 614; Parmenter v. Fitzpatrick, 135 N. Y. 190; Peek v. Derry, 37 Ch. Div. 541; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28. To the same effect is Schildt v. Board of Com'rs, 52 Colo. 509.

³² Adams v. Blodgett, 47 N. H. 219, 90 Am. Dec. 569.

³³ Peterson v. Gresham, 25 Ark. 380.

³⁴ Myers v. Chittyna Exploration, 20 Cal. App. 418.

³⁵ Sec. 904; Georgia S. & F. R. Co. v. Johnson, 121 Ga. 233; Central R. Co. v. Chicago P. Co., 122 Ga. 11, 106 Am. St. 87; Merchants & M's T. Co. v. Moore, 124 Ga. 482.

³⁶ Clarke v. Holford, 2 C. & K. 540; Lynch v. White (Tex. Civ. App.), 73 S. W. 835. See Ayer v. Bartlett, 9 Pick. 156.

The rule is otherwise when the property converted is lawfully attached to realty and the conversion

comprehensive code action the technical impediments sometimes encountered in the prosecution of common-law actions in the way of embracing in one suit all the injurious elements of a wrong do not exist.³⁷ Accordingly, facts connected with a wrongful taking which would be admissible and relevant in an action of trespass and tend to increase the damages may be alleged and proved in an action for the taking and conversion. Thus, in an action for the unlawful taking and conversion of a quantity of household goods, including carpets, upon the question of damages as to the latter, a charge was approved which directed the jury to inquire what would be the value to a party who wanted to get the same articles again; that it was proper to include not only their worth in the market, but also the value of the labor in cutting, making and putting them down.³⁸ But when the property so in place can no longer be there used by the owner and he is subject to summary removal its value will be estimated in case of conversion with reference to these facts; it will be estimated with reference to the condition in which the property will be when removed or as subject to the obligation or necessity of removal.³⁹ The damages may be affected by the contract between the parties; where a lessor bound itself to pay the value of buildings, to be fixed by arbitration on termination of the lease, which it converted it was proper to consider their value in connection with the use to which they had been and were being put, regard being had to the time they had been and might be used.⁴⁰

§ 1115. **Interest and value of use of property.** In England the allowance of interest under the operation of the statute of 3 and 4 William IV.⁴¹ is a matter of discretion with the jury. With us it is generally held to be matter of right from the time of the valuation; it is considered a constituent part of the

is by the owner of the latter.
§ 1110.

³⁷ Clark v. Bates, 1 Dak. 42;
Rhoda v. Alameda County, 58 Cal.
357.

³⁸ Starkey v. Kelly, 50 N. Y. 677.

³⁹ Moore v. Wood, 12 Abb. Pr.

393; Johnston v. Albany D. G. Co.,
12 App. Div. (N. Y.) 608, quoting
the text.

⁴⁰ Coliseum I. Co. v. King County,

72 Wash. 687.

⁴¹ Ch. 42, § 29.

indemnity which a party entitled to recover the value may claim,⁴² and it is the duty of the court to direct the jury to allow it from the date of conversion.⁴³ In Colorado, Texas, Oklahoma and Georgia interest is allowed as damages.⁴⁴ In North Carolina, Indiana, Kentucky and Missouri the awarding of interest is discretionary with the jury.⁴⁵ This view is favored in a

⁴² *Humbert v. Mason*, 46 Colo. 430; *Wenham v. Wilson*, 129 Ill. App. 553.

It should be demanded in the complaint. *Horner v. Missouri Pac. R. Co.*, 70 Mo. App. 285.

It will be allowed in a proceeding in equity to compel an accounting for the proceeds of converted property. *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. 314; *Cree v. Lewis*, 49 Colo. 186.

⁴³ *Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569; *Barron v. San Angelo Nat. Bank* (Tex. Civ. App.), 138 S. W. 142; *Fairfield v. Southport Nat. Bank*, 80 Conn. 92; *Suydam v. Jenkins*, 3 Sandf. 620 *et seq.*; *Wilson v. Conine*, 2 Johns. 280; *Bissell v. Hopkins*, 4 Cow. 53; *Hyde v. Stone*, 7 Wend. 354, 22 Am. Dec. 582; *Baker v. Wheeler*, 8 Wend. 505; *Dillenback v. Jerome*, 7 Cow. 294; *Stevens v. Low*, 2 Hill 132; *Chauncey v. Yeaton*, 1 N. H. 151; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Hamer v. Hathaway*, 33 Cal. 117; *Northern T. Co. v. Sellick*, 52 Ill. 249; *Tarpley v. Wilson*, 33 Miss. 467; *Worsham v. Vignal*, 5 Tex. Civ. App. 471; *Harrison v. Perea*, 168 U. S. 311, 42 L. ed. 478; *New Dunderberg M. Co. v. Old*, 38 C. C. A. 89, 97 Fed. 150.

If the conversion has occurred under a mutual mistake of fact, no fraud or misconduct existing on the part of the wrong-doer, liability for interest will not antedate the

discovery of the mistake and demand. *Craufurd v. Smith*, 93 Va. 623.

A carrier's liability for interest dates from the conversion, not from the time it received the goods. *Horner v. R. Co.*, *supra*.

⁴⁴ *Drumm-F. Com. Co. v. Edmison*, 208 U. S. 534, 52 L. ed. 606 (under Oklahoma statute); *Brown v. First Nat. Bank*, 49 Colo. 393; *Cree v. Lewis*, 49 Colo. 186; *Millettown L. Co. v. Carter*, 5 Ga. App. 344; *Harrison v. McGehee* (Tex. Civ. App.), 139 S. W. 613; *Railey v. Hopkins* (Tex. Civ. App.), 131 S. W. 624; *Buffalo P. Co. v. Stringfellow-H. H. Co.* (Tex. Civ. App.), 129 S. W. 1161; *Morris v. Smith*, 51 Tex. Civ. App. 357; *Omaha & G. S. & R. Co. v. Tabor*, 13 Colo. 41, 58, 16 Am. St. 185, 5 L.R.A. 236; *Sylvester v. Craig*, 18 Colo. 44; *Martin v. Oslin*, 94 Ga. 658.

⁴⁵ *Corona K. Co. v. Lichtman*, 84 N. J. L. 363; *Stevens v. Howerton*, 49 Ind. App. 151; *Hawkins F. Co. v. Morris*, 143 Ky. 738; *Simpson v. Bantley*, 142 Mo. App. 490; *Bigler v. Leonori*, 103 Mo. App. 131; *Lance v. Butler*, 135 N. C. 419 (if the value is fixed as of the time of the conversion interest is to be computed from the date of the judgment); *Stephens v. Koonce*, 103 N. C. 266; *Kavanaugh v. Taylor*, 2 Ind. App. 502; *Hawkins v. Kansas City H. P. B. Co.*, 63 Mo. App. 64; *Wheeler v. McDonald*, 77 id. 213; *State v. Hope*, 121 Mo. 34; *Carson*

New York decision.⁴⁶ Another case in that state declares that if the property converted was merchandise kept for sale the plaintiff who has made advances upon it is entitled to recover interest as a matter of law;⁴⁷ and another that it is not to be allowed for the conversion of stocks if there is a recovery of their highest intermediate value between the time of conversion and the trial.⁴⁸ In Vermont the jury may consider the time which has elapsed since the conversion to determine the fair compensation due for the injury.⁴⁹ Interest should be at the legal rate, not at the rate which the converted securities bore,⁵⁰ and the rate should be that fixed by the law of the forum.⁵¹ The view of the Kansas court, in opposition to that of New York, that the rate of interest converted securities bear, rather than the legal rate, should govern the allowance of interest finds support in Georgia, where it is the rule as between vendor and vendee that the rate of interest agreed upon should govern in an action by the former.⁵² The plaintiff should not recover, besides the value of animals or slaves and interest, their hire or the value of their services or use, nor in lieu of interest.⁵³ In some cases this has been allowed.⁵⁴ If damages are recovered for lost profits interest

v. Smith, 133 Mo. 606. Compare *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671.

It seems that interest is recoverable as of right for withholding money after demand. *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474.

⁴⁶ *Toplitz v. Bauer*, 161 N. Y. 325, 336, 34 App. Div. (N. Y.) 526.

Where it is impossible to arrive by computation at the amount of goods destroyed and there is no definite market value therefor, interest should not be allowed. *Davison v. Guardian Storage & Transfer Co. (Misc.)*, 144 N. Y. Supp. 601.

⁴⁷ *Einstein v. Dunn*, 61 App. Div. (N. Y.) 195.

⁴⁸ *Kavanaugh v. McIntyre*, 74 N. Y. Misc. 222.

⁴⁹ *Clement v. Spear*, 56 Vt. 401; *Davis v. Bowers G. Co.*, 75 Vt. 286.

⁵⁰ *Govin v. De Miranda*, 140 N. Y. 474. *Contra*, *Johnson v. Oil Well S. Co.*, 85 Kan. 507.

⁵¹ *Carson v. Smith*, *supra*.

⁵² *Moultrie Rep. Co. v. Hill*, 120 Ga. 730.

⁵³ *Lynch v. McGhan*, 7 Cal. App. 132, citing local cases; *Texarkana W. Co. v. Kizer* (Tex. Civ. App.), 63 S. W. 913; *Polk v. Allen*, 19 Mo. 467; *Fail v. Presley*, 50 Ala. 342; *Frey v. Drahos*, 7 Neb. 194; *Endel v. Norris*, 15 Tex. Civ. App. 140.

The rule may be affected by statute. See *Pridgin v. Strickland*, 8 Tex. 427, 58 Am. Dec. 124.

⁵⁴ *Baldwin v. Davidson* (Tex. Civ. App.), 127 S. W. 562; *Railey v. Hopkins*, 50 Tex. Civ. App. 600;

should not be added.⁵⁵ The act of a receiver in converting property is his individual act for which the estate should not be called upon to respond by way of interest.⁵⁶ Under circumstances which are elsewhere indicated⁵⁷ trustees may be charged with compound interest for the conversion of trust funds.⁵⁸ The value of the use of property may be recovered in lieu of interest, the computation to be made from the time of its seizure to the time of the trial.⁵⁹

§ 1116. **Recovery for property subject to sale.** Where the plaintiff held the property as sheriff or assignee and would have been obliged to sell it at auction if the defendant had not taken it and the conversion was followed by a sale, there does not appear to be any reason or precedent for adopting any different measure of damages or rule of proof on that account if the plaintiff is not restricted to some special value or mode of proof. It was remarked in one such case⁶⁰ that it often happens that a jury considers the sum at which the goods were actually sold at auction as a fair measure of damages. The owner was entitled to remove buildings standing upon ground condemned for a street; he neglected to do so and the public authorities, desiring to use the ground, disposed of them by a public sale. It was held that the plaintiff, by his neglect to remove the buildings, consented to the mode adopted to dispose of them; therefore, in an action for their conversion his recovery was limited to the net proceeds of that sale.⁶¹ In an English *nisi prius* case a distinction appears to have been recognized in the case of property which had to be sold. Goods were sold by a sheriff after bankruptcy, but in good faith. The assignees

Dealy v. Lance, 2 Spears 487; Schley v. Lyon, 6 Ga. 530; Banks v. Hatton, 1 Nott & McC. 221. See Hair v. Little, 28 Ala. 236.

⁵⁵ McGuire v. Galligan, 53 Mich. 453.

⁵⁶ Brezelton v. Campbell, 49 Tex. Civ. App. 218.

⁵⁷ § 353.

⁵⁸ Pullis v. Somerville, 218 Mo. 624.

⁵⁹ *Railey v. Hopkins* (Tex. Civ. App.), 131 S. W. 624; *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 114; *Johnson v. Marks*, 66 N. Y. Misc. 153 (property kept for hire).

⁶⁰ *Whitehouse v. Atkinson*, 3 C. & P. 344.

⁶¹ *Peters v. Mayor*, 8 Hun 405; *Light v. Hardy*, 29 Ont. 25.

were held to be entitled only to an amount equal to the proceeds, less the expenses of selling. As the assignees would be bound to sell the jury were allowed a discretion to deduct the expenses.⁶² But in a later case the court considered that if the trustee in bankruptcy elected to treat the sale as a tort he was entitled to the full value of the goods and any damages resulting to the estate from the sale; he was not confined to the proceeds except upon a ratification of the sale.⁶³

§ 1117. **Damages if property without market value.** This subject has been considered in other parts of this work, and it is not necessary here to enter upon it at large.⁶⁴ If the property has no market value at the time and place of conversion, either because of its limited production or because it is of such a nature that there can be no general demand for it, and it is more particularly valuable to the owner than any other it may be estimated with reference to its value to him,⁶⁵ exclud-

⁶² Clark v. Nicholson, 6 C. & P. 712.

⁶³ Smith v. Baker, L. R. 8 C. P. 350; Clarion Bank v. Jones, 21 Wall. 328, 22 L. ed. 542.

⁶⁴ §§ 652, 655, 1099.

If the market value of ordinary second-hand household goods is testified to by a competent witness and there are dealers in that kind of property in the city in which the conversion took place, it must not be assumed that such goods have no market value; nor must the jury be allowed to give their fair value to the owner in the absence of testimony showing what it is. Iler v. Baker, 82 Mich. 226.

⁶⁵ Gross v. Saratoga European H. & R. Co., 176 Ill. App. 160; Taft v. Smith, 76 N. Y. Misc. 283; Barker v. Lewis S. & T. Co., 78 Conn. 198, citing the text; s. c. 79 Conn. 342, 118 Am. St. 141, holding that the rule applies to books as well as to other household goods; Head v. Beeklenberg, 116 Ill. App. 576;

Schildt v. Board of Com'rs, 52 Colo. 509; Souther v. Hunt (Tex. Civ. App.), 141 S. W. 359; Snyder v. Jenkins, 3 Sandf. 620; State v. Sullivan, 99 Mo. App. 616; Green v. Boston, etc. R. Co., 128 Mass. 221, 35 Am. Rep. 370; Stickney v. Allen, 10 Gray 352; Sturges v. Keith, 57 Ill. 463, 11 Am. Rep. 28; Sell v. Ward, 81 Ill. App. 675; Wamsley v. Atlas S. Co., 50 App. Div. (N. Y.) 199, 12 Am. Neg. Rep. 72, reversed on another question, 168 N. Y. 533; Lovell v. Shea, 60 N. Y. Super. Ct. 412; Bateman v. Ryder, 106 Tenn. 712.

It was said in a case where electrotype plates were converted that "the actual value to one who owns and has use for them is the just rule of damages." Heald v. MacGowan, 15 Daly 233, affirmed without opinion, 117 N. Y. 643.

It is said, *arguendo*, in Freon v. Carriage Co., 42 Ohio St. 30, 38, where it was claimed that stock had no market value, that the damages

ing any sentimental value,⁶⁶ if it is impossible to replace it.⁶⁷ Interest on the value of the use of such property has been allowed from the time of its return and acceptance.⁶⁸ A wine merchant having obtained from a broker samples of wine then lying at a wharf, which the broker had agreed to sell at 14s. per dozen, sold it to the captain of a ship about to sell at 24s. per dozen, to be delivered on board the next day. The merchant obtained the delivery warrants from the broker and claimed the wine from the wharfinger, but he refused to deliver it. No other wine of the same brand and quality was to be had in the market, and the merchant was held entitled to recover in trover the actual value of the wine to him, which at the time of the conversion was 24s. per dozen, he having made a *bona fide* sale of it at that price.⁶⁹ Mellor, J., said: "Under ordinary circumstances the direction to the jury would simply be to ascertain the value of the goods at the time of the conversion; and in case the plaintiff could by going into the market have purchased other goods of like quality and description, the price at which that could have been done would be the measure of damages. It was, however, admitted on the trial in the present case that that course could not have been pursued, inasmuch as champagne of the like quality and description could not have been purchased in the market so as to enable the plaintiff to fulfill his contract with Captain H. We are of opinion that the true rule is to ascertain the actual value of the goods at the time of the conversion; and that a *bona fide* sale having been made to a solvent customer at 24s. per dozen, which would have been realized had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired the actual value of 24s. per dozen; and we think that,

were not limited to that value; its actual value was determinable under all the circumstances, such as the dividend-making capacity, goodwill, etc., of the corporation.

If music books are annotated by the owner so as to give them a special value for him he is entitled to compensation for such value. Leon-

cini v. Post, 37 N. Y. St. Rep. 255.

⁶⁶ Mathews v. Livingston, 86 Conn. 263.

⁶⁷ Ladd v. Ney, 36 Tex. Civ. App. 201.

⁶⁸ Baldwin v. Davidson (Tex. Civ. App.), 127 S. W. 562.

⁶⁹ France v. Gaudet, L. R. 6 Q. B. 199.

in the present case, that ought to be the measure applied; and that a jury would not only have been justified in ascertaining that to be the value, but ought, where the transaction was *bona fide*, to have taken that as a measure of damages, and * * * we think we ought to say that such is the proper measure of damages. * * * We are not prepared to say that there is any analogy between the case of contract * * * in which two parties making a contract for the sale and delivery of a specific chattel, the vendee gives notice to the vendor of the precise object of the purchase, and a case like the present. In the case of contract special damages, reasonably resulting from the breach of it, may be considered within the contemplation of the parties. In case of trover it is not in general special damages which can be recovered, but a special value attached by special circumstances to the article converted; the conversion consists in withholding from another property to the possession of which he is *immediately* entitled, and the circumstances which affix the value are then determined; no notice to the wrong-doer could then *affect the value*, although it might affect his conduct; but upon what principle is notice necessary to a man who *ex hypothesi* is a wrong-doer? In such a case as the present the actual value is fixed by circumstances at the time of the demand, and no notice of the special circumstances could then affect the actual value of the goods withheld from the rightful owner, who thereby sustains 'an actual present loss,' which appears to us to be a convertible term with actual value." ⁷⁰

⁷⁰ The judge further distinguished the value from special damages by observing: "It is not necessary to determine whether notice is or is not necessary in trover in order to enable the plaintiff to recover special damage, which cannot form part of the actual present value of the thing converted, as in the case of withholding the tools of a man's trade, in which the damage arising from the deprivation of his property is not, and apparently cannot
Suth. Dam. Voy. IV.—37.

be, fixed at the time of the conversion of the tools. In that case, however, we are inclined to think that either express notice must be given, or arise out of the circumstances of the case. This point was not determined in *Bodley v. Reynolds*, 8 Q. B. 779, approved in *Wood v. Bell*, 5 El. & B. 772, but we think there must have been evidence of knowledge on the part of the defendant that, in the nature of things, inconvenience beyond the loss of the tools

The owner of pamphlets which are alleged to be without the pale of the law because they contain matter which scoffs at and indecently attacks the Christian religion nevertheless has property in them independently of the printing, and is entitled to damages to the extent of the value of the paper, etc. If the pamphlets are not illegal the damages must be based upon their value as such as of the time of the tort.⁷¹ One who is not engaged in editing a newspaper cannot recover compensation for the inconvenience which one so employed would experience from being deprived of the possession of a file of newspapers covering the period while he was such editor.⁷² Where negatives converted had no market value it was competent to show the nature of the property, the cost of obtaining the photographs, the purpose for which they were procured and the difficulty of replacing them. The jury might also consider the value of the property to the plaintiff.⁷³ If it is shown that the property converted was without market value where the tort was committed its actual value may be recovered.⁷⁴ In the absence of proof of general market value the price at which the owner of the property had contracted to sell it may be shown.⁷⁵ If the property can be reproduced the cost of reproduction measures the recovery.⁷⁶ Where shares of unlisted stock, but few transfers of which were made, were converted the court said: No doubt the plaintiff might, by election to demand the value instead of the stock, have fixed the time with reference to which the value should be estimated, but he did not do so. * * * There was no unreasonable delay on his

must have been occasioned to the plaintiff." See *Seymour v. Ives*, 46 Conn. 109.

⁷¹ *Boucher v. Sherwan*, 14 Up. Can. C. P. 419.

⁷² *Leffingwell v. Gilchrist*, 40 Iowa 416.

⁷³ *Wamsley v. Atlas S. Co.*, 50 App. Div. (N. Y.) 199, 12 Am. Neg. Rep. 72, rev'd 168 N. Y. 533.

⁷⁴ *Harrison v. McGehee* (Tex. Civ. App.), 139 S. W. 613; *Gensburg v. Marshall Field & Co.*, 104 Iowa

599; *Texas Warehouse Co. v. Imperial Rice Co.*, — Tex. Civ. App. —, 164 S. W. 396. See *Barbrick v. White Sewing Mach. Co.*, 180 Mich. 535.

⁷⁵ *Clements v. Burlington, etc. R. Co.*, 74 Iowa 442; *Ladd v. Ney*, 36 Tex. Civ. App. 201.

⁷⁶ *Watson v. Cowdrey*, 23 Hun 169; *Heald v. MacGowan*, 5 N. Y. Supp. 450; *Lowell v. Shea*, 18 id. 193; *Taft v. Smith*, 76 N. Y. Misc. 283.

part in bringing suit. * * * Under these circumstances we think it is reasonable to say that the defendant ought to account to the plaintiff for whatever he received on account of the stock, with legal interest from the time the shares were received until judgment.⁷⁷

§ 1118. **Damages if property of fluctuating value.** As to the measure of damages for the conversion of such property there has been much conflict of opinion. The cases are numerous, and a review of them in detail would be prolix and unprofitable. The principal difference is that the courts in some states adhere to the general rule of damages where such property is in question, allowing the value at the time of the conversion and interest, whether the property converted is stock or not.⁷⁸ And in others the courts allow the highest market value between the time of the conversion and the commencement of suit or the trial; though some of the latter annex the limitation that the suit be commenced within a reasonable time and prosecuted to trial with due diligence.⁷⁹ Where the consideration has not

⁷⁷ *Loetscher v. Dillon*, 119 Iowa 202.

⁷⁸ *Peterson v. Gresham*, 25 Ark. 380; *Hamburg Bank v. George*, 92 id. 472; *Burns v. Shoemaker*, 172 Ill. App. 290; *Dooley v. Gladiator Con. G. M. & M. Co.*, 134 Iowa 468; *Merchants' Nat. Bank v. Williams*, 110 Md. 334; *Hetrick v. Smith*, 67 Wash. 664; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; *McKenney v. Haines*, 63 Me. 74; *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235; *Pinkerton v. Railroad Co.*, 42 N. H. 463; *Third Nat. Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35; *Boylan v. Huguet*, 8 Nev. 345; *Bates v. Stansell*, 19 Mich. 91; *Brewster v. Van Liew*, 119 Ill. 554, 59 Am. Rep. 823; *Galena, etc. R. Co. v. Ennor*, 123 Ill. 505; *First Nat. Bank v. Strong*, 28 Ill. App. 325; *Baltimore M. Ins. Co. v. Dalrymple*, 25 Md. 244; *Noonan v. Hisley*, 17 Wis. 314, 84 Am. Dec.

742; *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762; *Enders v. Board of Public Works*, 1 Gratt. 364; *White v. Salisbury*, 33 Mo. 150; *Continental Divide M. I. Co. v. Bliley*, 23 Colo. 160.

⁷⁹ *Myers v. Chittyna Exploration*, 20 Cal. App. 418 (without interest); *Hughes v. Barrell*, 167 Ill. App. 100; *Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569; *Witliff v. Spreen*, 51 Tex. Civ. App. 544 (the value specified in a fraudulent contract does not control); *Miller v. Lyons*, 113 Va. 275; *Wiggin v. Federal S. & G. Co.*, 77 Conn. 507; *Schaefer v. Dickinson*, 141 Ill. App. 234, interpreting *Brewster v. Van Liew*, *supra*, to so hold, and distinguishing *Cothran v. Ellis*, 107 Ill. 413, on the ground that there was nonperformance of an offer to sell; *In re Swift*, 114 Fed. 947; *Clark v. Pinney*, 7 Cow. 681; *Stapleton v. King*, 40 Iowa

been paid in advance, or when extraordinary circumstances have occurred to produce extreme prices during a long period, or the suit has been protracted without the fault of the defendant, or there are other unusual circumstances attending the transaction the rule of the highest market price in the intervening time is not applicable, but the ordinary rule—the value of the article at the time agreed on for delivery, and interest thereon—is applied.⁸⁰ It is intimated in Florida that in the case of stocks held for investment, or rare pictures, jewels and the like articles held otherwise than for immediate commercial purposes, it is equitable and proper that the highest value after conversion should measure the damages if the jury should be satisfied that the plaintiff would have held the property up to the time it increased in value.⁸¹ In Alabama the allowance of this measure of damages is discretionary with the jury;⁸² and so in Wyoming⁸³ and South Carolina.⁸⁴ In the latter state the jury may also consider any benefits derived from the property by the defendant.⁸⁵ In California, Dakota, Montana and Georgia, by virtue of statutory provisions, the highest market value may be recovered at the option of the injured party, if suit is begun within a reasonable time. If

278 (but *Gravel v. Clough*, 81 id. 272 and *Brown v. Allen*, 35 Iowa 306, are inconsistent with the rule of the highest intermediate market value); *Loeb v. Flash*, 65 Ala. 526; *Galigher v. Jones*, 129 U. S. 193, 32 L. ed. 658; *Tatum v. Manning*, 9 Ala. 144; *Guerry v. Kerton*, 2 Rich. 507; *Ewing v. Blount*, 20 Ala. 694; *Jenkins v. McConico*, 26 id. 213; *Kid v. Mitchell*, 1 Nott & McC. 334, 9 Am. Dec. 702; *Kent v. Ginther*, 23 Ind. 1; *Stephenson v. Price*, 30 Tex. 715; *Hatcher v. Pelham*, 31 id. 201; *Johnson v. Marshall*, 34 Ala. 521; *Freer v. Cowles*, 44 id. 314; *Boutwell v. Parker*, 124 Ala. 341; *Ralston v. Bank*, 112 Cal. 208; *San Antonio, etc. R. Co. v. Wilson*, 4 Tex. Civ. App. 178. See *Hubbell*

v. Blandy, 87 Mich. 209, 24 Am. St. 154.

⁸⁰ *Heilbronner v. Douglas*, 45 Tex. 402.

⁸¹ *Moody v. Caulk*, 14 Fla. 50.

⁸² *Henderson v. Hollind*, 1 Ala. App. 400; *Blair v. Riddle*, 3 Ala. App. 292; *Boutwell v. Parker*, 124 Ala. 341; *Loeb v. Flash*, 65 Ala. 526; *Burkes v. Hubbard*, 69 id. 379; *Terry v. Birmingham Nat. Bank*, 93 id. 599, 30 Am. St. 87.

⁸³ *Hilliard F. Co. v. Woods*, 1 Wyo. 396.

⁸⁴ *Kid v. Mitchell*, 1 Nott & McC. 334, 9 Am. Dec. 702; *Carter v. Du Pre*, 18 S. C. 179; *Burney v. Pledger*, 3 Rich. 191; *Harley v. Platts*, 6 id. 318. Compare *Brock v. Haley*, 88 S. C. 373.

⁸⁵ *Sizer v. Dopson*, 89 S. C. 535.

such value is claimed interest cannot be recovered,⁸⁶ nor the value of the use of the property.⁸⁷ In North Dakota and South Dakota the statutes provide for the recovery of the value of the property at the time of its conversion, with interest, or, where the action is prosecuted with reasonable diligence, the highest market value at any time between the conversion and the verdict, without interest, at the option of the injured party. In North Dakota the court disapproves the highest market value rule on the ground that it is not calculated to promote justice. Damages cannot be recovered under it unless the plaintiff affirmatively shows that he has commenced and prosecuted his action with reasonable diligence. No presumption will be indulged in his favor, and the statute will be strictly construed against him.⁸⁸ In South Dakota, notwithstanding the plaintiff may have demanded in his complaint that the damages be assessed under the first statutory rule, if the case is tried on the theory that the recovery may be under the other rule, the testimony as to damages all relating to that measure, the court may assume that both parties have agreed to that rule.⁸⁹ In England where there is a breach of an agreement to replace borrowed stock the damages are measured by its highest price on or before the day of the trial.⁹⁰ In Louisiana, in the absence of bad faith, the value of stocks when converted is the measure of liability except where the conversion is by a broker who knows they were bought with the intent of holding them for a rise in price; in such a case the loss of profit should fall on him.⁹¹ A trustee who retains the money received for property rightfully sold is not liable for the value of the property at the

⁸⁶ *Jaques v. Stewart*, 81 Ga. 81; *Smith v. Caldwell*, 22 Mont. 331. See *Livesley v. Krebs H. Co.*, 57 Ore. 352.

⁸⁷ *O'Neill Manuf. Co. v. Woodley*, 118 Ga. 114.

⁸⁸ *Pickert v. Rugg*, 1 N. D. 230; *First Nat. Bank v. Minneapolis & N. E. Co.*, 8 N. D. 430.

⁸⁹ *Rosum v. Hodges*, 1 S. D. 308, 9 L.R.A. 817. See *Colrick v. Swin-*

burne, 105 N. Y. 503, as to the effect of the trial of a case upon a theory of damages variant with that on which the complaint was drawn.

⁹⁰ *Cud v. Rutter*, 1 P. Wms. (4th ed.) 572, n. 3; *Owen v. Routh*, 14 C. B. 327; *Loder v. Kekule*, 3 C. B. (N.S.) 127; *France v. Gaudet*, L. R. 6 Q. B. 199. See § 1123.

⁹¹ *Leurey v. Bank*, 131 La. 30.

time he is called to account for such money; his liability is for the amount received with interest.⁹²

§ 1119. Same subject; criticism and modification of the rule.

The cases which originated this exception to the general rule have proceeded upon the plausible principle that the owner who has been tortiously deprived of his property should have the benefit of any subsequent increase in its value, and not the wrong-doer; that where the advance is owing to general causes it would be unjust to allow the latter to determine the date of fixing the value that he should pay for a tort, as he might select a time of great depression to convert the property and by having the benefit of a future appreciation derive large gains by his own wrong. To prevent this seeming injustice the owner at the time of the trial has been allowed a retrospection of the intermediate market and to recover the highest price reached during that period. This would not be unfair to the defendant nor more than a just indemnity to the owner if it were shown by the evidence that that was his real loss; that had the defendant done nothing to prevent his retaining the property he would have sold it and realized that price, or that he has in fact realized it. But the owner is more than compensated when he is allowed to recover on a review of the market more than he would have sold for during the same period. By allowing him uniformly the highest intermediate market price he is saved from all hazard of mistake in this regard and the wrong-doer is made to bear it without any possibility of gain for his sagacity, if he sold at the right time; and without premium or compensation to mitigate his loss in being obliged to indemnify the owner if he makes the common mistake of selling too soon or too late. These obvious considerations have prevented the adoption, as a uniform and invariable measure of damages, of the highest intermediate value where it has been fluctuating. In some states where the courts were once committed to this exceptional rule, cases have since arisen in which its application would be so manifestly unjust that it has been reconsidered and substantially abandoned. This has notably

⁹² *Cooper v. Cooper*, 256 Ill. 160.

occurred in New York and California. In *Baker v. Drake*⁹³ the court reviewed the previous decisions in the former state on this general question and subjected them to the test of the fundamental principle on which damages are assessed, namely: that in civil actions the rule of damages does not depend on the form of the action; that whether the action be on contract or in tort the proper measure, except where punitive damages are allowed, is a just indemnity to the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the person complaining would not have averted.⁹⁴ And the court reached the conclusion that a fixed, unqualified rule giving the plaintiff in all cases of conversion the highest market price from the time thereof to the time of trial cannot be applied upon any sound principle of reason or justice. The case was against a broker who had purchased stock for a customer, the plaintiff, not as an investment but upon speculation, the latter furnishing a small amount as a margin and the former supplying the residue of the capital embarked in the speculation. The broker made an unauthorized sale of the stock; and it was held that if, upon being advised of the sale, the customer desired further to prosecute the adventure he had a right to disaffirm the sale and to require the broker to replace the stock; and upon his failure or refusal to do this that the remedy of the principal was to replace it himself, and that the advance in the market price from the time of the sale up to a reasonable time to replace it after notice of the sale would afford a complete indemnity and was the proper measure of damages. The case of *Markham v. Jaudon*,⁹⁵ so far as it relates to the rule of damages, was overruled. Later decisions have approved and followed *Baker v. Drake*.⁹⁶ This rule has been

⁹³ 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80.

⁹⁴ *Barber v. Ellingwood*, 137 App. Div. (N. Y.) 704; *McIntyre v. Whitney*, *infra*.

⁹⁵ 41 N. Y. 235.

⁹⁶ *Mullen v. Quinlan*, 195 N. Y. 109, 24 L.R.A.(N.S.) 511; *Barber*

v. Ellingwood, 137 App. Div. (N. Y.) 704; *Burnham v. Lawson*, 118 App. Div. (N. Y.) 389; *Kavanaugh v. McIntyre*, 74 N. Y. Misc. 222; *Ormsby v. Vermont C. M. Co.*, 56 N. Y. 623; *Tying v. Commercial W. Co.*, 58 *id.* 308; *Mechanics', etc. Bank v. Farm-*

applied where the owner of stock which had been pledged, had fully paid for it, the sale having been made in good faith under an honest mistake.⁹⁷ Where the conversion of stock occurred at a time when its value was higher than at any subsequent reasonable time in which it might have been replaced the recovery was for its value then and interest; this was considered necessary to give the plaintiff the complete indemnity he was entitled to.⁹⁸

The existing rule in New York is approved by the supreme court of the United States in a case not governed by the local law of that state,⁹⁹ by the Louisiana, Iowa and Connecticut courts,¹ and by the court of errors and appeals of New Jersey, which said that when commercial securities pledged as collateral for the payment of a debt are sold by the pledgee without authority before maturity of the debt, the pledgor may ratify the sale

ers', etc. *Bank*, 60 id. 40; *Thayer v. Manley*, 73 id. 307; *Harris v. Tumbridge*, 83 id. 99, 38 Am. Rep. 398; *Wolff v. Lockwood*, 70 App. Div. (N. Y.) 569; *Burhorn v. Lockwood*, 71 App. Div. (N. Y.) 301; *Gruman v. Smith*, 81 N. Y. 27; *Colt v. Owens*, 90 id. 368; *Smith v. Savin*, 141 N. Y. 315; *Minor v. Beveridge*, 141 N. Y. 399, 38 Am. St. 804; *Griggs v. Day*, 158 N. Y. 1, 22. See *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. 154. See *McIntyre v. Whitney*, 139 App. Div. (N. Y.) 557. Affirmed, no opinion, 201 N. Y. 526.

The reasonable time allowed to replace stocks will not be extended beyond the period necessary for the plaintiff to act with knowledge of the state of the market, nothing being shown to excuse action at such time. *Hurt v. Miller*, 120 App. Div. (N. Y.) 833. A later case takes account of other considerations—such as time to consult counsel, to employ other brokers and to raise funds to repurchase stocks if he de-

cides that the condition of the market makes that a prudent course to pursue. His financial ability is not a material consideration, but if he has property or securities he should be given a reasonable time to convert them into money or to raise money on them. *Burhorn v. Lockwood*, *supra*. See *Rosenbaum v. Stiebel*, 137 App. Div. (N. Y.) 912, and note to § 1142.

⁹⁷ *Wright v. Bank*, 110 N. Y. 237, 1 L.R.A. 289.

⁹⁸ *McIntyre v. Whitney*, 139 App. Div. (N. Y.) 557.

⁹⁹ *Galigher v. Jones*, 129 U. S. 193, 32 L. ed. 658; *Rivinus v. Langford*, 33 L.R.A. 250, 21 C. C. A. 581, 75 Fed. 959.

¹ *Faraldo v. Gumbel*, 128 La. 287, quoting from the preceding paragraph of the text; *Wiggin v. Federal S. & G. Co.*, 77 Conn. 507; *Ling v. Malcolm*, 77 Conn. 517; *Loetscher v. Dillon*, 119 Iowa 202; *Doyle v. Burns*, 123 Iowa 488. See *Chadwick v. Butler*, 28 Mich. 349.

and claim the proceeds, or treat the unauthorized sale as a conversion and recover the advance in the market price from the time of the sale up to a reasonable time within which to replace the securities, or hold the pledgee for the breach of his duty to keep the property pledged until the maturity of the debt and claim as damages the market value of the securities at that time.² In Indiana the period for limiting the increase in the value of stock is such reasonable time after the owner has received notice of the conversion as will enable him to replace the stock, especially where the wrong was not wilful and fraudulent and no benefit resulted to the defendant. If the stock belonged to an estate the knowledge of its conversion, for the purpose of fixing a time for its valuation, should be that of some one charged with the duty to act and who was not connected with the wrong.³ A decision in Oregon impliedly favors the New York rule,⁴ as does such a case in Utah.⁵ In California the rule of the highest intermediate value was twice held, and in the last instance was treated as the doctrine of the state.⁶ But a later case subjected that rule to an ordeal that exploded it.⁷ The property in question was hay; it had been wrongfully taken by the defendant in 1863, when it was worth from \$3 to \$5 per ton; but at an expense of something over \$5 per ton for transporting it, it might have been sold for \$12.50

² *Dinock v. United States Nat. Bank*, 55 N. J. L. 296, 39 Am. St. 643.

³ *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671.

The court said: "To adopt the value as existing at the time of actual conversion would enable the converting holder to make the market for the owner and deprive him of his stock, whether he so wills or not. To adopt the highest value between the time of actual conversion and the trial is to encourage the owner to delay and speculate upon the chances of higher markets without assuming the chances of lower markets. If he knew of the conver-

sion and have a reasonable time in which to make himself whole by resorting to the markets, his loss is that which his stock should have yielded to that time, for he may then assume his position as a stockholder at a value to be charged to the defendant." *Blair Co. v. Rose*, 26 Ind. App. 487.

⁴ *Budd v. Multnomah St. R. Co.*, 15 Ore. 413, 3 Am. St. 169.

⁵ *Walley v. Desert Nat. Bank*, 14 Utah 305.

⁶ *Douglass v. Kraft*, 9 Cal. 562; *Hamer v. Hathaway*, 33 id. 117.

⁷ *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462.

per ton. In the following year there was great scarcity of hay and the price rose to about \$40 per ton. The case was tried in November, 1869, and the jury instructed that the plaintiff was entitled to the highest market value between the taking and the trial, with interest. This instruction was disapproved in a strong opinion which clearly shows the injustice of the rule.

§ 1120. **Same subject; conflict in New York cases.** In New York there were many decisions prior to *Baker v. Drake* which adopted or affirmed the rule of the highest intermediate value.⁸ But while this course of decision was in progress other cases were decided in that state somewhat out of harmony with it and in accord with the later adjudications. In one case there had been a wrongful sale of stock by a pledgee.⁹ Part of it was demanded afterwards, and the damage for its conversion was held to be its value at the date of the demand with interest. Another part was not demanded, and for its conversion its value within a reasonable time after the wrongful sale was allowed, the pledgee being permitted to deduct its cost, which he had paid for the plaintiff. In another case¹⁰ a factor at Buffalo had wheat on consignment from his principal, who directed him to sell it at a specified price on a given day, or, if not sold that day, to ship to New York. The factor sold it the day after that specified. If the directions of the principal had

By the California code, § 3336, it is declared that the measure of detriment for conversion of personal property is presumed to be, 1, the value of the property at the time of the conversion, with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value between the conversion and the verdict, without interest, at the option of the injured party; and 2, a fair compensation for the time and money properly expended in pursuit of the property. See *Barrante v. Garratt*, 50 Cal. 112; *Fairbanks v. Williams*, 58 id. 241. A delay of three months in bringing an ac-

tion does not deprive a plaintiff of the benefit of this provision. *Froman v. Sierra Nevada S. M. Co.*, 61 Cal. 629. See § 1118 for the rule under the code of North Dakota.

⁸ *West v. Wentworth*, 3 Cow. 82; *Clark v. Pinney*, 7 Cow. 681; *Blot v. Boiceau*, 3 N. Y. 85; *Romaine v. Van Allen*, 26 id. 309; *Wilson v. Mathews*, 24 Barb. 295; *Burt v. Dutcher*, 34 N. Y. 493; *Willard v. Bridge*, 4 Barb. 361; *Markham v. Jaudon*, 41 N. Y. 235; *Lobdell v. Stowell*, 51 N. Y. 70; *Lawrence v. Maxwell*, 6 Lans. 469.

⁹ *Brass v. Worth*, 40 Barb. 648.

¹⁰ *Scott v. Rogers*, 31 N. Y. 676.

been followed the wheat would have reached New York between the 27th and the 31st of July, at an expense for transportation of fifteen cents per bushel. The New York market fluctuated between July 25th and November 29th from \$1.25 to \$1.65 per bushel. The unauthorized sale was treated as a conversion and the measure of damages was held to be the difference between the price for which the wheat was sold, the proceeds of the unauthorized sale having been paid over, and what it was worth during a reasonable time afterwards, which was held to embrace the residue of the season to November 29th, when navigation closed. Had it appeared at what time the plaintiff intended to sell, after the arrival of the wheat in New York, the damages would have been computed with reference to its value at that time. In another case,¹¹ where a pledgee converted the pledge, which consisted of warehouse receipts for corn, the court, by Church, C. J., referring to the rule of the highest intermediate value, observed: "Whatever may be said of the propriety of such a rule, in any case not special and exceptional in its circumstances, it should not be applied in a case like this. The price was fixed a year and a half after the original action was commenced. There is not the slightest evidence that the plaintiff or his assignor contemplated or desired to keep the corn. On the contrary, it affirmatively appears that the intention was to sell it when it reached \$1 a bushel, and such was the agreement, while the price allowed was \$1.45. Besides, the evidence shows that it would have been difficult, if not impossible, to have preserved it until the time when the price was fixed.

* * * An unqualified rule, giving a plaintiff in all cases of conversion the highest price to the time of trial, I am persuaded cannot be upheld upon any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions, that the action must be commenced within a reasonable time and prosecuted with reasonable diligence, relieve it of its objectionable character."

In a case still earlier than these¹² Mr. Justice Duer delivered

¹¹ *Matthews v. Coe*, 49 N. Y. 57.

¹² *Suydam v. Jenkins*, 3 Sandf. 614.

a masterly opinion which contains a thorough discussion of the law of compensation for the loss of personal property by tort and breach of contract, upon principle and authority in opposition to the rule of the highest intermediate value, except upon proof of such facts as makes it manifest that it is a just indemnity for the owner's actual loss, or gives him a value which the wrong-doer actually obtained or might have realized. He says: "It seems to us exceedingly clear that the highest price for which the property could have been sold, at any time after the right of action accrued and before the entry of judgment, cannot, except in special cases, be justly considered as the measure of damages. Whenever the evidence justifies the conclusion that a higher price would have been obtained by the owner had he kept the possession, or has been obtained by the wrong-doer, we have admitted and shown that it ought to be included in the estimate of damages; in the first case, as a portion of the indemnity to which the owner is entitled; and, in the second, as a profit which the wrong-doer cannot be permitted to retain; but we cannot admit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price would have been realized, and still less where it is proved that it would not have been obtained by the owner and has not been obtained by the wrong-doer. Its allowance in these cases would in truth impose a penalty upon the wrong-doer and render the damages vindictive instead of remunerative; and it must be remembered that we are treating exclusively of the cases in which vindictive damages are not claimed, or, if claimed, ought not to be given."

§ 1121. **Same subject; Pennsylvania rule.** In Pennsylvania the point under discussion has had pretty nearly the same history, beginning with *Bank v. Reese*.¹³ In that case the court held that where bank stock has been wrongfully withheld from a party entitled to it the measure of damages, where the consideration had been paid, is the highest market value between the breach and the trial, together with the bonus and dividends which have been received in the meantime; but where the con-

¹³ 26 Pa. 143. See *Musgrave v. Beckendorff*, 53 id. 310.

sideration has not been paid the plaintiff should be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock. Strong reasons are given why the general rule should not apply where the articles could not be procured elsewhere, and where, because of restrictions on its production or other causes, its price is subject to considerable fluctuations. But the conclusion that the loss is the highest intermediate value is not so satisfactorily sustained where it rests merely on the inference that the owner would have realized it. It is true, as said in *Harrison v. Harrison*,¹⁴ that "justice is not done if you do not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time;" but it does not maintain this measure of redress except in a retributive, rather than a compensatory, sense, to say we cannot act upon the possibility of his not keeping it, or that, if it was stock bought on speculation to be sold at the best opportunity, it will be assumed that but for the defendant's wrong the plaintiff would so have disposed of it. The English decisions referred to may have proceeded, and there is reason to suppose they did, on the reasonable presumption, from prevalent habit, that the stock was intended as a permanent investment and therefore would be kept until the trial. That presumption is quite unlike one that if stock is bought to be sold again for profit the holder will sell when the market is the most favorable. This Pennsylvania case is subsequently referred to as laying down a principle exclusively applicable to a party who is bound by a contract or trust duty to deliver stock.¹⁵ And finally that the rule here laid down has no application to trover and does not apply to ordinary stock contracts; that it applies between trustee and beneficiary, or to cases where justice cannot be reached by the ordinary measure of damages.¹⁶ It is said in the opinion of one of the courts of

¹⁴ 1 C. & P. 412.

¹⁵ *Neiler v. Kelley*, 69 Pa. 403; *Work v. Bennett*, 70 id. 484.

¹⁶ *Huntingdon, etc. C. Co. v. English*, 86 Pa. 247; *North v. Phillips*,

89 id. 250; *Wagner v. Peterson*, 83 id. 238; *In re Jamison's Est.*, 163 Pa. 143; *Pennsylvania Co. v. Philadelphia, etc. R. Co.*, 1 Pa. Dist. 301. In *Jennings v. Loeffler*, 184 Pa.

common pleas in an action by a stockholder against a corporation to recover for the wrongful transfer of the plaintiff's shares upon a forged power of attorney, which opinion was approved by the supreme court, that the recent cases decide that in all actions not involving an actually wrongful conversion or breach of trust the old and well-established rule still prevails that the value of the stock at the time of the technical conversion, with interest thereon, is the measure of damages.¹⁷ The latest case which has come to the notice of the writer favors the rule of the highest market value between the time of the conversion of stock by a broker to the time of the trial; the reasons for making a distinction between this and the usual measure of liability are given in the opinion.¹⁸

§ 1122. **Same subject; Massachusetts rule.** The rule of the highest market value within a reasonable time after a sale has been made by a factor in contravention of the orders of his principal has been approved in Massachusetts.¹⁹ But no distinction is made there as to the measure of compensation for the conversion of different classes of property in other cases.²⁰

§ 1123. **Same subject; English, Canadian and Australian cases.** The measure of damages in trespass, trover or replevin for the loss of property is generally the same as that which a

318, an action for the breach of a contract to return borrowed stock, the rule declared in *Huntingdon, etc. Co. v. English*, *supra*, that the rights of the parties were definitely fixed when the breach occurred, is approved. In the later case the highest price was that ruling at the time of demand and refusal.

In *Jamison's Assigned Est.*, 3 Pa. Dist. 217, it is held that a broker who buys a specific stock for a customer is a trustee thereof; and that a conversion of it to his own use makes him liable for its highest value until restitution is made; but that the rights and claims of all parties upon the assets of an assigned estate are fixed by the assign-

ment and the right of the customer to have the full value of his stock at that time is then matured.

The trust relation referred to in the Pennsylvania case "would probably be deemed to exist between a stock broker and his client." *Gallagher v. Jones*, 129 U. S. 193, 32 L. ed. 658.

¹⁷ *Pennsylvania Co. for Insurance v. Philadelphia, etc. R.*, 153 Pa. 160.

¹⁸ *Learock v. Paxson*, 208 Pa. 602.

¹⁹ *Maynard v. Pease*, 99 Mass. 555. See § 1112.

²⁰ *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 3 L.R.A.(N.S.) 98, 112 Am. St. 296.

vendee, who has paid therefor, is entitled to recover against a vendor for its non-delivery. The rule applied in one such action is cited freely in the others. The English cases make a difference between vendor and purchaser when the vendee has paid the price in advance. Therefore, the rule is the same for a conversion of the plaintiff's stock, and where he sues for a breach of a contract to replace stock or for non-delivery of stock contracted and paid for its value at the time of the trial,²¹ if the price has advanced, measures the damages; otherwise he will be entitled to its value at the time of the conversion.²² It has there been held that where a bond is given by the borrower of a share of stock to secure its replacement, and payment in the meantime of a sum equal to the interest and dividends, and a bonus is afterwards declared upon the stock the lender has an equity to be placed in the same situation as if it had remained in his hands and is consequently entitled to the replacement of the original stock increased by the amount of the bonus, and to

²¹ *Shepherd v. Johnson*, 2 East 211; *McArthur v. Seaforth*, 2 Taunt. 257; *Harrison v. Harrison*, 1 C. & P. 412; *Shaw v. Holland*, 15 M. & W. 145; *Owen v. Routh*, 14 C. B. 327.

²² *Forest v. Elwes*, 4 Ves. 492; *Sanders v. Kentish*, 8 T. R. 161; *In re Baha, etc. R. Co.*, L. R. 3 Q. B. 584.

In *Michael v. Hart*, [1902] 1 K. B. 482 (in the court of appeal), the defendants, who were stock brokers, agreed with the plaintiff to carry over to the end of May account on the stock exchange certain stocks which they had purchased for him, and made the necessary arrangements with jobbers for that purpose. Before the settling day arrived they closed the plaintiff's account without instructions by selling the stocks. Plaintiff gave notice that he should insist on performance by them of the contract when the settling day arrived. At

the time of closing the account the prices of the stocks were falling, but shortly afterwards they rose, and they were higher at the end of the May settlement, having been still higher during the interval between the closing of the account and the end of May settlement. In an action brought after the end of that settlement for non-performance of the contract to carry over the stocks it was held that the plaintiff was entitled to insist on performance of the contract at the end of May settlement and to measure his damages with reference to the prices of the stocks at that date. Owing to a compromise made between the parties the court did not find it necessary to decide whether the plaintiff had a right to have the damages estimated on the basis of the highest prices at which the stocks had stood in the interval between the closing of the account and the end of May. The affirmative of that proposition

the dividends in the meantime as well upon the bonus as upon such stock.²³ This is a reasonable measure of damages on the footing of the English ventures in stock as an investment; but affords no support to the rule of the highest intermediate value which is not maintained to the time of the trial.²⁴

In an action against the directors of a company who had improperly allotted to themselves a large number of shares at less than their value they were required to account to the company for the profits derived from the sale of such shares thus allotted as they had disposed of; as to the shares retained, the proper measure of damages was, not the highest price at which any shares of the company had been sold during the period for which the directors had held their shares, but the market value of the shares at the dates at which they were respectively allotted, the directors being required to pay to the company the excess (if any) of that market value above the sums which

was held in the court below. [1901] 2 K. B. 867. The rule declared there has been doubted. *Goodall v. Clarke*, 21 Ont. L. R. 614.

²³ *Vaughan v. Wood*, 1 M. & K. 403.

²⁴ *Williams v. Peel River, etc. Co.*, 55 L. T. Rep. 689; *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. 270; *Earl of Sheffield v. Same*, 13 App. Cas. 333; *In re Waters*, 5 New Zeal. L. R. 431.

It is said in the 8th ed. of *Mayne on Dam.*, pp. 220, 221: where there has been a loan of stock and a breach of the agreement to replace it, the measure of damages is held to be the whole value of the stock lent, taken at such rate as will indemnify the plaintiff. Therefore, where the stock has risen since the time appointed for the transfer, it will be taken at its price on or before the day of the trial. *Downes v. Back*, 1 Stark. 318; *Harrison v. Harrison*, 1 C. & P. 412; *Shepherd v. Johnson*, 2 East 211; *Owen v.*

Routh, 14 C. B. 327. In the last case the rule stated was laid down as the invariable one, without any reference to a rise or fall in the price. And it is no answer to say that the defendant may be prejudiced by the plaintiff's delaying to bring the action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market. Per *Grose, J.*, 2 East 212. In one case, where it had fallen, it was estimated at its price on the day it ought to have been replaced; *Sanders v. Kentish*, 8 T. R. 162; see 2 East 212; and in another case, where no day was named for its replacement, and it had fallen in value, at its price on the day it was transferred to the borrower. *Forrest v. Elwes*, 4 Ves. 492. But the plaintiff cannot recover the highest price which the stock had reached at any intermediate day, *M'Arthur v. Lord Seaforth*, 2 Taunt. 257; see

they had paid for the shares. The right to recover the highest intermediate market value of the shares was urged on the authority of *Eden v. Risdale's Railway Lamp and Lighting Co.*,²⁵ in which the court of appeal ruled that a gift by a promoter of a company to a director whilst there are any questions open between the company and the promoter must be accounted for by the director to the company, and the latter may claim the thing given or its highest value while held by the director. The grounds of the judgment in the principal case are indicated in the opinion of Collins, L. J., who agreed with Webster, M. R., and Rigby, L. J.: The market value is merely a piece of machinery to ascertain the value of the thing. When there is a real market for the thing the market price determines its value. The principle would be precisely the same whether there was a market for it or none at all. That which would have to be accounted for would be the highest value of the thing wrongfully taken. When there is a real market, in which the things in question can to any amount be exchanged and sold for money, there is a short cut to the value to take the market price. But when these conditions do not exist it is not a short cut to the value to take the price at which isolated lots could on given dates be sold. You would practically be applying to the shares a value which did not exist—a market value when in truth and in fact there was not a real market at all. The learned judge has found in effect that the value claimed was not the market value, because he said that if these shares had been put into the market in any quantity they could not have been sold at all. Under the circumstances it would be very unfair to take what is an artificial and fictitious standard of value as the true value of the shares. I think that the time at which the damages are to be ascertained may be fairly taken as

Simmons v. London Joint Stock Bank, [1891] 1 Ch. at p. 284; because such a measure involves the assumption that he would have sold out upon that day, which is purely speculative profit. Nor can he claim damages for any profit which he

Suth. Dam. Vol. IV.—38.

might have made had he possessed the stock, at all events unless his wish to have it back for that express purpose was distinctly communicated to the defendant. *M'Arthur v. Seaforth*, *supra*.

²⁵ 23 Q. B. Div. 368, [1889].

the time at which the wrong was done. The action is for damages, and in the present case I think it is exactly analogous to the common-law action for conversion.²⁶ This rule of damages has been applied in Victoria in a very similar case, though it was not distinguished by the fact that there was no market value for the stock. The allowance of interest on the value of the stock was a matter in the discretion of the court.²⁷ In another English case of the same nature the rule of highest intermediate value has been applied; the only distinction appearing is that there was a market value for the shares.²⁸ In yet another, which was brought under the Companies Act, 1862, the shares were taken to be of their nominal value.²⁹

In Ontario the liability of a defendant will not be measured by the price paid for unregistered shares of stock without market value where the sale was made under exceptional circumstances. If their value is uncertain the court may determine what their fair value is.³⁰ If stocks are not held as an investment a bailee who refuses to deliver them is liable for the highest price paid for like shares between the date of demand and their delivery.³¹ Colts bred from mares after their conversion are not to be considered in fixing the value of the latter, though if they were in foal when converted that fact would affect their value.³²

In Victoria a plaintiff whose stock has been converted may recover its value at the date either of the institution of suit or of the decree, at his option.³³ In a later case in which an improper exercise of the mortgagee's power of sale was complained of, the court considered that elements of trust and of contract were involved and that, therefore, the adoption of a different measure of damages than governed in ordinary actions

²⁶ *Shaw v. Holland*, [1900] 2 Ch. 305.

²⁷ *Montgomerie's B. Co. v. Blyth*, 26 Vict. L. R. 612.

²⁸ *Nant-y-glo & Blania I. Co. v. Grave*, 12 Ch. Div. 738; *In re Morvah Consols T. M. Co.*, 2 id. 1.

²⁹ *In re Caerphilly C. Co.*, 5 Ch. Div. 336.

³⁰ *Goodall v. Clarke*, 21 Ont. L. R. 614.

³¹ *Elgin L. & S. Co. v. National T. Co.*, 10 Ont. L. R. 41 (Court of Appeal), 7 id. 1.

³² *Scott v. McAlpine*, 6 Up. Can. C. P. 302.

³³ *Hicks v. Commercial Bank*, 5 Vict. L. R. (eq.) 228.

for conversion was demanded. It not appearing that the plaintiff had delayed bringing suit in order that his recovery might be augmented, his damages were assessed as of the time the writ issued.³⁴ A subsequent case was brought to recover for the non-delivery of scrip, and the plaintiff had the choice of market value at the time of the breach of contract or such value at the time of the trial.³⁵ Where the action was for the unauthorized forfeiture of shares, followed by their sale, and the plaintiff demanded their recovery or, in the alternative, damages, he was entitled to recover the shares if they could be procured, notwithstanding their very large increase in value; that failing, he was entitled to their value at the time of forfeiture.³⁶ In New Zealand the value of property which has increased in value intermediate the wrong and the trial of the action may be proved as of a time subsequent to the conversion.³⁷

§ 1124. **Same subject; rule in North Carolina.** The rule in North Carolina is peculiar. The value at the trial is the measure of damage and though the property may have suffered injury or deterioration, the defendant has the option to surrender it, and damages may be assessed for the detention, including compensation for the diminution of value.³⁸

§ 1125. **Departure from general rule sometimes justifiable.** The general rule may safely and justly be departed from or supplemented when it fails to furnish adequate compensation for the entire injury; as if there be a subsequent increase in price, which the plaintiff would have, or which the defendant has, obtained.³⁹ And if he has the property in his possession at the time of the trial there is no injustice in compelling him to

³⁴ *Amoretty v. City of Melbourne Bank*, 13 Vict. L. R. 431, approving *Owen v. Routh*, *supra*; *Shepherd v. Johnson*, *supra*.

³⁵ *Vicary v. Foley*, 17 Vict. L. R. 407.

³⁶ *Haddow v. Duke Co.*, 18 Vict. L. R. 155.

³⁷ *Kohai v. Macdonald*, 9 New Zeal. L. R. 221.

³⁸ *Boylston Ins. Co. v. Davis*, 70 N. C. 485.

³⁹ *Symes v. Oliver*, 13 Mich. 9; *Ewart v. Kerr*, 2 McMull. 141; *De Clerq v. Mungin*, 46 Ill. 112; *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762.

pay what it is worth at that time.⁴⁰ The subject of special and consequential damages will be considered further on.

§ 1126. **Recovery where value of property enhanced by defendant.** If the wrong-doer takes property in one condition and by bestowing labor upon it puts it in a better condition and thus makes it more valuable, is he chargeable in an action for its conversion with the improved value? The general rule in trover—the value at the time and place of conversion, with interest—would exclude any such question by the very logic of the remedy. But under the more flexible rule of reaching the real equity of the particular case or under the rule of giving the highest intermediate value this has often been a grave practical question. The improved value is recoverable in some states upon general principles, and in others, to some extent, by statute. Thus where timber has been taken and converted into wood; wood into coal; logs into lumber; corn into whisky, or the like, the value in the latest and most improved form has been recovered.⁴¹ As against trespassers upon government land

⁴⁰ *Ingram v. Rankin*, *supra*.

⁴¹ *Strickland v. Miller*, 12 Ga. App. 671; *Sligo F. Co. v. Hobart-L. T. Co.*, 153 Mo. App. 442; *Cummings v. Masterson*, 42 Tex. Civ. App. 549, citing the text; *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 id. 168; *Brown v. Sax*, 7 Cow. 95; *Riddle v. Driver*, 12 Ala. 590; *Walther v. Wetmore*, 1 E. D. Smith 7; *Silsbury v. McCoon*, 3 N. Y. 379; 6 Hill 425, 41 Am. Dec. 753, 4 Denio 332; *Babeock v. Gill*, 10 Johns. 287; *Nesbitt v. St. Paul L. Co.*, 21 Min. 491; *Ellis v. Wire*, 33 Ind. 127, 5 Am. Rep. 189; *Symes v. Oliver*, 13 Mich. 9; *Final v. Backus*, 18 id. 218; *Snyder v. Vaux*, 2 Rawle 423, 21 Am. Dec. 466; *Millar v. Humphries*, 2 A. K. Marsh. 446; *Smith v. Gonder*, 22 Ga. 353; *Baker v. Wheeler*, 8 Wend. 505; *Davis v. Easley*, 13 Ill. 192; *Eastman v. Harris*, 4 La. Ann. 103; *Everson v. Seller*, 105 Ind. 266;

Shepard v. Pettit, 30 Minn. 481; *Baker v. Hart*, 52 Hun 363; *Guch-enheimer v. Angewine*, 81 N. Y. 397; *Benson M. & S. Co. v. Alta M. & S. Co.*, 145 U. S. 428, 36 L. ed. 762; *Powers v. Tilley*, 87 Me. 34, 47 Am. St. 304; *Wing v. Milliken*, 91 Me. 387, 64 Am. St. 238; *Missouri, etc. R. Co. v. Starr*, 22 Tex. Civ. App. 353; *Whiting v. Adams*, 66 Vt. 679, 25 L.R.A. 598, 44 Am. St. 875; *Genet v. Delaware & H. C. Co.*, 14 App. Div. (N. Y.) 177. See § 1020.

In *Walther v. Wetmore*, 1 E. D. Smith 7, it is held that because the owner does not lose title to the property by the wrong-doer improving it and may retake or replevy it he is entitled to recover the improved value in trover. *Grant v. Smith*, 26 Mich. 201; *Moret v. Mason*, 106 Mich. 340, distinguishing *Winchester v. Craig*, 33 Mich. 205, on the ground that in the latter case the timber was cut by mistake;

who wilfully convert timber thereon or ore therein the rule of damages is the full value of the property at the time and place of demanding it in the condition it then is.⁴² The measure of liability of an innocent purchaser is the value of the property at the time the purchase was made. If the defendant is an innocent trespasser or purchaser without notice from him the recovery is limited to the value of the property at the time it was converted,⁴³ without deduction on account of the increase of value resulting from the acts of the trespasser.⁴⁴ Long delay in bringing suit for the conversion of timber on government land is cause for limiting the recovery to its value when converted, and it is also cause for denying the recovery of interest on the damages.⁴⁵ In Georgia an innocent purchaser may deduct from the value of the property or mitigate his liability to the extent of the sum his vendor, if an innocent trespasser, expended in improving it.⁴⁶ A purchaser who buys with notice of the rights of the plaintiff must answer for the value of the property in the condition in which he acquired it.⁴⁷

In a case where an innocent purchaser from a wilful trespasser, in anticipation of an absolute purchase and on the faith of a good title to the property in his vendor, advanced money to be expended in improving its value, and to be credited on account of the purchase-money when the property should be delivered in its improved condition, and took from the vendor a transfer of title to the property in its unimproved condition,

Saltmarsh v. Chicago, etc. R. Co., 122 Mich. 103; *Hendricks v. Evans*, 46 Mo. App. 313 (improved condition of animals).

⁴² *Wooden-ware Co. v. United States*, 106 U. S. 432, 27 L. ed. 230; *Bly v. Same*, 4 Dill. 466; *Union Naval S. Co. v. United States*, 202 Fed. 491; *United States v. Ute C. & C. Co.*, 85 C. C. A. 302, 158 Fed. 20; *Anderson v. United States*, 152 Fed. 87, 81 C. C. A. 311; *United States v. Flint L. Co.*, 87 Ark. 80. See *United States v. Mills*, 9 Fed. 684; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551, 2 Dill. 398.

⁴³ *Wooden-ware Co. v. United States*, *supra*; *Potter v. United States*, 58 C. C. A. 231, 122 Fed. 49; *Penfield v. Sage*, 71 Hun 573; *Hastay v. Bonness*, 84 Minn. 120; *Holt v. Hayes*, 110 Tenn. 42.

⁴⁴ *Central C. & C. Co. v. Henry S. Co.*, 69 Ark. 302; *Crosland v. Graham*, 83 S. C. 228; *Cummings v. Masterson*, 42 Tex. Civ. App. 549.

⁴⁵ *White v. United States*, 202 Fed. 501.

⁴⁶ *Milltown L. Co. v. Carter*, 5 Ga. App. 344.

⁴⁷ *Holt v. Hayes*, *supra*.

pending the completion of the contract, to secure the advances made, the damages were to be estimated as of the time when the first advances were made by such purchaser. "The rule which forfeits to the owner the added value conferred by the labor and money of the trespasser is a punitive one, and should not be made to apply to the innocent purchaser where it can be avoided. In the *Wooden-ware Co.* case it could not be avoided, because when the purchaser paid his money to his vendor that which he bought belonged, increased value and all, to the person from whom it had been tortiously taken. In this case, however, the defendants advanced money for the very purpose of giving the property added value, when it was still in the shape of logs, and secured a transfer of title at that time. We think justice requires that we should treat the case as if the purchase had taken place when the logs were on the skids, and the accession in value had been the result of the defendant's expenditure thereafter."⁴⁸ Where a tenant in common was fraudulently deprived of his interest in an oil leasehold by his co-tenant he recovered the value of his share of the oil produced and converted by the latter as it stood in the tank, without charge for the expense of producing it.⁴⁹

§ 1127. *Same subject.* In Indiana a crop of wheat was wrongfully taken, harvested and threshed; and the wrong-doer was held liable for it at the highest market price between the taking and the sale made by him without any abatement or allowance for harvesting and threshing.⁵⁰ Similar rulings have been made in other states.⁵¹ In such cases the plaintiff, by his recovery, is placed in a better situation than he would be in if the wrong had not been committed. He is not entitled to recover this increase of value as a necessary part of a perfect compensation for the loss and injury which he suffered. It is said that a wrong-doer cannot acquire title to another's prop-

⁴⁸ *Fisher v. Brown*, 17 C. C. A. 225, 70 Fed. 570.

⁴⁹ *Foster v. Weaver*, 118 Pa. 42, 4 Am. St. 573.

⁵⁰ *Ellis v. Wire*, 33 Ind. 127, 5 Am. Rep. 189, approved in *Everson*

v. Seller, 105 Ind. 266; *Ayers v. Hobbs*, 41 Ind. App. 576.

⁵¹ *Stuart v. Phelps*, 39 Iowa 14; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384. *Contra*, *Boutwell v. Harriman*, 58 Vt. 516.

erty by improving it. As a general proposition this is true; but the principle does not apply when the owner sues for a conversion and asks damages therefor. The injury then to be compensated is not affected at all by the use which the defendant has subsequently made of the property. When found guilty of the conversion and the defendant pays the damages assessed the law vests him with the title as of that date. By bringing such an action the owner tacitly assents to this result.⁵² Instead of the value added by the defendant, the value at the time and place of the conversion with interest is the rule founded in sound principle and now supported by a decided preponderance of authority. Maule, J., said upon this point:⁵³ "It may be that the wrong-doer who acquires no property in the chattel he converts acquires no lien for what he expends on it, and the owner may bring detinue or trover. But it does not follow that if the owner brings trover he is to recover the full value of the thing in its improved state. The proper measure of damages, as it seems to me, is the amount of the pecuniary loss the plaintiffs have sustained by the conversion." Where the chattel has become such by an unintentional tortious severance from the realty, as where coal or minerals are taken from a mine, or timber or fixtures from the freehold the general rule is to allow the value immediately after the severance and when the property first becomes a chattel.⁵⁴ In the California cases

⁵² § 1108.

⁵³ Reid v. Fairbanks, 13 C. B. 692.

⁵⁴ Quitman N. S. Co. v. Conway, 63 Fla. 253 (with interest); Central C. & C. Co. v. Penny, 97 C. C. A. 600, 173 Fed. 340; United States v. Ute C. & C. Co., 85 C. C. A. 302, 158 Fed. 20; Trustees of Dartmouth College v. International P. Co., 132 Fed. 92; Zimmerman Mfg. Co. v. Dunn, 151 Ala. 435; Smith v. Ingram, 134 Ga. 523; Smoot v. Consolidated C. Co., 114 Ill. App. 512; Ball L. Co. v. Sims L. Co., 121 La. 627, 18 L.R.A.(N.S.) 244; Bayle v. Norris (Tex. Civ. App.), 134 S. W.

767; Lightner M. Co. v. Lane, 161 Cal. 689; Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 239; Martin v. Porter, 5 M. & W. 351; Morgan v. Powell, 3 Q. B. 278; Maye v. Tappan, 23 Cal. 306; Goller v. Fett, 30 id. 481; Single v. Schneider, 24 Wis. 301, 30 id. 570; Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 151; Adams v. Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Tilden v. Johnson, 52 Vt. 628; Stockbridge I. Co. v. Cone I. Works, 102 Mass. 80; Winchester v. Craig, 33 Mich. 205; Firmin v. Firmin, 9 Hun 571; McLean County C. Co. v. Long, 81 Ill. 359; Kier v. Peterson, 41 Pa. 357;

last cited the action was for *mesne* profits or for injury to land, and the rule of damages applied was the value of the gold dust, less the expense of its extraction. In *Maye v. Tappan* the court say the rule of damages depends to some extent upon the form of the action; whether it is for an injury to the land itself or for conversion of a chattel severed therefrom. In that case the action was for injury to the land. The same rule was laid down in *Clowser v. Joplin Mining Co.*⁵⁵ In Pennsylvania, Wisconsin and the federal court for Massachusetts the same rule has been applied in trover.⁵⁶ In *Forsyth v. Wells* it was held that the rule of the value after severance would transfer to the plaintiff all the defendant's labor in mining the coal which was the subject of the action and thus give the plaintiff more than

Heard v. James, 49 Miss. 236; *Young v. Lloyd*, 65 Pa. 199; *Lyon v. Gormley*, 53 id. 261; *Clarke v. Holford*, 2 C. & K. 540; *Bennett v. Thompson*, 13 Ired. 146; *Smith v. Gonder*, 22 Ga. 353; *Wood v. Morewood*, 3 Q. B. 440, note; *Cushing v. Longfellow*, 26 Me. 306; *United States v. Magoon*, 3 McLean 171; *Greeley v. Stilson*, 27 Mich. 154; *Tome v. Dubois*, 6 Wall. 548, 18 L. ed. 943; *Potter v. Mardre*, 74 N. C. 36; *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653; *Omaha & G. S. & R. R. Co. v. Tabor*, 13 Colo. 41, 56, 16 Am. St. 185, 5 L.R.A. 236; *Ayres v. Hubbard*, 57 Mich. 322, 58 Am. Rep. 361, 71 Mich. 594; *Beede v. Lamprey*, 64 N. H. 510, 10 Am. St. 426; *Railroad Co. v. Hutchins*, 37 Ohio St. 282; *White v. Yawkey*, 108 Ala. 270, 54 Am. St. 159, 32 L.R.A. 199 (if the trespass was unintentional); *Ragland v. Taylor*, 7 Ky. L. Rep. 163 (the value of trees as they stood in the forest); *Carpenter v. Lingenfelter*, 42 Neb. 728, 32 L.R.A. 422; *Durant M. Co. v. Percy Con. M. Co.*, 35 C. C. A. 252, 93 Fed. 166; *Dyke v. National*

T. Co., 22 App. Div. (N. Y.) 360; *Colorado Cent. C. M. Co. v. Turek*, 17 C. C. A. 128, 70 Fed. 294; *Ivy C. & C. Co. v. Alabama C. & C. Co.*, 135 Ala. 579; *Dolliff v. Robbins*, 83 Minn. 498; *Livingston v. Rawyards C. Co.*, L. R. 5 App. Cas. 25. It was formerly the rule in England that the value of coal immediately after its severance might be recovered. *Martin v. Porter*, 5 M. & W. 351. See *Gates v. Riffe B. Co.*, 70 Mich. 309 and §§ 1019, 1020.

The rule was formerly to the contrary in Minnesota; but in a late case the court, without unqualifiedly accepting the doctrine of the text, holds that it should be applied whenever the act is not intentionally or grossly wrongful. *Viliski v. Minneapolis*, 40 Minn. 304, 3 L.R.A. 831; *Whitney v. Huntington*, 37 Minn. 197.

⁵⁵ 4 Dill. 469, note.

⁵⁶ *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617; *Single v. Schneider*, 30 Wis. 570, 24 id. 299; *Hungerford v. Redford*, 24 id. 345; *Ghen v. Rich*, 8 Fed. 159.

compensation for the injury done; and the court discuss the relation of the rule of damages to the form of action.⁵⁷

§ 1128. **Same subject.** Where the plaintiff's timber standing was worth \$1.50 per thousand feet, and an expense of \$9 was incurred by the defendant in wrongfully cutting it into logs and transporting them to a distant market where they were worth \$12 per thousand, the owner was held entitled in trover to recover the value when taken, that is the "stumpage" value in the ordinary market; or the value at the place where it was marketed less the sums expended in the cutting and transportation in thus putting the property in condition for sale, with interest from the date of conversion.⁵⁸ The value of property converted may be and often is enhanced by transportation. This increase of value is no just cause for an increase of damages to the owner; for it is no additional element in his pecuniary loss. He is, therefore, by the prevailing course of decision, allowed only the value at the place as well as time of conversion.⁵⁹ Where a conditional sale of cloths was made and the purchaser printed them but did not perfect his purchase, in

⁵⁷ Forsyth v. Wells, *supra*.

In Lyon v. Gormley, 53 Pa. 265, Strong, J., commenting on Forsyth v. Wells, used this language: "The decision was made by a bare majority of the court, and it is to be regarded as ruling nothing more than the law as applicable to the circumstances of that case. There the coal had been taken under a mistake of right, and the act complained of was substantially a trespass. It was a case for compensation, and though it was held trover would lie, the action was treated as an action *quare clausum fregit* for an injury not wanton." The rule and principle of Forsyth v. Wells has been followed in Herdic v. Young, 55 Pa. 176, 93 Am. Dec. 739; Coleman's App., 62 Pa. 278; Young v. Lloyd, 65 id. 199

If coal is removed by agreement

of the parties pending litigation to determine their respective boundaries the wrong-doer who has acted in good faith will be charged with a reasonable royalty on the quantity removed. Sandy River C. C. Co. v. White House C. C. Co., 125 Ky. 278.

⁵⁸ Winchester v. Craig, 33 Mich. 205; Hennes v. Hebard, 169 Mich. 670; St. Paul v. Louisiana C. L. Co., 116 La. 585.

⁵⁹ Wall v. Holloman, 156 N. C. 275; Weymouth v. Chicago, etc. R. Co., 17 Wis. 550, 84 Am. Dec. 763; Saunders v. Clark, 106 Mass. 331; Herdic v. Young, *supra*; Tilden v. Johnson, 52 Vt. 628; Ayers v. Hubbard, 57 Mich. 322, 58 Am. Rep. 361; Beede v. Lamprey, 64 N. H. 510, 10 Am. St. 426. *Contra*, Baker v. Hart, 52 Hun 363; Hilliard F. Co. v. Woods, 1 Wyo. 396.

trover brought by the seller against one to whom the conditional vendee had consigned the cloths to be sold, the plaintiff recovered only their value at the time they were delivered, not their value after they were printed.⁶⁰ In trover for the conversion of a vessel which was taken in an unfinished state and completed by the defendant, it was held, in an action by the purchaser at a sale under execution levied while it was in the unfinished state in which the defendant took it, that the plaintiff was entitled only to the value at the time of the levy.⁶¹ And a similar rule was applied in England. The plaintiff had a bill of sale of a ship being built to secure advances. The defendant converted her before she was finished and afterwards completed her. The plaintiff was held entitled to her value at the time of the conversion, not at a subsequent time; and he was not entitled to special damages for loss of freight she might have earned.⁶²

This principle, which confines the plaintiff's recovery to compensation for his actual loss and therefore to the value of his property at the time of conversion, applies when its identity is destroyed by a wrongful intermixture with other property, producing what is commonly called a *confusion of goods*. If the owner chooses to seek his remedy by an action for the conversion of his goods, he is fully compensated when he recovers their value at the time of such a conversion, as when it occurs in any other manner. By the general current of authority he is confined to that measure of redress.⁶³ But where this rule of

⁶⁰ Dresser Mfg. Co. v. Waterston, 3 Metc. (Mass.) 9; Aborn v. Mason, 14 Blatch. 405.

⁶¹ Green v. Hall, 1 Houst. 506.

⁶² Reid v. Fairbanks, 13 C. B. 692.

Where property was improved by the party who first converted it and sold thereafter by him, it was held that the betterments were wrongfully made, that the title thereto was in the owner, and the purchaser from the wrong-doer was liable for the value of the property at the time and place when and where he

became such. There was no question in the case as to the damages recoverable from the vendee being in excess of the amount for which the original wrong-doer was liable. Glaspy v. Cabot, 135 Mass. 435.

⁶³ Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 239; per Campbell, J., in Stephen-son v. Little, 10 Mich. 433; Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653; Potter v. Mardre, 74 N. C. 36; Baker v. Meisch, 29 Neb. 227; Carpenter v. Lingenfelter, 42

strict compensation in this class of cases does not prevail and the improved article may be taken after it has been enhanced in value by the wrong-doer, the right of the owner to the entire property of which his goods have become a part by a wrongful admixture is recognized and enforced.⁶⁴ The cases which administer the mitigated rule, exempting the wrong-doer from paying the owner the enhanced value caused by his labor, or the loss of his property by its admixture with that of another, confine it to the case of conversion by mistake or in the *bona fide* assertion of his rights.⁶⁵ But there are intimations in several cases that the value of the original property should be given as the measure of compensation without regard to the wrong having been done wilfully or fraudulently.⁶⁶ One who fails to use ordinary care to ascertain the boundary line between his land and that on which he enters may be found to be an intentional trespasser

Neb. 728, 32 L.R.A. 422. See *Single v. Schneider*, 30 Wis. 570; *Ryder v. Hathaway*, 21 Pick. 298.

The cost of separating one mineral from another may be recovered if both were removed in the exercise of the right to remove one. *Smoot v. Consolidated C. Co.*, 114 Ill. App. 512.

⁶⁴ *Rice v. Hollenbeck*, 19 Barb. 664; *Walther v. Wetmore*, 1 E. D. Smith, 7; *Silisbury v. McCoon*, 6 Hill 425, 41 Am. Dec. 753, 4 Denio 332; *Isle Royale M. Co. v. Hertin*, 37 Mich. 332; *Burnham v. Marshall*, 56 Vt. 365; *Strubbee v. Trustees Cincinnati R.*, 78 Ky. 481, 39 Am. Rep. 251.

⁶⁵ *Strickland v. Miller*, 12 Ga. App. 671; *Central C. & C. Co. v. Penny*, 97 C. C. A. 600, 173 Fed. 340; *Trustees of Dartmouth College v. International P. Co.*, 132 Fed. 92; *Bayle v. Norris*, — Tex. Civ. App. —, 134 S. W. 767; *Heard v. James*, 49 Miss. 236; *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617; *Whitney v. Huntington*, 37 Minn.

197; *Viliski v. Minneapolis*, 40 Minn. 304, 3 L.R.A. 831; *Hoxsie v. Empire L. Co.*, 41 Minn. 548; *Railroad Co. v. Hutchins*, 37 Ohio St. 282; *Wooden-ware Co. v. United States*, 106 U. S. 432, 27 L. ed. 230; *Tignor v. Toney*, 13 Tex. Civ. App. 518; *White v. Yawkey*, 108 Ala. 270, 54 Am. St. 159, 32 L.R.A. 199; *Durant M. Co. v. Percy Con. M. Co.*, 35 C. C. A. 252, 93 Fed. 166; *Golden Reward M. Co. v. Buxton M. Co.*, 38 C. C. A. 228, 97 Fed. 413; *Dyke v. National T. Co.*, 22 App. Div. (N. Y.) 360; *Colorado Cent. Con. M. Co. v. Turek*, 17 C. C. A. 128, 70 Fed. 294.

In New Hampshire the rule is extended to cases where the wrong is done carelessly, but not wilfully. *Beede v. Lamprey*, 64 N. H. 510, 10 Am. St. 426.

⁶⁶ *Single v. Schneider*, 30 Wis. 570; *Potter v. Mardre*, 74 N. C. 36; *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239; *Carpenter v. Lingenfelter*, *supra*. See § 103.

and to be subject to the severer rule of damages.⁶⁷ Cases may well arise in which the circumstances may be such that the increased value resulting to property from the labor of the wrong-doer may not be of any practical advantage to its owner, as where he could have performed it without expense or loss if the conversion had not deprived him of the opportunity of doing so. In such a case no deduction should be made in behalf of the defendant.⁶⁸ In all cases the party who seeks to retain the advantage of his labor by deducting from the damages sought by the plaintiff the value thereby added to the latter's property must show the amount of such increased value or he will be charged with the worth of the property in its improved state.⁶⁹ As a concluding objection to the allowance of anything but strictly compensatory damages in the action of trover it may be said that anything beyond that, if it is imposed upon the defendant because of his bad motive, is in the nature of vindictive damages and it is exceptional for the court, instead of the jury, to award them as matter of law and of right.⁷⁰

§ 1129. **Special or consequential damages.** In England and generally in this country special damages are recoverable in this action if alleged in the declaration.⁷¹ In trover for a horse valued at 15*l.* special damage was claimed for the hire of another. There was some hesitation in recognizing the damage as recoverable, and a compromise result followed in a judgment for 25*l.*⁷² Where a carpenter's tools were the subject of the suit the court allowed special damages by reason of

⁶⁷ *Lamb v. Kincaid*, 38 Can. Sup. Ct. 516; *Durant M. Co. v. Percy Con. M. Co.*, *supra*. See § 1020.

⁶⁸ *Taber v. Jenny*, 1 Sprague 315.

⁶⁹ *Steele v. United States*, 19 Ct. of Cls. 181.

⁷⁰ See *Heard v. James*, 49 Miss. 236.

⁷¹ *Southern R. Co. v. Webb*, 143 Ala. 304, 111 Am. St. 45; *Dakin v. Elmore*, 127 App. Div. (N. Y.) 457; *Cernahan v. Chrisler*, 107 Wis. 645, disapproving *Collins v. Lowry*, 78

Wis. 329; *Blewett v. Miller*, 131 Cal. 149.

⁷² See *Hughes v. Quentin*, 8 C. & P. 703; *Barrow v. Arnaud*, 8 Q. B. 595; *Saunders v. Brosius*, 52 Mo. 50; *Boylan v. Huguet*, 8 Nev. 345.

In a Georgia case cotton was purchased from a warehouseman and while in his possession was resold, and delivery was impossible. In settling the accounts between him and the owner equity compelled the warehouseman to pay the amount the owner was obliged to pay his

the plaintiff, a carpenter, being prevented, in consequence, from working at his trade.⁷³ In a subsequent case⁷⁴ the court of queen's bench drew a distinction between special damage and special value, and said they were inclined to think that to enable a plaintiff to recover special damage which did not form part of the actual present value of the goods, as in withholding the tools of a man's trade, the defendant must have some notice of the inconvenience likely to be occasioned.⁷⁵ In a Texas case exempt tools and apparatus were levied upon and sold. The plaintiff sought to recover for the loss of labor put upon material which was to be used in filling a contract he had entered into, and which material, in consequence of the sale, he was unable to complete. Because the officer knew nothing of such contract a recovery of lost profits was denied.⁷⁶ If property was not in use at the time it was taken and could not be used until after expiration of ample time to replace it damages are not recoverable because of the deprivation of the use.⁷⁷ Where the defendant, in an attempt to collect a debt, forcibly and against the remonstrance of the plaintiff entered her house while she was disrobed, seized a check, demanded that she indorse it and took it away the latter was considered the *gravamen* of the action, and the other matters were merely in aggravation of the damages. The facts made the case one for awarding compensation for mental suffering and, also, for punitive

vendee on account of his inability to fulfill his contract, which was the difference between the price the cotton was then worth and the price at which it had been sold. *Beall v. Rust*, 68 Ga. 744.

⁷³ *Bodley v. Reynolds*, 8 Q. B. 779; *Reilley v. McMinn*, 2 Pugsley (New Bruns.) 370.

⁷⁴ *France v. Gaudet*, L. R. 6 Q. B. 199.

⁷⁵ In trover against an officer for seizing the tools of one's trade damages for breaking up the plaintiff's business are not recoverable where that results from the award of the property in an action of replevin to

the defendant in the action of trover. *McGuire v. Galligan*, 57 Mich. 38.

Anticipated profits from fulfilling existing contracts for threshing grain are subject to too many contingencies to be made the basis of damages for the conversion of a machine necessary to be used in doing so. *Cushing v. Seymour*, 30 Minn. 310; *Williams v. Wood*, 55 Minn. 323; *Truman v. Case T. M. Co.*, 169 Mich. 153.

⁷⁶ *McKnight v. Carmichael*, 7 Tex. Civ. App. 270.

⁷⁷ *Woods v. Gaar*, 93 Mich. 143.

damages.⁷⁸ It has been held that if the goods have been returned after conversion and accepted by the plaintiff he can only recover a nominal sum unless he claims special damages and alleges them in his declaration.⁷⁹ Such return accepted is treated as if ordered by the court; and therefore, in the absence of allegations in the declaration or conditions agreed on at the acceptance, the latter is deemed an admission that the property has been returned in the same plight as when converted and that no special damages have been suffered, for only in such a case would the court stay proceedings on return of the property.⁸⁰ In Pennsylvania such damages are not regarded as special.⁸¹ In allowing proof that the defendant's detention prevented the sale of the property when the market was high and that the plaintiff was injured by the subsequent decline, the court thus stated what is believed to be the theory of the American practice on this point: "The redelivery is the defense, and is evidence for the defendant, not in bar of the action but in mitigation of the damages; and the plaintiff in reply may surely present to the consideration of the jury the actual injury resulting to him from the trover or conversion in order to show to what extent the damage should in justice be mitigated."⁸² One who innocently buys stolen property from a thief is liable to the owner for its value. If any of it is returned to the owner the wrongdoer's liability is mitigated to that extent. If the owner has incurred expense in recovering possession of his property, as by bringing replevin suits against purchasers of it from the defendant, the latter is liable for such expense, including traveling expenses and attorney's fees.⁸³ There may be a recovery of the

⁷⁸ *Bonelli v. Bowen*, 70 Miss. 142.

⁷⁹ *Lamb v. Kincaid*, 38 Can. Sup. Ct. 516; *Barrelett v. Bellgard*, 71 Ill. 280; *Moon v. Raphael*, 2 Bing. N. C. 310.

⁸⁰ See § 1144. In *Moon v. Raphael*, *supra*, the defendant, a sheriff, who held goods taken in execution, delivered them to plaintiffs, assignees of a bankrupt, after an action of trover had been commenced

by them; the plaintiff accepted the goods without condition; held, that they could not recover in the action more than nominal damages; at all events not without alleging special damages in the declaration.

⁸¹ *Rank v. Rank*, 5 Pa. 211.

⁸² See § 1139.

⁸³ *Laughlin v. Barnes*, 76 Mo. App. 258; *Myers v. Chittyna Exploration*, 20 Cal. App. 418 (time

reasonable expenses of attempting to find and retake the property of which the owner has been deprived. "The rule" said Judge Lyon, "goes upon the ground that one whose property has been tortiously taken from him shall not be compelled, in the first instance, to resort to an action of trover to recover its value, thus surrendering his property to the wrong-doer, but may employ all reasonable means and incur reasonable expenses to recover the property itself, and thus avoid the consequences of the unlawful act of the wrong-doer. It is entirely equitable that such expenses should be recoverable in the action of trover if the owner of the property has been driven to that action to obtain redress."⁸⁴ But expenses incurred in obtaining the return of the property are not recoverable after a voluntary acceptance of a return of it pending the action to recover damages.⁸⁵ If the completion of a house erected to be rented is delayed as the result of converting articles of plumbing therein there may be a recovery of the rent lost.⁸⁶ Any damages claimed in addition to the value and interest are necessarily special and must be alleged.⁸⁷ But the compensation the plaintiff may be entitled to in place of the value by reason of a return of the goods is not of this nature.

Loss of profits resulting from the conversion of a stock of goods cannot be recovered for as compensatory damages.⁸⁸ In Nebraska the contrary rule is well established.⁸⁹ One of the Australian courts has recognized disturbance of business as a

and money expended in pursuit of property).

Under a statute allowing a fair compensation for the time and money expended in pursuit of property expenses in and about the protection of it from a laborer's lien cannot be recovered. *Aronson v. Oppgard*, 16 N. D. 595.

⁸⁴ *Parroski v. Goldberg*, 80 Wis. 339. See *Mathews v. Livingston*, 86 Conn. 263.

⁸⁵ *Collins v. Lowry*, 78 Wis. 329.

⁸⁶ *Munroe v. Armstrong*, 179 Mass. 165.

⁸⁷ § 419; *Summers v. Heard*, 66

Ark. 550; *Fish v. Nethercutt*, 14 Wash. 582, 53 Am. St. 892; *Ling v. Malcom*, 77 Conn. 517 (advance in price of stocks); *Singer v. Pearson-P. Co.*, 58 Ore. 526.

⁸⁸ *Miller v. Jannett*, 63 Tex. 82; *Anderson v. Sloane*, 72 Wis. 566, 7 Am. St. 885; § 1102; *Summers v. Heard*, *supra*; *Montignam v. E. V. Crandall Co.*, 34 App. Div. (N. Y.) 228; *Wehle v. Haviland*, 69 N. Y. 448; *Moravec v. Grell*, 78 App. Div. (N. Y.) 146.

⁸⁹ *Haverly v. Elliott*, 39 Neb. 201; *Kyd v. Cook*, 56 Neb. 71, 71 Am. St. 661.

ground of damage.⁹⁰ It has been ruled by the New York supreme court, appellate term, that ordinarily where conversion is brought for the taking and removal of a stock in trade by a sheriff the value of the goods is the damage allowed; but if the action be for the trespass as well as for the conversion, as alleged in this complaint, which was for ejecting the plaintiff from her business and breaking up and destroying it, and depriving her of the use, benefit and profits of it, as well as for the taking of the goods and detaining them, the loss of profits while the plaintiff was so deprived is unquestionably a direct damage, as in every case of trespass which interferes with the trade or business carried on in the premises.⁹¹ An insolvent cannot recover damages for injury to his commercial standing,⁹² nor can one who has voluntarily gone out of the mercantile business though he may have intended to resume it.⁹³ Evidence as to the plaintiff's reputation and financial standing is inadmissible.⁹⁴ One from whom cows have been taken cannot recover for the loss of their calves and the milk which the cows might have subsequently produced.⁹⁵ In New South Wales a different view has been held where milch cows were taken. "In order that cows should be used for dairy purposes it is necessary that they should have calves. The cows were taken away from the plaintiff, and now in an action of trover and trespass he asks damages for being deprived of their use. The loss of the progeny appear to me, under the circumstances, to be part of the damage and loss which would result in the natural course of events." No deduction was allowable on account of rearing the calves and taking them to market and other like expenses.⁹⁶

⁹⁰ Albrecht v. Raemus, *infra*.

⁹¹ Ebenreiter v. Dahlman, 19 N. Y. Misc. 9, aff'g s. c., 18 N. Y. Misc. 351, and citing Schile v. Brokhahus, 80 N. Y. 614.

⁹² Roby v. Meyer, 84 Tex. 386.

⁹³ Scott G. Co. v. Kelly, 14 Tex. Civ. App. 136.

⁹⁴ Downing v. Outerbridge, 25

C. C. A. 244, 79 Fed. 931. *Contra*, Albrecht v. Raemus, 4 Current Notes, 39, bound with 4 "The Argus" L. R. (Australia).

⁹⁵ Drennen v. Charles, 12 Pa. Super. Ct. 476.

⁹⁶ Venables v. West, 3 New South Wales St. Rep. 54.

An officer who has wrongfully seized and retained property is not liable for its loss by fire unless his wrongful act exposed it thereto, or it occurred through his negligence.⁹⁷ Depreciation in the value of property converted is an element of damage if the defendant is the cause thereof.⁹⁸ The plaintiff cannot recover for his time in attending court on the trial of an action involving the validity of the seizure of his property, nor for any other such incidental expense.⁹⁹ The expenses of the plaintiff are only recoverable where he actually becomes repossessed of the property and that fact is pleaded in mitigation of the damages.¹ Expenditures on account of rent may be recovered if the wrongdoer took possession of the premises.² Expenses incurred in consequence of the defendant's fraudulent statements to the plaintiff concerning his knowledge of the disposition of the property are recoverable.³ Where they were incurred while waiting for the delivery of freight in reliance on a false statement made by the agent of the carrier that the property had not arrived they were regarded as too remote;⁴ a conclusion which seems open to question. The expense of preparing goods for market may be recovered.⁵ In the absence of aggravating circumstances outraged feelings are not an element of damage.⁶ The conversion of the model of a device is ground for the recovery of the money, labor and material expended in perfecting and producing it; and where an application for a patent thereon was wrongfully made by the wrong-doer and he declared that no other person should have the use of it, there was a further liability for the loss of the benefit of a contract of sale made by the plaintiff with a third person for articles

⁹⁷ *Norris v. McCanna*, 29 Fed. 757.

⁹⁸ *Southern R. Co. v. Webb*, 143 Ala. 304, 111 Am. St. 45; *Citizens' Bank v. Shaw*, 132 Ga. 771; *Proctor v. Irvin*, 22 Mont. 547. See *Rambaut v. Irving Nat. Bank*, 42 App. Div. (N. Y.) 143.

⁹⁹ *Harris v. Finberg*, 46 Tex. 79, 90.

¹ *United States v. Pine River L. & Suth. Dam.* Vol. IV.—39.

I. Co., 32 C. C. A. 406, 89 Fed. 907.

² *Casey v. Ballou B. Co.*, 98 Iowa 107.

³ *Withrow v. Walker*, 41 Pa. Super. Ct. 155.

⁴ *Central R. Co. v. Chicago P. Co.*, 122 Ga. 11, 106 Am. St. 87.

⁵ *Prince v. St. Louis C. Co.*, 112 Mo. App. 49.

⁶ *Gates v. Bekins*, 44 Wash. 422.

like the model, the defendant having knowledge thereof. It could not be assumed that the purchaser would, in view of the defendant's act and threats, have accepted articles made from another model.⁷ The physical consequences to a mortgagor of being obliged to walk because the mortgagee of his horse took possession of it is too remote to be a ground for recovery.⁸

§ 1130. **Attorney's fees.** In some states counsel fees incurred and paid in prosecuting an action of trover cannot be recovered.⁹ But they have been allowed in Ohio against an agent in favor of his principal,¹⁰ and in New York.¹¹ The California code provides that the damages recoverable for a conversion shall include a fair compensation for the time and money properly expended in pursuit of the property. This authorized the recovery of reasonable attorney's fees expended by the plaintiff in recovering a large part of a sum of money obtained from him through the fraud of the defendant's agent, for which fraud the defendant was liable.¹² In Georgia counsel fees are not recoverable unless the defendant has acted in bad faith or has been stubbornly litigious,¹³ notwithstanding the action is by the vendor of the property and the defendant's note stipulates for the payment of the fee, which might be collected in an action on the note.¹⁴ In Massachusetts there may be a recovery for the services of an attorney in securing the redemption and recovery of property after a refusal to return it.¹⁵

⁷ *Smith & E. Mfg. Co. v. Webster*, 87 Conn. 74.

⁸ *Hinson v. Smith*, 118 N. C. 503.

⁹ *Dean v. Nichols & S. Co.*, 95 Iowa 89; *Park v. McDaniels*, 37 Vt. 594; *Renfro v. Hughes*, 69 Ala. 581; *Lee v. McDonnell* (Tex. Civ. App.), 72 S. W. 612. See § 1101.

¹⁰ *Peckham I. Co. v. Harper*, 41 Ohio St. 100, 108.

¹¹ *Hynes v. Patterson*, 95 N. Y. 1. See *Bishop v. Hendrick*, 82 Hun 323, affirmed without opinion, 146 N. Y. 398; *Rambaut v. Irving Nat. Bank*, 42 App. Div. (N. Y.) 143.

¹² *Bank of Palo Alto v. Pacific Postal Tel. C. Co.*, 103 Fed. 841,

McDonald v. McConkey, 57 Cal. 325; *Greenbaum v. Martinez*, 86 Cal. 459. *Contra*, *Nicholls v. Mapes*, 1 Cal. App. 349 (under § 3336 Civil Code).

¹³ *Buckner v. State*, 115 Ga. 238.

An allegation that the defendant had so acted as to compel the bringing of the suit is not sufficient to charge him with liability for the fee of the attorney. *Central R. Co. v. Chicago P. Co.*, 122 Ga. 11, 106 Am. St. 87.

¹⁴ *Moultrie Rep. Co. v. Hill*, 120 Ga. 730.

¹⁵ *Berry v. Ingalls*, 199 Mass. 77.

§ 1131. **Exemplary damages.** In jurisdictions in which exemplary damages are allowed they are generally recoverable in all actions of tort where the wrong which is the gist of the action is committed wilfully and maliciously—is attended with the aggravations which are treated as sufficient ground in trespass to justify such damages.¹⁶ An officer who acts under process may be and usually is exempt from liability for punitive damages; but that result does not follow in favor of the plaintiff in the process who wrongfully procured it and used it for the purpose of obtaining possession of property not his own,¹⁷ or acted without probable cause and with malice.¹⁸ An officer is liable for exemplary damages if he knowingly seizes exempt property.¹⁹ In trover, where property has been tortiously taken, the taking is not the gist of the action; and the manner of the

¹⁶ *Louisville & N. R. Co. v. Earl*, 139 Ga. 456; *Plummer v. Hardison*, 6 Ala. App. 525; *Pribble v. Kent*, 10 Ind. 325, 71 Am. Dec. 327; *For-syth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617; *Neiler v. Kelley*, 69 Pa. 403; *Jacoby v. Laussatt*, 6 S. & R. 300; *Dennis v. Barber*, id. 420; *Berry v. Vantries*, 12 id. 89; *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181; *Dibble v. Morris*, 26 Conn. 416; *Mowry v. Wood*, 12 Wis. 413; *Fitts v. Howard*, 13 Ky. L. Rep. 302 (Ky. Super. Ct.); *Bonelli v. Bowen*, 70 Miss. 142; *Jones v. Martini F. Co.*, 71 Mo. App. 474; *San Antonio, etc. R. Co. v. Kniffen*, 4 Tex. Civ. App. 484; *Tignor v. Toney*, 13 Tex. Civ. App. 518; *Downing v. Outerbridge*, 25 C. C. A. 244, 79 Fed. 931; *Casey v. Ballou B. Co.*, 98 Iowa 107; *Reamer v. Morrison Exp. Co.*, 93 Mo. App. 501; *Polykranas v. Krausz*, 73 App. Div. (N. Y.) 583; *Blackmer v. Cleveland, etc. C. Co.* (Mo. App.), 73 S. W. 913; *Gilbert v. Peck*, 162 Cal. 54; *Walker v. Farmers' & Merchants' Bank*,

— Tex. Civ. App. —, 146 S. W. 312; *Garden v. Houston*, 163 Ala. 300; *Kentucky T. & S. Co. v. Ringo*, 145 Ky. 190; *Marlatte v. Weickgenant*, 147 Mich. 266, citing the text; *Shandy v. McDonald*, 38 Mont. 393; *Baldwin v. Davidson* (Tex. Civ. App.), 127 S. W. 562; *Werkheiser-P. Mill Co. v. Langford*, 51 Tex. Civ. App. 224. *Contra*, *Meadowell v. Murdock*, 1 Nott. & McC. 237, 9 Am. Dec. 684; *Tittle v. Kennedy*, 71 S. C. 1. See *Forrest v. McBee*, 72 S. C. 189.

An allegation that the acts complained of were done for the purpose of oppressing the plaintiff and compelling him to surrender his property without receiving compensation therefor, sufficiently charges malice, although the word "malice" is not used. *Gensburg v. Marshall Field & Co.*, 104 Iowa 599.

¹⁷ *Land v. Klein*, 21 Tex. Civ. App. 3.

¹⁸ *Carlton v. Carter*, — Tex. Civ. App. —, 140 S. W. 827.

¹⁹ *Bailey v. Hopkins*, — Tex. Civ. App. —, 131 S. W. 624.

taking is not usually considered for the purpose of exemplary damages. It is otherwise, however, in Pennsylvania,²⁰ Dakota,²¹ Ohio,²² Mississippi,²³ and Texas.²⁴ The fact that property was seized and held with the purpose of enforcing a claim made in good faith is not conclusive against the right to recover punitive damages; it may be found, nevertheless, that the defendant acted in wanton disregard of the rights of the plaintiff with the intent of withholding the value of the property from the plaintiff.²⁵ Where property is converted in good faith under a claim of right exemplary damages should not be assessed.²⁶

§ 1132. **Conversion of money securities.** It is a well established principle that when a bill or note has been diverted from the object for which it was intended an action will lie against the person who has unlawfully diverted it for the conversion thereof or for money had and received by him.²⁷ For the conversion of such instruments or other money securities their owner is, *prima facie*, entitled to recover their face value with interest; that is the presumptive value, and he will be entitled

²⁰ See Pennsylvania cases cited in first note to this section.

²¹ *Bates v. Callender*, 3 Dak. 256.

²² *Peckham I. Co. v. Harper*, 41 Ohio St. 100, 108 (fraud by agent against his principal).

²³ *Bonelli v. Bowen*, *supra*.

Such damages may be imposed (1) in all cases where the original act was wilful and wrongful; (2) or where it was *bona fide*, but the subsequent detention, sale or other disposition of the property, after knowledge of the plaintiff's claim, was wilful and injurious; (3) or where the original act and the subsequent disposition of the property for a greater price than its market value, at the time of the original taking, were in ignorance of the plaintiff's rights, but the defendant seeks to retain the difference as a speculation from his original unintentional wrong; (4) or where the property has some peculiar value to

the plaintiff and is wilfully withheld from him, or he has been deprived thereof by the wilful and wrongful act of the defendant. *Whitfield v. Whitfield*, 40 Miss. 352; *Bickell v. Colton*, 41 id. 368.

²⁴ *Land v. Klein*, 21 Tex. Civ. App. 3; *Curlee v. Rogan*, — Tex. Civ. App. —, 136 S. W. 1126.

²⁵ *Werkheiser-P. M. Co. v. Langford*, 51 Tex. Civ. App. 224.

²⁶ *Allen v. Cable*, 180 Ill. App. 472.

²⁷ *First Nat. Bank v. Felker*, 185 Fed. 678; *Hynes v. Patterson*, 95 N. Y. 1; *Decker v. Mathews*, 12 id. 313; *Comstock v. Hier*, 73 id. 269, 29 Am. Rep. 142; *Murray v. Burling*, 10 Johns. 172; *Union Nat. Bank v. Post*, 64 Ill. App. 404; *Bavins v. London & S. Bank*, [1900] 1 Q. B. 270.

The right of action for the conversion of a series of notes is an en-

to recover the actual value if in any manner shown.²⁸ Thus, if bonds are sold the amount realized, with interest from the time of sale, and such interest as had been collected on them previous to sale, is recoverable.²⁹ The maker of notes which are diverted from their purpose may recover the amount it costs him to discharge them.³⁰ A pledgee who uses bonds for

tiety. *Skeen v. Springfield E. & T. Co.*, 42 Mo. App. 158.

²⁸ *Kirkpatrick v. San Angelo Nat. Bank*, — Tex. Civ. App. —, 148 S. W. 362; *First Nat. Bank v. Felker*, 185 Fed. 678; *Hubbard v. State L. Ins. Co.*, 129 Iowa 13; *Bank v. Powers*, 102 Mo. App. 415; *Deri v. Union Bank*, 65 N. Y. Misc. 531; *Hetrick v. Smith*, 67 Wash. 664; *Latham v. Brown*, 16 Iowa 118; *Robinson v. Hurley*, 11 id. 410; *Bredow v. Mutual Sav. Inst.*, 28 Mo. 181; *Craig v. McHenry*, 35 Pa. 120; *Roberts v. Berdell*, 61 Barb. 37; *Turner v. Retter*, 58 Ill. 264; *Dennis v. Barber*, 6 S. & R. 420; *Menkens v. Menkens*, 23 Mo. 252; *McPeters v. Phillips*, 46 Ala. 496; *St. John v. O'Connell*, 7 Port. 476; *Mercer v. Jones*, 3 Camp. 476; *Wilson v. Conine*, 2 Johns. 280; *Shotwell v. Wendover*, 1 id. 65; *Cortelyou v. Lansing*, 2 Cai. Cas. 200; *Ingalls v. Lord*, 1 Cow. 240; *King v. Ham*, 6 Allen 298; *Tyng v. Commercial W. Co.*, 58 N. Y. 308; *Fisher v. Brown*, 104 Mass. 259; *Potter v. Merchants' Bank*, 28 N. Y. 641; *Seals v. Cummings*, 8 Humph. 442; *Canton v. Smith*, 65 Me. 203; *Holt v. Van Eps*, 1 Dak. 206; *Decker v. Mathews*, 12 N. Y. 313; *Evans v. Kymer*, 1 B. & Ad. 528; *American Exp. Co. v. Parsons*, 44 Ill. 312; *Ray v. Light*, 34 Ark. 421, 430; *Merchants' & P.'s Nat. Bank v. Trustees Masonic Hall*, 62 Ga. 271; *Hayes v. Massachusetts Mut. L. Ins. Co.*, 125 Ill. 626, 1 L.R.A. 303; *Pelley v.*

Walker, 79 Iowa 142; *Hersey v. Walsh*, 38 Minn. 521, 8 Am. St. 689; *State v. Berning*, 74 Mo. 87; *Ramsey v. Hurley*, 72 Tex. 194; *Hurst v. Coley*, 15 Fed. 645; *Meixell v. Kirkpatrick*, 29 Kan. 679; *Union Nat. Bank v. Post*, 64 Ill. App. 404; *Powell v. Ong*, 92 id. 95; *Dean v. Nichols & S. Co.*, 95 Iowa 89; *Boley v. Wood M. & R. Mach. Co.*, 62 Mo. App. 139; *Halbert v. Rosenbalm*, 49 Neb. 498; *Griggs v. Day*, 136 N. Y. 152, 18 L.R.A. 120; *Grigsby v. Day*, 9 S. D. 585; *Walley v. Deseret Nat. Bank*, 14 Utah 305, quoting the text.

In *Brightman v. Reeves*, 21 Tex. 70, the presumption of face value was denied and proof required of the actual value.

In *Pawson v. Miller*, 66 App. Div. (N. Y.) 12, a check called for the payment of two amounts, the smaller being designated in the body of it. This amount the bank offered to pay. On its being taken to the drawer for correction he destroyed it. It was not competent for him to say it was not worth the sum the bank offered to pay.

²⁹ *Collins v. Smith*, 158 Fed. 872; *Loring v. Brodie*, 134 Mass. 453, 463.

³⁰ *Hynes v. Patterson*, 95 N. Y. 1. In this case the plaintiff executed notes and loaned them to the defendant, who was to discount them, pay plaintiff ten per cent. of the proceeds and apply the balance to a specified use. The notes were used

an unauthorized purpose must reimburse their owner for the cost of redeeming them, though that exceeds the benefit the pledgee derived from them.³¹ The rule that the measure of damages for the conversion of securities is, *prima facie*, the amount due on them rests upon the fact that the owner has been divested of his property. This rule does not apply where the maker of obligations complains that by reason of the defendant's wrongful act he has become chargeable to and will be compelled to pay innocent holders of them, when but for such act the obligations would never have become binding against him. Where bonds were wrongfully obtained from the person who held them in escrow and transferred to *bona fide* purchasers the damages were measured (the bonds being outstanding) by their amount at the time judgment was rendered, according to their terms; interest matured on the coupons attached thereto after the conversion and up to the time of judgment; interest at the legal rate upon each matured coupon from the date of its maturity to the date of the judgment, and interest upon the principal of the bonds at the stipulated rate from the time the last coupon matured, prior to the judgment, to the date of the latter.³² Stated accounts,³³ and even accounts which have not been stated, are within the rule which presumes them to be worth their face value.³⁴ This presumption may be easily overthrown as to the latter class.³⁵ The damages for the conversion of a savings bank book are measured by the actual loss, not by the amount shown by it to be due the depositor. His right to recover the latter sum from the bank is not affected by the loss of the book.³⁶

for an entirely different purpose, and judgment was rendered on them against plaintiff, which he settled by paying less than it called for. The amount thus paid and counsel fees were recovered.

³¹ *Interurban C. Co. v. Hayes*, 191 Mo. 248.

³² *Winona v. Minnesota R. & C. Co.*, 29 Minn. 68.

³³ *O'Donoghue v. Corby*, 22 Mo.

393; *Casey v. Ballou B. Co.*, 98 Iowa 107, citing the text.

³⁴ *Thornton-T. M. Co. v. Brether-ton*, 32 Mont. 80.

³⁵ *Sadler v. Bean*, 37 Iowa 439. See *Doyle v. Eccles*, 17 Up. Can. C. P. 644; *Woodborne v. Scarborough*, 20 Ohio St. 57.

³⁶ *Newman v. Munk*, 36 N. Y. Misc. 639.

Interest should be computed to the date of the conversion where the face value is recovered and the converted security bore interest;³⁷ and though it did not bear it.³⁸ It has been held to be error to compute interest on the face of notes to the date of demand and then on the whole amount to the date of the verdict;³⁹ but as to this the cases are not a unit.⁴⁰ If the defendant has collected instalments of interest on a note as they became due and appropriated them to his own use the owner may recover all such sums paid.⁴¹ The face value of a check which has been paid on a forged indorsement is the measure of damages after a refusal to surrender it on demand.⁴² It seems that there cannot be a recovery of the amount paid for protest fees.⁴³ The recovery in trover for a receipted account of the plaintiff against the defendant is measured by the value of the document. There is no legal presumption that its value as a chattel is equal to that of the chose in action.⁴⁴ The maker of a promissory note can maintain an action for its conversion against one who, before it has any legal inception, wrongfully negotiates it to a *bona fide* holder for value. He is entitled to recover the full amount without averring or proving that he has paid it to the holder. It is sufficient that he is legally liable to pay it.⁴⁵ But where a note having the plaintiff's name on it as indorser only has been as to him fraudulently transferred to a *bona fide* holder and has not yet matured he is not entitled to maintain an action before he has been called on for payment or his liability is made absolute. He is not yet deemed to have

³⁷ Roberts v. Berdell, 61 Barb. 37; Clark v. Bates, 1 Dak. 42; Nutting v. Thomasson, 57 Ga. 418; Merchants' & P.'s Bank v. Trustees Masonic Hall, 62 id. 271.

³⁸ Hubbard v. State L. Ins. Co., 129 Iowa 13.

³⁹ Benjamin W. & C. Co. v. Merchants' Exch. Bank, 63 Wis. 470.

⁴⁰ Citizens' Bank v. Shaw, 132 Ga. 771, citing Booth v. Powers, 56 N. Y. 22; Mercer v. Jones, 3 Camp. 477; Evans v. Kymer, 1 B. & A.

528; Decker v. Mathews, 12 N. Y. 313; St. John v. O'Connel, 7 Port. 466.

⁴¹ Halbert v. Rosenbalm, 49 Neb. 498.

⁴² Survey v. Wells, etc. Co., 5 Cal. 124.

⁴³ Hurst v. Coley, 15 Fed. 645.

⁴⁴ Moody v. Drown, 58 N. H. 45.

⁴⁵ Decker v. Mathews, 12 N. Y. 313; Winona v. Minnesota R. & C. Co., 29 Minn. 68. See preceding section.

suffered any damage.⁴⁶ In a case in which there was a breach of the defendant's contract to deliver the plaintiff's note to him it was ruled that the latter had a right of action. Dodge, J., said: If the measure of his damages is involved in some degree of uncertainty, or if possibly a recovery of the full amount of the face of the note may work injustice to the defendant, it must be remembered that the situation results from the fault of the latter, and not of the former. The postponement of the plaintiff's recovery till he has paid, especially if he be poor or embarrassed, may subject him to serious injuries meanwhile, enhanced by his poverty. His attempts to do business or to emerge from his state of insolvency may be thwarted at every turn by the impairment of his credit from the mere existence of the liability. Any property acquired by him may be promptly sacrificed in the effort to enforce that liability, and still the debt remain unpaid and he without remedy; and that, too, without any fault on his part save poverty. As between the two, inconvenience should fall on the guilty rather than the innocent. The peril, suggested by the defendant, that the plaintiff may recover and collect judgment against the defendant, and still not pay the note, was pointed out, and held not sufficient to prevent a recovery in *Loosemore v. Radford*,⁴⁷ and was considered in *Johnson v. Britton*,⁴⁸ where it was shown that under code practice, where law and equity are administered by the same court, it might readily be averted by equitable counterclaim. * * * A note is not necessarily entirely valueless because its maker is insolvent, or because no property subject to execution exists. Many a note has been paid notwithstanding such condition. That situation, too, would largely disappear upon recovery of judgment in the plaintiff's favor which might be in reach of execution. Still less is it true, as already pointed out, that insolvency precludes damage to the maker of such a note from its existence as a liability against him. At most, the plaintiff's financial condition was a circumstance to be con-

⁴⁶ *Freeman v. Venner*, 120 Mass
424.

⁴⁷ 9 M. & W. 657.
⁴⁸ 23 Ind. 105.

sidered in assessing the damages.⁴⁹ Trover may be brought by the acceptor for the conversion of a paid bill of exchange; nor is he confined to nominal damages; he is entitled to recover in respect of the risk of liability although the bill is utterly valueless.⁵⁰ One who converts a written instrument payable by its terms to himself, but in which another has an interest, must account to the latter for his share of the full sum due according to the face thereof unless he shows its actual value.⁵¹ The obligee in a bond may recover in this action against the obligor who tore off his seal; and the whole amount of the penalty, it appearing that the condition had been broken to the damage of the plaintiff to a still greater amount.⁵² In such a case no alternative can be given the defendant to deliver up the obligation in discharge of damages.⁵³ It has been held that the owner may recover for the conversion of a bond the sum he would be entitled to recover on it from the obligee.⁵⁴ The conversion of a common-law bond for the payment of a judgment renders the wrong-doer liable, *prima facie*, for the amount of the judgment which it secured.⁵⁵ If the party liable on an instrument converts it he is subject to that measure of recovery, and the defense of insolvency has no application.⁵⁶ So where a plaintiff sues for conversion of notes made by himself the measure of damages is the amount due on them at the time of the trial without reference to his ability to pay.⁵⁷ If a judgment has been recovered against him thereon and he has satisfied it the amount paid will be the measure of damages.⁵⁸ In other cases the insolvency of

⁴⁹ Lyle v. McCormick H. M. Co., 108 Wis. 81.

⁵⁰ Dunne v. Thorpe, B., D. & O. 128. See Hansard v. Robinson, 7 B. & C. 90; Evans v. Kymer, 1 B. & Ad. 528; Stone v. Clough, 41 N. H. 290.

⁵¹ Davies v. Stevenson, 59 Kan. 648.

⁵² Bank v. Widmer, 2 Up. Can. Jur. (O. S.) 222.

⁵³ Id.

⁵⁴ Romig v. Romig, 2 Rawle. 241; Delany v. Hill, 1 Pittsb. 28.

⁵⁵ Johnson v. Dun, 75 Minn. 533.

⁵⁶ Outhouse v. Outhouse, 13 Hun 132; Ackerman v. Green, 195 Mo. 124, disapproving a remark in Fry v. Baxter, 10 Mo. 192; Stephenson v. Thayer, 63 Me. 143.

⁵⁷ Robbins v. Packard, 31 Vt. 570; Thayer v. Manley, 73 N. Y. 305; Metropolitan E. R. Co. v. Kneeland, 120 id. 134, 17 Am. St. 619, 8 L.R.A. 253.

⁵⁸ Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142; Hynes v. Patterson, 95 N. Y. 1.

the parties liable on the paper may be shown in mitigation.⁵⁹ If, on account of peculiar circumstances, the note of a person having no property liable to execution would be available to the owner for its full amount he is entitled to recover it.⁶⁰

The fact that at the time a judgment was converted the judgment debtor was insolvent does not necessarily limit the recovery to nominal damages; the fact that he became solvent after the judgment was rendered may be shown.⁶¹ There cannot be a recovery of the expense of an unsuccessful defense to an action on a converted note by the defendant's transferee.⁶² It is provided by statute in Georgia that in estimating the value of personalty unlawfully detained the plaintiff may recover the highest amount which he can prove was the value of it between the time of the conversion and the trial. This does not authorize a creditor to recover from his debtor for the conversion of collaterals a sum exceeding the amount of the debt, with interest. In no case can the recovery for the conversion of a security exceed the sum which would be recovered were the action brought directly on the debt or demand.⁶³ Where the note converted was payable in cotton and the evidence did not show its value at the time when and place where the note was due and payable a money recovery was denied.⁶⁴

The defendant has a right to show in reduction of damages payment in whole or in part; the inability of the maker to pay or his release from his undertaking; the invalidity of the instrument or any other matter which will legitimately affect or diminish its value.⁶⁵ But if the maker becomes insolvent after

⁵⁹ *McPeters v. Phillips*, 46 Ala. 496; *Potter v. Merchants' Bank*, 28 N. Y. 641; *Latham v. Brown*, 16 Iowa 118; *Zeigler v. Wells, etc. Co.*, 23 Cal. 179, 83 Am. Dec. 87; *Cothran v. Hanover Nat. Bank*, 40 N. Y. Super. Ct. 401.

⁶⁰ *Rose v. Lewis*, 10 Mich. 483; *Delegal v. Naylor*, 7 Bing. 460.

⁶¹ *Rivinus v. Langford*, 33 L.R.A. 250, 21 C. C. A. 581, 75 Fed. 959.

⁶² *Dean v. Nichols & S. Co.*, 95 Iowa 89.

⁶³ *Fisher v. Jones Co.*, 108 Ga. 490.

⁶⁴ *Bell v. Ober & S. Co.*, 96 Ga. 214.

⁶⁵ *Capps v. Vasey*, 23 Okla. 554; *Booth v. Powers*, 56 N. Y. 22; *Terry v. Allis*, 20 Wis. 32; *Ingalls v. Lord*, 1 Cow. 240; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404; *Fell v. McHenry*, 42 Pa. 41; *King v. Ham*, 6 Allen 298; *Mathew v. Sherwell*, 2 Taunt. 439; *Robinson v. Hurley*, 11 Iowa 410; *Ray v.*

the conversion it will be no ground for mitigation of damages.⁶⁶ Where an executor brought trover for the conversion of a note made by himself as an individual to the decedent, his appointment as executor not operating as a discharge of his obligation, he recovered only nominal damages. It was inequitable to apply the general rule and make the defendant liable for the value of the note because he would pay the debt owed the estate by the plaintiff. Besides, inasmuch as the plaintiff could not sue himself, the value of the note to the estate was not established.⁶⁷ A mortgagee of chattels who has deposited a mortgage thereof with his creditor can recover only to the extent of the value of the mortgage from a third person who converts it after the creditor has collected his debt out of the goods.⁶⁸

§ 1133. **Conversion of insurance policies.** In trover for conversion of an insurance policy the rule of damages is probably the same as if the action were by the insured upon the policy, subject to mitigation by evidence of the insolvency of the insurer.⁶⁹ If the insurer converts a policy after liability for a loss has attached the damages are measured by the face of the policy,⁷⁰ with interest from the date of the conversion.⁷¹ Where the wrong is done by a third party before a life policy has become payable the damages are measured by the principle which governs where the insurer wrongfully refuses to receive premiums⁷²—the difference between the rate of premiums paid for the insurance and what another company of equal credit and standing would charge to issue a new policy on the same life, and the difference in the rates of premium

Light, 34 Ark. 421, 430; Thompson v. Halbert, 40 Hun 536 (statute of limitations); Dean v. Nichols & S. Co., *supra*; Griggs v. Day, 136 N. Y. 152, 18 L.R.A. 120; Walley v. Deseret Nat. Bank, 14 Utah 385, quoting the text; Lyle v. McCormick H. M. Co., 108 Wis. 81, 51 L.R.A. 906.

⁶⁶ Knapp v. United States, etc Exp. Co., 55 N. H. 348; King v. Ham, 6 Allen 298; Kellogg v. Thompson, 142 Mass. 76; Ramsey v. Hurley, 72 Tex. 194.

⁶⁷ Robinson v. Ferguson, 23 New Bruns. 332.

⁶⁸ Nesbitt v. Moore, 39 S. C. 351.

⁶⁹ Kohne v. Insurance Co., 1 Wash. C. C. 93. See Chicago B Soc. v. Crowell, 65 Ill. 453.

⁷⁰ Hayes v. Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 1 L.R.A. 303. See Cooper v. Board of Review, 207 Ill. 472, 64 L.R.A. 72.

⁷¹ Mutual L. Ins. Co. v. Allen, 212 Ill. 134.

⁷² § 838.

calculated upon his expectancy of life. This rule only governs where the insured is in as good condition of health as he was when his policy was procured. In such a case the amount paid on it and interest thereon is not the measure of recovery because he would have had insurance without cost.⁷³ If, however, the life insured is no longer insurable the value of the policy at the time the wrong was done, with interest, may be recovered,⁷⁴ less the premiums which became due intermediate the conversion and the death of insured. In New York the allowance of interest is within the discretion of the jury.⁷⁵ In trover for a policy it appeared that it was void; the plaintiff had assigned it as security for a debt and the pledgee, on receipt of a certain amount from the insurer as a gratuity, had delivered it up to be canceled. It was held that the plaintiff was entitled to only nominal damages for the value of the parchment; he had no claim for the full amount of the policy, for it was confessedly bad, nor to the sum paid the defendant, for it was merely a gratuity.⁷⁶ In one case trover was sustained for a policy which was never effected. An agent had been employed to procure insurance and reported that he had done so, when in fact he had not. He was not permitted to gainsay his representation and was held to the same liability as an insurer for the indemnity the plaintiff would have had if the representation had been true.⁷⁷ A pledgor whose policy has been unlawfully canceled by the pledgee and the insurer is not bound to accept in mitigation of damages, the original policy which has been re-issued to the pledgee upon the surrender of one obtained by him in lieu of the original. The question of the validity of the latter cannot be determined in an action between those parties. The defendant is presumed to have in his possession the market value of the

⁷³ This consideration has weight as between insured and insurer, but it is of very doubtful application as between the former and a third party.

⁷⁴ *Barney v. Dudley*, 42 Ken. 212, 16 Am. St. 476; *Toplitz v. Bauer*, 161 N. Y. 325, 34 App. Div. 526.

If the policy converted had no

market or trade value its value to the owner at the time of the conversion will furnish the measure of damages. *Woodworth v. Hascall*, 59 Neb. 124.

⁷⁵ *Toplitz v. Bauer*, *supra*.

⁷⁶ *Wills v. Wells*, 8 Taunt. 264.

⁷⁷ *Harding v. Carter*, Park on Insurance, 5.

plaintiff's policy, the increase of such value subsequent to the conversion, less the amount due the pledgee on the debt for which the policy was given as collateral, is the measure of recovery.⁷⁸ The recovery for the conversion of a matured policy by one who may collect on it is, *prima facie*, the amount specified in it.⁷⁹ The measure of damages recoverable from an insurer which cancels an unmatured policy is the difference between the cost of the old insurance and what another reliable insurer would charge for such a policy to one of the age of the insured at the date of the cancellation, with interest from the latter date.⁸⁰ The premiums paid on a prior policy canceled by consent are not a factor in an action for the conversion of a subsequent policy.⁸¹

§ 1134. **Conversion of deeds, etc.** Damages for conversion of deeds and other instruments will be allowed according to the loss in the particular case. If the party deprived of a deed is in possession of all it was intended to convey the damages are less than when he is out of possession.⁸² In the latter case the jury may give the full value of the estate as damages, but these are generally reduced to a small sum on the deed being given up.⁸³ Where the obligor in a bond to convey land has converted the bond the measure of damages has been held to be the value of the land. This may justly be awarded, for recovery and satisfaction would extinguish the equitable interest and thus have the same effect to transfer title as in other cases.⁸⁴ But where the conversion of a deed will not affect the owner's title and the wrong is not one for which punitive damages can be given the proper measure is such a sum as will recompense the plaintiff for any actual loss he may have sustained, and for the trouble and expense of going into a court of equity or else-

⁷⁸ *Wheeler v. Pereles*, 43 Wis. 332; *Bailey v. American D. & L. Co.*, 52 App. Div. (N. Y.) 402.

⁷⁹ *Stafford v. Lang*, 25 R. I. 488.

⁸⁰ *Supreme Lodge, etc. v. Neeley* (Tex. Civ. App.), 135 S. W. 1046.

⁸¹ *Id.*

⁸² *Lloyd v. Sadlier*, 7 Irish Jur. (N.S.) 15.

⁸³ *Loosemore v. Radford*, 9 M. & W. 657; *Coombe v. Sansom*, 1 D. & R. 201.

⁸⁴ *Clowes v. Hawley*, 12 Johns. 483.

where to establish and perpetuate the evidence of his title.⁸⁵ A. having agreed to purchase of B. the remainder of a term, the latter delivered to him the lease in order that he might get an assignment made out. A. then obtained an enlargement of the term from the original landlord and refused to accept an assignment or pay the full price agreed on, because B.'s under-tenant had removed some fixtures. It was held that B. might insist on A. accepting the assignment and after demand and refusal of the lease might maintain trover for it and recover the agreed price as damages.⁸⁶

§ 1135. **Conversion of shares of stock.** The more important questions arising out of the conversion of such property are elsewhere considered.⁸⁷ If there is a refusal to deliver stock on demand and it is subsequently tendered and accepted the owner may recover the difference between its value when demand was made and when it was delivered.⁸⁸ The loss of dividends declared on converted stock between the time of doing the wrong and making demand for the stock is a direct and necessary result of the conversion and they may be recovered,⁸⁹ as may interest on them.⁹⁰ It has been held in South Carolina that the person who converts certificates of shares of stock is liable for their full value.⁹¹ This is doubtless correct if the effect of the act is to deprive the owner of his stock; but if that result does not follow and the defendant does not become the owner of it after recovery against him it is erroneous.⁹² If a certificate of membership in a board of trade is converted and

⁸⁵ *Mowry v. Wood*, 12 Wis. 413, *Edwards v. Dickinson*, 102 N. C. 519.

In Texas the owner of land scrip which has been converted is not bound to pursue the property in the hands of a third person or institute suit to establish his right to it as against the holder. The scrip was treated as if it were a chattel and unlike an ordinary deed, because it had a market value. *Nelson v. King*, 25 Tex. 655, 1 Am. Neg. Cas. 937.

⁸⁶ *Parry v. Frame*, 2 B. & P. 451.

⁸⁷ §§ 1118-1125.

⁸⁸ *McDonald v. McKinnon*, 104 Mich. 428.

⁸⁹ *Briggs v. Kennett*, 8 N. Y. Misc. 264.

⁹⁰ *Doyle v. Burns*, 123 Iowa 488, approving *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671.

⁹¹ *Connor v. Hillier*, 11 Rich. 193, 73 Am. Dec. 105.

⁹² *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 91.

loss of membership follows, the damages are, *prima facie*, the value of the right to transact business as a member thereof,⁹³ or the value of the stock represented by the certificate.⁹⁴ If the stock for the conversion of which an action is brought against the corporation which issued it by the purchaser and debtor has not been fully paid for, the amount due thereon may be deducted if it does not exceed the market price of the stock.⁹⁵ Executors who retain railroad stock under circumstances which prevent the reorganization of a railroad company are estopped from claiming that the person entitled to the stock would not have availed himself of his privilege if they had not done the wrong. But if such executors have purchased the railroad property on foreclosure for reorganization of the company after the plan of reorganization had been made public, the party entitled to the stock cannot recover damages because of the resulting hindrance experienced by him in connection with the reorganization.⁹⁶

§ 1136. Recovery limited to plaintiff's interest. To entitle a plaintiff in trover to recover the full value of the property from one who converts it, he must be the owner thereof, or, if not such, have a right of possession with responsibility over to the general owner. The goods must be stated in the declaration to be those of the plaintiff. He must have the title or right of possession at the time of the conversion.⁹⁷ Property in a third person, with whom the wrong-doer is in no privity, will be wholly unavailing to one who tortiously invades actual possession, or to rebut a right inferable therefrom. Actual possession, not wrongful as to the defendant, will be sufficient to maintain the action unless the plaintiff has possession as a

⁹³ *Olds v. Chicago Open Board of Trade*, 33 Ill. App. 445.

⁹⁴ *Barth v. Union Nat. Bank*, 67 Ill. App. 131.

⁹⁵ *Budd v. Multnomah St. R. Co.*, 15 Ore. 413, 3 Am. St. 169.

⁹⁶ *Griggs v. Day*, 158 N. Y. 1.

⁹⁷ *Roper W. G. Co. v. Faver*, 8 Ga. App. 178; *Thayer v. Hutchinson*, 13 Vt. 507, 37 Am. Dec. 607; *Kemp v. Thompson*, 17 Ala. 9; *Pattison v.*

Adams, 7 Hill, 126, 42 Am. Dec. 59; *Bond v. Mitchell*, 3 Barb. 304; *Curd v. Wunder*, 5 Ohio St. 92; *Fairbank v. Phelps*, 22 Pick. 538; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Baker v. Seavey*, 163 Mass. 522, 47 Am. St. 475; *Parker v. First Nat. Bank*, 3 N. D. 87; *Cledenning v. Hawk*, 8 N. D. 419; *Henderson v. Williams*, [1895] 1 Q. B. 521.

mere servant to somebody else.⁹⁸ But under a plea which puts the plaintiff's possession and property in issue at the time of the conversion the defendant may show title in a third person. Such proof tends to controvert the plaintiff's title; and where the defendant has a right of possession derived from the general owner, has acted by his authority or has responded to him he is entitled to set up his title.⁹⁹ If the plaintiff is not possessed of the full title, but has actual possession with responsibility over to the true owner for the property, or has any special possessory title, however temporary, if it existed at the time of the conversion, he may recover the full value as against a mere stranger or wrong-doer.¹ But if the plaintiff, having but a limited title, brings his action against one having the remaining interest or against one claiming under such residuary

⁹⁸ *National S. Co. v. United States*, 63 C. C. A. 512, 129 Fed. 70; *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 114; *Freshwater v. Nichols*, 7 Jones 251; *Bartlett v. Hoyt*, 29 N. H. 317; *Harris v. Smith*, 3 S. & R. 20; *Hampton v. Brown*, 13 Ired. 18; *Gruman v. Smith*, 81 N. Y. 27; *Bennet v. Gilbert*, 194 Ill. 403, aff'g 94 Ill. App. 505.

⁹⁹ *Bates v. Stanton*, 1 Duer 79; *Beach v. Berdell*, 2 id. 327; *Edson v. Weston*, 7 Cow. 278; *King v. Richards*, 6 Whart. 418, 37 Am. Dec. 420; *Ogle v. Atkinson*, 5 Taunt. 759; *Sheridan v. New Quay Co.*, 4 C. B. (N.S.) 618; *Floyd v. Bovard*, 6 W. & S. 75; *White v. Teal*, 12 Ad. & E. 114; *Sylvester v. Girard* 4 Rawle. 185; *Baker v. Seavey*, 163 Mass. 522, 47 Am. St. 475.

¹ *Gross v. Saratoga European H. & R. Co.*, 176 Ill. App. 160; *Missouri Pac. R. Co. v. Peru-Van Zandt I. Co.*, 73 Kan. 295, 6 L.R.A. (N.S.) 1058, 117 Am. St. 468; *Johnson v. Gulf & C. R. Co.*, 82 Miss. 452; *Biehler v. Irwin* (Misc.), 84 N. Y. Supp. 574; *McCrossan v. Reilly*, 34 Pa. Super. Ct. 628; *Mes-*

senger v. Murphy, 33 Wash. 353; *Carson v. Hanawalt*, 50 Ind. App. 409; *Mechanics' & Tr. Bank v. Farmers' & M. Bank*, 60 N. Y. 40; *Buck v. Remsen*, 34 id. 383; *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770; *Davidson v. Gunsolly*, 1 Mich. 388; *McGowen v. Young*, 2 Stew. 276; *Pomeroy v. Smith*, 17 Pick. 85; *Gruman v. Smith*, 71 N. Y. 27; *Adamson v. Petersen*, 35 Minn. 529; *Leoncini v. Post*, 37 N. Y. St. 255; *Philbrook v. Eaton*, 134 Mass. 398; *Jones v. Kellogg*, 51 Kan. 263, 37 Am. St. 278, citing the text; *Hanly v. Davis*, 166 Mass. 1; *Rund v. Blatt*, 170 Mass. 469; *Vandiver v. O'Gorman*, 57 Minn. 64; *Rector-W. Co. v. Nissen*, 35 Neb. 716; *Bigelow v. Goble*, 9 App. Div. (N. Y.) 391; *Einstein v. Dunn*, 61 App. Div. (N. Y.) 195; *Sanger v. Henderson*, 1 Tex. Civ. App. 412; *Martin-B. Co. v. Henderson*, 9 Tex. Civ. App. 130; *Cabell v. Johnston*, 14 Tex. Civ. App. 472; *White v. Sterzing*, 11 Tex. Civ. App. 553; *Thomas M. Co. v. Voelker*, 23 R. I. 441.

owner he can then recover only according to his interest,² which is to be determined according to the latest contract between the parties.³ The defendant hired a negro to the plaintiff for two years and put him in possession; soon afterwards the defendant got possession of the negro and sold him. In trover it was held the hirer was entitled to recover the difference between the amount fixed as hire and the profits of the negro's labor for the stipulated term.⁴ The holder of a lien, seeking to enforce it against the owner or who sues the owner or one claiming under him for injury to or conversion of the property, can only recover the value of his lien.⁵ A mortgagee is not entitled to

² *Stewart v. Harris*, 6 Ala. App. 518; *Smith v. Case T. M. Co.*, 50 Pa. Super. Ct. 92, citing the text; *Commercial Bank v. First State Bank & T. Co.* (Tex. Civ. App.), 153 S. W. 1175; *Fetzer v. South Side L. Co.*, 202 Fed. 878; *Hamburg Bank v. George*, 92 Ark. 472; *Merchants' Nat. Bank v. Williams*, 110 Md. 334; *Keables v. Christie*, 47 Mich. 594; *Schwarz v. Kennedy*, 142 Fed. 1027; *Higdon v. Garrett*, 163 Ala. 285; *Hall v. Nix*, 156 Ala. 423; *Ryan v. Young*, 147 Ala. 660; *Bradley L. & L. Co. v. Eastern Mfg. Co.*, 104 Me. 203, quoting the text; *Richter v. Buchanan*, 48 Wash. 32; *Clark v. Clement*, 75 Vt. 417; *Roper W. G. Co. v. Faver*, 8 Ga. App. 178; *Illinois T. & S. Bank v. Stewart L. Co.*, 119 Wis. 54; *Fowler v. Gilman*, 13 Metc. (Mass.), 267; *Klinkert v. Fulton S. & M. Co.*, 113 Wis. 493; *Tenney v. State Bank*, 20 Wis. 152; *Briggs v. Boston, etc. R. Co.*, 6 Allen, 246, 83 Am. Dec. 626; *Case v. Hart*, 11 Ohio 364; *Peebles v. Boston, etc. R. Co.*, 112 Mass. 498; *McGuire v. Galligan*, 57 Mich. 38; *Ganong v. Green*, 71 Mich. 1; *Becker v. Dunham*, 27 Minn. 32; *Lugenbeal v. Lamert*, 42 Ohio St. 1; *Norris v. McCanna*, 29 Fed. 757; *Warner v. Vallily*, 13 R. I. 483; *Bradley v. Suth. Dam.* Vol. IV.—40.

Burkett, 82 Ga. 255; *Horner v. Guiser Mfg. Co.*, 74 Ga. 790; *Lacy v. Johnson*, 58 Wis. 414; *Mississippi Mills v. Meyer*, 83 Tex. 433; *Seibold v. Rogers*, 110 Ala. 438; *Sunny South L. Co. v. Neimeyer L. Co.*, 63 Ark. 268; *Stanley v. Citizens' C. & C. Co.*, 24 Colo. 103; *Huellmantel v. Vinton*, 116 Mich. 621; *Tobener v. Hassinbusch*, 56 Mo. App. 591; *Haverly v. Elliott*, 39 Neb. 201; *Harvey v. Morse*, 69 N. H. 475; *Fifth Nat. Bank v. Providence W. Co.*, 17 R. I. 112, 9 L.R.A. 260; *Kohn v. Dravis*, 36 C. C. A. 253, 94 Fed. 288; *California C. F. Ass'n v. Ainsworth*, 134 Cal. 461, citing the text; *Thomas M. Co. v. Voelker*, *supra*.

³ *Smith v. Goff*, 29 R. I. 439.

⁴ *Compton v. Martin*, 5 Rich. 14.

⁵ *Lusch v. Huber Mfg. Co.*, 79 Neb. 45; *Buffalo P. Co. v. Stringfellow-H. H. Co.* (Tex. Civ. App.), 129 S. W. 1161; *Ullman v. Devereux*, 46 Tex. Civ. App. 459; *Scaling v. First Nat. Bank*, 39 Tex. Civ. App. 154; *Brown v. Union S. & L. Ass'n*, 28 Wash. 657; *Hays v. Riddle*, 1 Sandf. 248; *Bailey v. Godfrey*, 54 Ill. 507, 5 Am. Rep. 157; *Sheldon v. Southern Exp. Co.*, 48 Ga. 625; *Spoor v. Holland*, 8 Wend. 445, 24 Am. Dec. 37; *Ward v.*

recover from an officer who seizes mortgaged chattels the whole amount of the mortgage debt, regardless of their value or of the damage sustained because the defendant did not comply with a statute requiring him to pay or tender to the mortgagee or deposit for him the amount of the mortgage debt. The recovery cannot exceed the value of the property converted and such other damage as immediately results to the mortgagee from the conversion, such as loss of time and expense in discovering the property. If the value of the latter is in excess of the debt and such damages these measure the recovery.⁶ The right of a mortgagee to recover against a trespasser for the conversion of a part of the mortgaged property to the extent of his lien is not dependent upon the sufficiency of that remaining to satisfy his lien.⁷ One who takes property impounded under trustee process from the possession of the trustee is liable for the amount of a judgment rendered against and paid by the trustee, not exceeding the value of the property; it is immaterial that such judgment was by default if it appears the trustee would have been chargeable had he made disclosure.⁸ The amount which would have been realized from garnished goods converted, their value being less than the judgment, may be recovered.⁹ A partner who sues for the conversion of his interest in firm property can only recover the value of his undivided share therein

Henry, 15 Wis. 239; Harris v. Grant, 96 Ga. 211; Mautonya v. Emerich O. Co., 172 Ill. 92, aff'g 69 Ill. App. 62; Thompson v. Anderson, 86 Iowa 703; Burton v. Randall, 4 Kan. App. 593; Benton v. McCord, 96 Ga. 393; West v. White, 165 Mass. 258; Schmittziel v. Moore, 120 Mich. 199; Watson v. Coburn, 35 Neb. 492; Kasper v. Walla, 49 Neb. 288; Plummer v. Green, 49 Neb. 316; Lovejoy v. Merchants' State Bank, 5 N. D. 623; Clendenning v. Hawk, 8 N. D. 419; Hundley v. Calloway, 45 W. Va. 516; Donnelly v. Graves, 6 Vict. L. R. (law) 247, 254.

If a mortgagee sues for a sum

less than the value of the property he may recover the costs and charges properly incurred in protecting his property and enforcing his security whereby he would be entitled to recover these as against the mortgagor by virtue of the security. Manning v. Jones, 14 New Zeal. L. R. 53.

⁶ Agne v. Skewis, 98 Minn. 32; Rocheleau v. Boyle, 12 Mont. 590; Keith v. Haggart, 4 Dak. 438; Irwin v. McDowell, 91 Cal. 119.

⁷ Barron v. San Angelo Nat. Bank (Tex. Civ. App.), 138 S. W. 142.

⁸ Deno v. Thomas, 64 Vt. 358.

⁹ Focke v. Blum, 82 Tex. 436.

where the proceeds of the converted property have been applied in satisfaction of the firm indebtedness. It will not be assumed that the plaintiff in such an action owned more than an undivided half of the property, or that upon a settlement of accounts between the partners he would be entitled to a lien upon the other half for the balance due him as a partner.¹⁰ Under the insolvency laws of Massachusetts so long as a solvent partner is ready and willing to settle the business and dispose of the partnership property and account for and pay over the proceeds an assignee in insolvency of one of the partners has no right to the possession of the partnership property. Such property and the solvent member of the firm are not within the jurisdiction of the court of insolvency. Hence, in an action for the conversion of partnership property attached on a writ against one partner the solvent partner may recover the full value of the property though the defendant has delivered it to the assignee in insolvency of the other partner.¹¹ The owner's recovery may be limited to a nominal sum if the property converted was attached by his creditor before the action of trover was brought. The conversion did not vest the title in the wrong-doer; that was in the plaintiff when possession was taken from the defendant by virtue of the attachment. The plaintiff will have the benefit of it by its application to the payment of his debt.¹²

§ 1137. **Same subject.** A party who has a lien on or other special interest in property and converts it is liable to the owner for its value, but is entitled to recoup the value of his special property.¹³ This right of recoupment may be extended, under

¹⁰ *Carrie v. Cloverdale B. & C. Co.*, 90 Cal. 84.

¹¹ *Russell v. Cole*, 167 Mass. 6.

¹² *Jones v. Cobb*, 84 Me. 153. See § 1141.

¹³ *Continental G. Co. v. De Bord*, 34 Okla. 66; *Jarvis v. Rogers*, 15 Mass. 389; *Stearns v. Marsh*, 4 Denio 227, 47 Am. Dec. 248; *Bel-den v. Perkins*, 78 Ill. 449; *Wheeler v. Pereles*, 43 Wis. 332; *Chadwick v. Lamb*, 29 Barb. 518; *McCalla v. Clark*, 55 Ga. 53; *Jones v. Horn*, 51

Ark. 19, 14 Am. St. 17; *Ludden v. Buffalo B. Co.*, 22 Ill. App. 415; *Rosenzweig v. Frazer*, 82 Ind. 342; *Torp v. Gulseth*, 37 Minn. 135; *Brink v. Freoff*, 40 Mich. 610, 44 id. 69; *Feige v. Burt*, 118 Mich. 243, 74 Am. St. 390; *Van Schaick v. Ramsey*, 90 Hun 550; *Lovejoy v. Merchants' State Bank*, 5 N. D. 623, citing the text; *Kohn v. Dravis*, 36 C. C. A. 253, 94 Fed. 288; *Smith v. Savin*, 141 N. Y. 315; *Union Nat. Bank v. Post*, 64 Ill. App. 404, 93 id.

the American authorities, to cases or to counter-claims where there is no lien or special property. It does not depend on a lien,¹⁴ as we shall have occasion to notice under the next head.¹⁵ In short, if the plaintiff, not being completely the owner, has the possession or the right of possession as to the defendant at the time of the conversion so that he is under a contract obligation to preserve the property and deliver it to the owner, or is liable to him for it, however that liability may arise, he is entitled to recover the full value. On the other hand, if he is not completely and absolutely the owner and is under no such obligation or liability he can recover only the value of his own interest. The suit then, in some sort, accomplishes a partition; the plaintiff takes his part in value and leaves the residue in the hands of the defendant. And in actions by the general owner or one recovering in that right the defendant is entitled to recoup for his special interest, whatever it may be, and for any cross-demand growing out of the same transaction, whether it be a lien interest or not. And he is, besides, entitled to mitigations, which we shall presently consider, arising from the principle of limiting the plaintiff's compensation to his actual loss. He may show that the latter has not suffered so great a

339, 192 Ill. 385; Richardson v. Ashby, 132 Mo. 238; Barber v. Hathaway, 47 App. Div. (N. Y.) 165, affirmed without opinion, 169 N. Y. 575.

A pledgee who sells the pledged property after a *bona fide* tender of the amount due is liable for the full value of it without any abatement for the amount for which the property was pledged. Hyams v. Bamberger, 10 Utah 1.

If the debt has been discharged in full pending the action the damages will be such sum as will carry costs. If a judgment is relied on to establish the amount of the liability of the pledgor on the principal debt the defendant cannot go behind the judgment and show that the amount thereof, though apparently

due, was not so in fact. Holmes v. Langston, 110 Ga. 860.

¹⁴ Baltimore Ins. Co. v. Dalrymple, 25 Md. 269; Johnson v. Stear, 15 C. B. (N.S.) 330; Cole v. Dalziel, 13 Ill. App. 23; Ludden v. Buffalo B. Co., 22 id. 415.

The defendant cannot recoup damages sustained by the fraud of the plaintiff. "Recoupment in the nature of damages cannot be pleaded by the defendant nor adjudicated in an action of trover unless some special equity, such as non-residence or the insolvency of the plaintiff, is shown." Bell v. Ober & S. Co., 111 Ga. 668; Harden v. Lang, 110 Ga. 392.

¹⁵ See Briggs v. Boston, etc. R. Co., 6 Allen, 246, 83 Am. Dec. 626; Parish v. Wheeler, 22 N. Y. 494.

loss as his case, on the proof, imports, by reason of other facts which are part of the *res gestæ*; as payments or other acts done by the defendant in connection with the conversion which have the effect to lessen the injury or partially to compensate it. In Massachusetts it is presumed, *prima facie*, that a note taken in renewal of or for an antecedent debt is received in payment. A pledgee of a note who takes from the maker two other notes to the pledgee's own order and surrenders the original note to the maker and afterwards renews such notes, from time to time receiving small payments, and finally combines the amount due on one of the notes with the amount of another claim held against the maker and takes a new note for the amount of both claims, is liable to the pledgor for the full amount of the original note.¹⁶ The general rule is that a pledgor or any person who converts the pledge under his authority is liable for the value of the pledge with interest from the time of conversion unless such sum is in excess of that due to the pledgee, in which case the latter sum measures the damages.¹⁷ A first mortgagee who is sued for the conversion of the mortgaged property may show that the plaintiff gave other mortgages thereon subsequent to his and before the conversion occurred.¹⁸

Where the vendee in a conditional sale sold the property before he acquired the title by fulfilling the condition of paying for it, the vendor in trover was held entitled to recover the full value without any deduction for payments received by him from his vendee.¹⁹ But in Pennsylvania where the party making the conditional purchase was the defendant the plaintiff was held entitled to recover only the value of his beneficial inter-

¹⁶ *Stevens v. Wiley*, 165 Mass. 402, citing *Depuy v. Clark*, 12 Ind. 427; *Freeman v. Benedict*, 37 Conn. 559; *Garlick v. James*, 12 Johns. 146; *Gage v. Punchard*, 6 Daly 229; *Nexsen v. Lyell*, 5 Hill, 466; *Southwick v. Sax*, 9 Wend. 122, and distinguishing *Hunter v. Moul*, 98 Pa. 13, 42 Am. Rep. 610; *Exeter Bank v. Gordon*, 8 N. H. 66; *Randolph v. Merchants' Nat. Bank*, 9 Lea 63.

¹⁷ *Watkins v. Citizens' Nat. Bank*,

53 Tex. Civ. App. 437; *Hurst v. Coley*, 15 Fed. 645; *Hay v. Riddle*, 1 Sandf. 248; *Holmes v. Langston*, 110 Ga. 860; *Jones v. Hicks*, 52 Miss. 682; *Jones on Pledges* (2d ed.), § 432; *Hallaek L. & Mfg. Co. v. Gray*, 19 Colo. 149.

¹⁸ *Kohn v. Dravis*, 36 C. C. A. 253, 94 Fed. 288.

¹⁹ *Brown v. Haynes*, 52 Me. 578; *Buckmaster v. Smith*, 22 Vt. 203; *Smith v. Foster*, 18 Vt. 182.

est; the defendant was allowed the benefit of his payments. As trover is an equitable action, this appears more just and in accordance with the principle of limiting recovery to just compensation.²⁰ The same rule has been laid down and applied in other states.²¹ A piano was sold conditionally, title to pass on all the payments being made. After a large part of the purchase-money had been paid the vendor sued for its conversion. The court held that the payments would go in mitigation; and that the defendant was also entitled to recoup the damages, if any, for breach of the warranties in the contract of sale.²² A vendee of goods received them at a stipulated price, payable in certain indorsed notes, on condition that within a given period he should deliver the notes or return the goods; he afterwards refused to do either and the vendor sued him for the goods in trover. It was held that the measure of damages was their actual value and interest; the vendee was not concluded by the agreed price. Under such circumstances it was thought that that price was high evidence of actual value as against the wrong-doer and should not be reduced except upon strong proof. Had the vendor, instead of electing to disaffirm the contract, sued in *assumpsit* he would have been entitled to the agreed price though subject even then to a deduction if it turned out that the notes stipulated for were of less value.²³ Where one of several part owners sues a stranger for conversion of the common property he can only recover in respect of his part, and the damages will be apportioned.²⁴ The recovery by the holder of a mechanic's lien on buildings on leased land

²⁰ *Farmers' Bank v. McKee*, 2 Pa. 318; *Rose v. Story*, 1 id. 190, 44 Am. Dec. 121. See *Anderson v. Durant*, 18 N. Y. 496; *Shepherd v. Taylor*, 105 Ala. 507.

²¹ *Davis v. Bliss*, 187 N. Y. 77, 10 L.R.A. (N.S.) 458; *Guilford v. McKinley*, 61 Ga. 230; *Boutell v. Warne*, 62 Mo. 350; *Johnston v. Whittemore*, 27 Mich. 463; *Bower v. Birdsell*, 49 id. 5; *Bradley v. Burkett*, 82 Ga. 255; *Ross v. Mc-*

Duffie, 91 Ga. 120; *Colby v. Kimball Co.*, 99 Iowa 321.

If the purchaser has paid nothing his recovery is limited to the value of his bargain. *Meixell v. Kirkpatrick*, 29 Kan. 679.

²² *Guilford v. McKinley*, 61 Ga. 230.

²³ *Stevens v. Low*, 2 Hill 132.

²⁴ *Noland v. Johnson*, 5 J. J. Marsh. 351; *Powell v. Glenn*, 21 Ala. 458; *Wing v. Milliken*, 91 Me. 387, 64 Am. St. 238.

which were removed before he could have them sold is limited to their value after their wreckage and removal.²⁵ The purchaser of goods the title to which is not to pass until full payment, may recover against his vendor the amount paid for them.²⁶ A lessor who converts property of the lessee after the payment of an installment of rent therefor, the lessee having the right to buy it for a nominal sum after the expiration of the lease, is liable for the rent paid less the value of the use of the property during the time the lessee had possession of it.²⁷

§ 1138. **Mitigation of damages.** If the case is such that the plaintiff can be fully compensated by a sum of money less than the full value of the property converted the recovery will be limited to the amount that will suffice for complete indemnity. He will be confined to compensation commensurate with the actual injury.²⁸ The recovery is so reduced when the plaintiff has only a special property subject to which the defendant is entitled to the goods.²⁹ Courts of law in actions of trover are authorized to investigate the justice and equity of the particular case in a manner and upon principles similar to those by which, in such courts, the defense of partial failure of consideration is sustained.³⁰ Where an officer was sued by the debtor for attach-

²⁵ *Hammond v. Darlington*, 109 Mo. App. 333.

²⁶ *Levan v. Wilten*, 135 Pa. 61.

²⁷ *Smith v. Case T. M. Co.*, 50 Pa. Super. Ct. 92.

²⁸ *Cook v. Loomis*, 26 Conn. 483; *Chamberlain v. Shaw*, 18 Pick. 278, 29 Am. Dec. 586; *Jones v. Horn*, 51 Ark. 19, 14 Am. St. 17; *White v. Allen*, 133 Mass. 423; *Kyle v. Caravello*, 103 Ala. 150; *Lovejoy v. Merchants' State Bank*, 5 N. D. 623, quoting the text; *Brewster v. Silliman*, 38 N. Y. 423; *Reynolds v. Shuler*, 5 Cow. 337; *Stone v. Chicago, etc. R. Co.*, 3 S. D. 330; *Field v. Munster*, 11 Tex. Civ. App. 341, quoting the text.

An unauthorized sale of pledged property by the pledgee does not cause him to lose his lien and ren-

der him liable for the value of the property if the pledgor was not damaged. *Whipple v. Dutton*, 175 Mass. 365, 78 Am. St. 501.

²⁹ *Id.*; *Hyde v. Cookson*, 21 Barb. 92; *Pierce v. Benjamin*, 14 Pick. 356; *Force v. Peterson Mach. Co.*, 17 N. D. 220 (under a statute).

³⁰ *Gorder v. Hilliboe*, 17 N. D. 281; *McGowen v. Young*, 2 Stew. & P. 160; *Bates v. Murphy*, *id.* 161; *Sprague v. Brown*, 40 Wis. 620; *Field v. Munster*, 11 Tex. Civ. App. 341. See *Wilson v. Conine*, 2 Johns. 280.

A set-off cannot be allowed in trover. *Sinemaker v. Rose*, 62 Ill. App. 118.

The price of land sold to the mortgagee by a chattel mortgagor under an agreement that its value

ing exempt property and he, by direction of the creditor, who had become the legal owner of a mortgage thereon, sold it under the mortgage and applied the proceeds thereon, the sum so applied, went in mitigation of damages.³¹ Where the mortgagor of goods has sold part of them in accordance with the terms of the mortgage he is entitled to credit for the expenses of doing so, notwithstanding the remainder of the stock was sold without authority.³² If the property converted was subject to a lien the defendant may show payment in whole or in part of the lien debt and thereby defeat or reduce *pro tanto* his liability.³³ The recovery is not affected by a payment on behalf of the plaintiff which is independent of the property involved.³⁴ In an action by a vendor who has retained title and has been but partially paid for the goods he may recover their value, regardless of payments made.³⁵ The liability of the wrong-

should be applied on the mortgage indebtedness should be considered in reduction of the damages in an action by the mortgagee against an officer for the conversion of the mortgaged property. *Huellmantel v. Vinton*, 112 Mich. 47.

See the Australian case of *Albrecht v. Raemus*, Current Notes, in "The Argus" L. R. for 1898, p. 39, for facts which mitigated liability for the conversion of the plaintiff's trade tools, including the latter's financial condition, the claims of the defendant and of other creditors.

³¹ *Cooper v. Newman*, 45 N. H. 339; *Pate v. Vardeman*, *infra*. See *Davis v. Gott*, 130 Ky. 486.

³² *Kohn v. Dravis*, 36 C. C. A. 253, 94 Fed. 288.

³³ *Hortman v. Illinois State T. Co.*, 173 Ill. App. 234; *Gandy v. Cowart*, 163 Ala. 295; *Merchants' Nat. Bank v. Williams*, 110 Md. 334; *Southwick v. Himmelman*, 109 Minn. 76; *Payne v. Lindsley* (Tex. Civ. App.), 126 S. W. 329; *Nicholson-W. S. & C. Co. v. Urquhart*,

32 Tex. Civ. App. 527; *McSorley v. Bullock*, 62 Wash. 140; *Karter v. Fields*, 130 Ala. 430; *Waite v. Corbin*, 109 Ala. 154. *Contra*, if the lien holder takes possession without process and sells the property notwithstanding the objections of the plaintiff. *Banks v. Windham*, 7 Ala. App. 616.

³⁴ *First State Bank v. Barnett*, 48 Tex. Civ. App. 82.

³⁵ *Lorain S. Co. v. Norfolk & B. St. R. Co.*, 187 Mass. 500. It was said: If the vendor's right of possession had been asserted and the property retaken without suit the vendee would have no cause of action to recover money paid, and where such a claim cannot be directly asserted and is not actionable, it is not admissible in evidence either by way of mitigation of damages or to avoid circuity of action. *Angier v. Taunton P. Mfg. Co.*, 1 Gray 621, 61 Am. Dec. 436; *Buckmaster v. Smith*, 22 Vt. 203; *Brown v. Haynes*, 52 Me. 578.

doer is not lessened by an independent or wrongful act done by the plaintiff.³⁶ Thus, seizures under separate attachments are distinct wrongs and the liability of the defendant is mitigated by the application of the proceeds of the property only to the extent of his liability under the writ pursuant to which he seized it.³⁷ A converter of timber cannot lessen his liability by showing the payment of taxes on the land from which the timber was taken, the value of the latter exceeding the taxes paid.³⁸ A wrong-doer is not entitled to the benefit of any bargains the plaintiff may have made, and cannot show that the goods converted could have been bought for less than their market price.³⁹

A special agent to whom a bill of lading was sent with instructions to deliver it to a purchaser on his paying a forthcoming draft for the price, delivered it on a mere acceptance of the draft, and the purchaser obtained the goods from a common carrier on paying the freight; such purchaser then pledged the goods to the defendant. The latter was liable for their value at the time of the conversion, less the freight paid by the pledgor; no deduction was allowed for commissions which would have been due to the pledgor if the goods had been disposed of according to the owner's instruction.⁴⁰ The right to recoup for freight wrongfully paid has been denied in New York.⁴¹ It has been held in Kentucky, after a careful review of the authorities, that there is no substantial difference between the effect of a pledge made by a factor and one made by a pledgee; that, though a factor wrongfully pledges the goods of his principal the amount the latter may recover of the factor's innocent

³⁶ Wyckoff v. Bodine, 65 N. J. L. 95.

³⁷ Pate v. Vardeman (Tex. Civ. App.), 141 S. W. 317.

³⁸ Citizens' Bank v. Jeausonne, 120 La. 393.

³⁹ Hart v. Brierley, 189 Mass. 598.

⁴⁰ Stollenwerck v. Thacher, 115 Mass. 224; Covell v. Hill, 6 N. Y. 374; Whitney v. Beckford, 105

Mass. 267; Peebles v. Boston, etc. R. Co., 112 id. 498; Forbes v. Boston & L. R. 133 id. 154; Kentucky H. Co. v. Hood, 133 Ky. 383, 22 L.R.A.(N.S.) 588, 134 Am. St. 457.

A factor who makes an unauthorized sale may not lessen his liability by claiming a commission. Faraldo v. Gumbel, 128 La. 287.

⁴¹ Walther v. Wetmore, 1 E. D. Smith 7.

pledgee must be reduced by the sum the plaintiff owed the factor.⁴²

In a Massachusetts case against a broker for the conversion of shares of stock held as margin for a purchase made by direction of the plaintiff, who failed to furnish additional margin, whereupon the defendant sold the purchased stock at a loss and afterwards the margin, the claim of the defendant for the sum due in respect of the purchase, was allowed. The argument was on the theory that the case was one of recoupment; but the court said that if that were the proper way of regarding it, it might be difficult to maintain that the defendant's claim arose out of the same transaction with the plaintiff's, for it might be objected that to maintain the claim for the conversion the plaintiff did not rely upon his contract with the defendant, but stood on his title. The claim was not recoupment properly so called. The defendant had an interest in the property to the extent of the sum due him for which the property was held as security, and as against him the plaintiff to that extent was not entitled to compensation. There are numberless decisions that when pledgees, mortgagees or persons having a lien convert a pledged chattel by selling it in an unauthorized way, they are entitled to retain the amount of their lien.⁴³ A factor who hypothecates the goods of his consignor for his own debt, so that any surplus they may bring in excess of the factor's demand would go to others than the consignor, is liable for the value of the goods at the time he disposed of them free from charges made against them subsequently, including commissions and charges on sub-

⁴² *First Nat. Bank v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198. The court criticised the following statement made in the eighth edition of *Story on Bailments* (§ 326): "Later decisions have, however, fully settled the law that a pledge by a factor of his principal's goods is wholly tortious and the owner may recover their whole value of the pledgee without any deduction or recoupment for his claim against the factor." The cases cited to sustain this

proposition are *Hoffman v. Noble*, 6 Mete. (Mass.) 74, 39 Am. Dec. 611; *Warner v. Martin*, 11 How. 209, 13 L. ed. 667; *Holton v. Smith*, 7 N. H. 446; *Newbold v. Wright*, 4 Rawle 195. The three first of these, the court says, have no bearing upon the question, and the last did not necessarily involve the right of recoupment.

⁴³ *Farrar v. Paine*, 173 Mass. 58; *Barber v. Ellingwood*, 137 App. Div. (N. Y.) 704.

sequent sales.⁴⁴ The view held in Kentucky may not be harmonizable with the English law. The question came up in Victoria in 1877 in a case which had previously been before the court. It was then assumed that the factor was entitled to deduct from the damages the amount which he could have demanded before he could be compelled to deliver up the goods. On the second appeal the court admitted that that view was erroneous and held "that where a party having a lien abuses it by wrongfully parting with the goods the measure of damages is the value of the goods."⁴⁵

§ 1139. **Same subject.** If after the conversion of property it goes into the possession of the plaintiff and he accepts it this will go in mitigation of damages, even though no agreement be shown on his part that he will receive it.⁴⁶ So if the

⁴⁴ Halsey v. Bird, 39 C. C. A. 638, 99 Fed. 525.

⁴⁵ Osborne v. Synnot, 3 Viet. L. R. (law) 148, citing De Comas v. Prost, 3 Moore's P. C. (N.S.) 158, 12 L. T. 682. The opinion contains the following: A strong illustration of the rule is afforded by Jacobs v. Latour, 5 Bing. 130. There the defendant, having a lien on horses, caused the sheriff to seize and sell them under a writ of *fi. fa.*, and at the sale became himself the purchaser. After the sale a commission of bankruptcy issued against the former owner of the horses, founded on an act of bankruptcy prior to the execution. The assignee brought trover against the purchaser, and it was contended that, assuming the execution to be void against the assignee in bankruptcy, the purchaser could not set up his lien as an answer to the action, the horses never having been out of his possession; but it was held that the lien was gone by the sale. It would be almost a contradiction in terms to say that the lien was gone or lost so far as to

enable the owner to sue, but remained so far as to disable him from recovering the full value of the chattel. Accordingly, in Siebel v. Springfield, 9 L. T. (N.S.) 324, it was held that a tortious sale by a factor enabled the owner to recover the full value of the goods. The lien of an unpaid vendor—which was the case in *Chinery v. Viall*, 5 H. & N. 288, 29 L. J. Ex. 180—stands on a different ground. That kind of a lien has been described as something more than a lien. It is the remnant of an original ownership, and exists even after possession has been parted with, as is shown by the right to stop *in transitu* on the purchaser's insolvency.

⁴⁶ Plummer v. Hardison, 6 Ala. App. 525; Stillwell v. Farewell, 64 Vt. 286; De Celles v. Casey, 48 Mont. 568; Owen v. Williams, 38 Colo. 79; Seaboard A. L. R. Co. v. Phillips, 108 Md. 285; Prince v. St. Louis C. C. Co., 112 Mo. App. 49; Johnson v. Marks, 66 N. Y. Misc. 153; Murphy v. Hobbs, 8 Colo. 17; King v. Franklin, 132 Ala. 559;

property has gone to the plaintiff's use with his consent, expressed or implied, and, it seems, without such consent,⁴⁷ the

Yale v. Saunders, 16 Vt. 232; *Sparks v. Purdy*, 11 Mo. 219; *Reynolds v. Shuler*, 5 Cow. 323; *Easton v. Woods*, 1 Mo. 506; *Brady v. Whitney*, 24 Mich. 154; *Dailey v. Crowley*, 5 Lans. 301; *Wheelock v. Wheelwright*, 5 Mass. 104; *Cook v. Loomis*, 26 Conn. 483; *Hepburn v. Sewell*, 5 Har. & J. 211, 9 Am. Dec. 512; *Allen v. American B. & L. Ass'n*, 49 Minn. 544; *Wiechers v. Central T. Co.*, 80 Hun 576.

In *Sprague v. McKinzie*, 63 Barb. 60, the reasoning in which is open to comment, it appeared that B. converted A.'s horse by selling it to D. Without delay A. took the horse from D.; then sued B. in trover for it. It was held that he was entitled to recover the full value, and that evidence of the retaking was not admissible in mitigation.

⁴⁷ *Chesapeake & O. R. Co. v. Lavin*, 136 Ky. 205; *Kentucky H. Co. v. Hood*, 133 Ky. 383, 22 L.R.A. (N.S.) 588, 134 Am. St. 457; *Clarke v. Chesapeake & O. R. Co.*, 63 W. Va. 423; *Dudley v. Chicago, etc. R. Co.*, 58 W. Va. 604, 3 L.R.A. (N.S.) 1135, 112 Am. St. 1027; *Bowers v. Bradley*, 112 Iowa 537; *Plevin v. Henshall*, 10 Bing. 24; *Irish v. Cloyes*, 8 Vt. 39; *Sharpe v. Graydon*, 99 Ind. 232; *Mears v. Cornwall*, 73 Mich. 78; *Storrs v. Robinson*, 74 Conn. 443; *Dahill v. Booker*, 140 Mass. 308, 54 Am. Rep. 465; *Barnett v. Speir*, 93 Ga. 762; *Torry v. Black*, 58 N. Y. 185; *Meeks v. Simon*, 2 N. Y. Misc. 241; *Stone v. Chicago, etc. R. Co.*, 3 S. D. 330; *Field v. Munster*, 11 Tex. Civ. App. 341, quoting the text; *Dodson v. Cooper*, 37 Kan. 346; *Farr v. State Bank*, 87 Wis. 223, 41 Am.

St. 40; *Cernahan v. Chrisler*, 107 Wis. 645; *Koyer v. White*, 6 Tex. Civ. App. 381; *Coulson v. Panhandle Nat. Bank*, 4 C. C. A. 616, 54 Fed. 855. See *Locke v. Garrett*, 16 Ala. 698.

A pledgee of a mortgage who has converted it is not entitled to any credit against the mortgagee for redeeming the mortgaged property without his consent, its value being sufficient to pay the debt and the amount required to redeem. *Horttman v. Illinois State T. Co.*, 173 Ill. App. 234.

A carrier who delivered property, shipped for account of the plaintiff and subject to his order, to one who had agreed to purchase it, but who had paid only a portion of the price therefor at the time of delivery, was permitted to show that after the conversion the vendee paid for the property and that the vendor accepted payment with knowledge of the facts. *Jellett v. St. Paul, etc. R. Co.*, 30 Minn. 265.

In *Morgan v. Kidder*, 55 Vt. 367 (approved in *Smith v. Anderson*, 70 Vt. 424), M. sold a herd of cattle, including a yoke of oxen, to G. upon condition that they were to remain his property until they were fully paid for. G. sold the oxen to K., and the latter in an action of trover brought against him for their conversion offered to show in mitigation of damages that the identical money which he paid G. was subsequently paid to the plaintiff and applied upon his lien debt, and it was claimed that this payment should go in mitigation. The court held otherwise. The general rule as stated in the text was fully recog-

fact may be shown in mitigation.⁴⁸ It is immaterial whether the property be recaptured by the owner, voluntarily returned and accepted or bought in by him at a sale.⁴⁹ Where a mortgagee sues for the conversion of part of the mortgaged chattels the amount at which he bid in the remaining part of them at a mortgage sale, rather than the amount for which he afterwards sold the same, should be applied in reduction of the mortgage debt in determining the amount of his damages.⁵⁰ If exempt property converted has been repurchased the whole sum paid therefor should be recovered, and if non-exempt property was also converted the recovery should be apportioned between the two classes according to their relative value; interest and any special damages proven should also be recovered.⁵¹ If the property is accepted pending the action the defendant may avoid liability for costs, assuming that only nominal damages are recoverable, by tendering judgment therefor and costs up to the time of the tender.⁵² One who buys notes of an infant from the attorney of the latter and discounts them otherwise than in good faith is not entitled by way of equitable set-off to

nized; but was held inapplicable "because it cannot strictly be said that the avails have gone to the plaintiff's use. The sale and the conversion by the defendant infringed the plaintiff's contract right to have the oxen remain in G.'s possession as security until the whole debt was paid."

The defendant in an action of trover brought by the assignee of a chattel mortgage cannot complain that moneys collected by the plaintiff upon accounts assigned as collateral to the mortgage, instead of being credited thereon, were applied to the payment of other claims against the mortgagor to secure which the plaintiff held a second assignment of the accounts executed prior to the levy. *Hull v. Bernatz*, 106 Mich. 551.

Partial satisfaction by one tort-

feasor mitigates the liability of his co-tortfeasors. *Muser v. Lewis*, 50 N. Y. Super. Ct. 431.

⁴⁸ *State v. Kelly*, 78 Kan. 42; *McKahan v. American Exp. Co.*, 209 Mass. 270, 35 L.R.A.(N.S.) 1046; *Flagler v. Hearst*, 91 App. Div. (N. Y.) 12; *Aylesbury M. Co. v. Fitch*, 22 Okla. 475, 23 L.R.A.(N.S.) 573; *Clements v. Eiseley*, 63 Neb. 651. See § 1140.

⁴⁹ *Field v. Munster*, *supra*; *Sprague v. Brown*, 40 Wis. 620; § 156; *Scott G. Co. v. Kelly*, 14 Tex. Civ. App. 136; *Muenster v. Fields*, 89 Tex. 102; *Blewett v. Miller*, 131 Cal. 149; *First State Bank v. Jones* (Tex. Civ. App.), 139 S. W. 671; *Davidson v. Oberthier*, 42 Tex. Civ. App. 337.

⁵⁰ *Hull v. Bernatz*, *supra*.

⁵¹ *Blewett v. Miller*, *supra*.

⁵² *Cernahan v. Chrisler*, *supra*.

more than the attorney had a right to hand over to the infant, or more than he might have properly handed over were he the infant's general guardian.⁵³ A wrong-doer cannot claim any benefit because of money paid by a third party to the plaintiff by mistake.⁵⁴

In some states an unaccepted offer to return converted property is of no avail;⁵⁵ but the better rule is otherwise if the wrong was not wilfully done.⁵⁶ Where in an action for the conversion of machinery in a workshop, it not appearing that the defendant had ever appropriated it to his own use, or removed it, or had actual possession of it otherwise than by being in the rightful possession of the workshop, and the alleged conversion consisting in a refusal to allow the plaintiff to remove the machinery on demand, a subsequent notice to the plaintiff by the defendant that he relinquished all claim to the machinery was considered in mitigation.⁵⁷ An accepted offer to receive the property is ineffectual if not performed, regardless of the cause of nonperformance.⁵⁸ If the plaintiff sells the property

⁵³ *Petrie v. Williams*, 88 Hun 292, affirmed without opinion, 153 N. Y. 671.

⁵⁴ *Louisville & A. R. Co. v. Blow*, 136 Ky. 434, 26 L.R.A.(N.S.) 555. Two of three cars of goods were delivered to one who subsequently became bankrupt. The plaintiff proved his claim for the value of the three cars, and was allowed part of their value. Subsequently it developed that only two cars were so delivered. The liability of the carrier was not affected by the full sum received from the bankrupt's estate, but only to the extent of the *pro rata* payment on the cars delivered.

⁵⁵ *Norman v. Rogers*, 29 Ark. 365; *Stickney v. Allen*, 10 Gray 352; *Mears v. Cornwall*, 73 Mich. 78; *Allen v. Coates*, 29 Minn. 46; *Gilbert v. Peek*, 43 Mo. App. 577; *Fidalgo Island S. Co. v. Brown*, 61

Wash. 516; *Munier v. Zachary*, 138 Iowa 219, 18 L.R.A.(N.S.) 572; *Carpenter v. Dresser*, 72 Me. 377, 39 Am. Rep. 337; *Carpenter v. American B. & L. Ass'n*, 54 Minn. 403, 40 Am. St. 345.

The owner of an undivided interest in goods is not bound to receive what is left of them after the mortgagee of his co-owner has sold what he sees fit of them. *Keables v. Christie*, 47 Mich. 594.

⁵⁶ *Pacific M. Co. v. Enterprise M. Co.*, 16 Hawaii 282; *Seaboard A. L. R. Co. v. Phillips*, 108 Md. 285; *Marshall & M. G. Co. v. Kansas City, etc. R. Co.*, 176 Mo. 480, 98 Am. St. 508. See § 1141.

⁵⁷ *Delano v. Curtis*, 7 Allen 470; *Bigelow Co. v. Heintze*, 53 N. J. L. 69.

⁵⁸ *Carlton v. Carter*, — Tex. Civ. App. —, 140 S. W. 827.

after conversion he can recover only nominal damages.⁵⁹ Where the property is returned an action may, notwithstanding, be brought for the conversion and the measure of damages as generally held is the market value at the time of the conversion, less such value at the time of the return.⁶⁰ It has been so held in Pennsylvania, and that these are not special damages which should be specially alleged in the declaration.⁶¹ But depreciation in the market price of goods, not being a necessarily natural or legal consequence of the conversion, must be specially alleged.⁶² If there has been no depreciation in the value of the property and it had no usable value except for shearing, the expense of which was exceeded by the cost of keeping it, interest on the value during the time of detention may be recovered.⁶³ The reason of the rule that the value of the goods with interest is the measure of damages where the property has not been restored to the owner is that such value is equal to the goods themselves; and interest thereon is the legal damage for withholding such value. But where the property is returned to the owner the reason for allowing interest ceases after that time; and in place of interest for its previous detention compensation for the use, if valuable, should be allowed.⁶⁴ In the absence of a demand for special damage interest on the value of the property returned to the time of the trial, less its value when

⁵⁹ *Brady v. Whitney*, 24 Mich. 154.

⁶⁰ *Eldridge v. Hoefer*, 45 Ore. 239; *Baldwin v. Davidson* (Tex. Civ. App.), 127 S. W. 562; *Lucas v. Trumbull*, 15 Gray 306; *Ewing v. Blount*, 20 Ala. 694; *Irish v. Cloyes*, 8 Vt. 30, 30 Am. Dec. 446; *Renfro v. Hughes*, 69 Ala. 581; *Green v. Stephens*, 37 Mo. App. 641; *Gove v. Watson*, 61 N. H. 136; *Hough v. Bowe*, 51 N. Y. Super. Ct. 207; *Polak v. Davidson*, 87 Ala. 551; *Murphy v. Hobbs*, 8 Colo. 17; *Watson v. Coburn*, 35 Neb. 492; *Stillwell v. Farewell*, 64 Vt. 286; *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471; *Coulson v. Panhandle Nat. Bank*, 4 C. C. A.

616, 54 Fed. 855; *Cernahan v. Chrisler*, 107 Wis. 645, disapproving *Collins v. Lowry*, 78 Wis. 329; *Walker v. Fuller*, 29 Ark. 448; *Greenfield Bank v. Leavitt*, 17 Pick. 1, 28 Am. Dec. 268; *Bigelow Co. v. Heintze*, *supra*.

⁶¹ *Rank v. Rank*, 5 Pa. 211.

⁶² *Harris v. Finberg*, 46 Tex. 79.

⁶³ *Coulson v. Panhandle Nat. Bank*, 4 C. C. A. 616, 54 Fed. 855.

⁶⁴ *Ewing v. Blount*, 20 Ala. 694; *Renfro v. Hughes*, 69 id. 581; *Post v. Munn* 4 N. J. L. 61, 5 Am. Dec. 570; *Farrel v. Colwell*, 30 N. J. L. 123; *Moore v. King*, 4 Tex. Civ. App. 397; *Craddock v. Goodwin*, 54 Tex. 588.

returned, with interest thereon from that date, has been said to be the better rule.⁶⁵ If hire is allowed in lieu of interest it should not be computed by the day for a long period of time.⁶⁶ If the property is injured or suffers deterioration from any cause after the conversion it is the loss of the wrong-doer, and the owner may recover for it in trover.⁶⁷ In such case he cannot compel the owner to receive the property; and if he does so he only receives it in mitigation of damages for what it is then worth.⁶⁸ One who hires a horse to go to a certain place and drives him beyond is guilty of a conversion and liable for any decrease in its value occurring after he has passed that point, although it happens by the fault of the horse.⁶⁹ If the property after conversion be destroyed or taken by an officer on process against a third person it is the loss of the wrong-doer so far as the owner is concerned; the cause of action in his favor is complete at the time and by the act of conversion, and if he is not able to return the property in some mode to the owner he can have no mitigation of damages, but they will be computed by the general rule of the value at the date of conversion and interest.⁷⁰ A mortgagor who has unauthorizedly taken the mort-

⁶⁵ *Eldridge v. Hoefer*, 45 Ore. 239.

⁶⁶ *Hull v. Davidson*, 6 Tex. Civ. App. 588; *Hudson v. Wilkinson*, 45 Tex. 444.

⁶⁷ *Jamison v. Hendricks*, 2 Blackf. 94, 18 Am. Dec. 131; *Field v. Munster*, 11 Tex. Civ. App. 341; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 34 Am. St. 579; *Muenster v. Fields*, 89 Tex. 102; *Kellogg v. Malick*, 125 Wis. 239.

Where an automobile is returned the measure of damages is the depreciation in value of the car and the damage caused by loss of its use by way of rental or otherwise, including loss of opportunity to sell the car. *Lyman v. James*, 87 Vt. 486.

⁶⁸ *Stillwell v. Farewell*, 64 Vt. 236; *Lucas v. Sheridan*, 124 Wis. 567; *Beach v. Raritan, etc. R. Co.*,

37 N. Y. 457; *Mullen v. Ensley*, 8 Humph. 428; *Hooks v. Smith*, 18 Ala. 338; *Freer v. Cowles*, 44 Ala. 314; *Gray v. Crocheron*, 8 Port. 191; *Seay v. Marks*, 23 Ala. 532; *Dahill v. Booker*, 140 Mass. 308, 54 Am. Rep. 465; *Nash v. Minnesota Title, Ins. & T. Co.*, 163 Mass. 574, 28 L.R.A. 753, 47 Am. St. 489; *Rutland & W. R. v. Middlebury Bank*, 32 Vt. 639; *Bigelow Co. v. Heintze*, 53 N. J. L. 69.

⁶⁹ *Perham v. Coney*, 117 Mass. 102; *Gove v. Watson*, 61 N. H. 136. See *Stillwell v. Farewell*, *supra*.

⁷⁰ *Tiffany v. Lord*, 65 N. Y. 310; *Smith v. Healey* (Misc.), 121 N. Y. Supp. 230; *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511; *Wehle v. Butler*, 61 N. Y. 245; *Hartmann v. Burtis*, 65 App. Div. (N. Y.) 481.

gaged property and claimed to be the absolute owner of it cannot mitigate his liability because of expense incurred in caring for the property.⁷¹

§ 1140. *Same subject.* If there was a wilful taking of the property, a wilful refusal to surrender it on demand or it has suffered an injury or deterioration in value the defendant cannot compel the plaintiff to accept it in mitigation of damages.⁷² This rule rests on the doctrine that a wrong-doer cannot take from the person wronged his right to pursue any of the legal remedies open to him.⁷³ But if the property came lawfully into the defendant's possession and his refusal to surrender was qualified, or the conversion technical only, or without intentional wrong, and it remains in the same condition as before the conversion the defendant may compel the plaintiff to accept it in mitigation.⁷⁴ In a decision in Wisconsin⁷⁵ the court, by Taylor, J., say: "It has been a well-established rule in the courts of England for more than a century that in actions of trover the court will, under certain circumstances, permit the defendant, after suit brought, to bring the property claimed into court for the defendant,⁷⁶ with the costs up to that time, and will then order a stay of proceedings, or permit the plaintiff to proceed with the action at the risk of having the costs finally adjudged against him unless he is able to show that he has been specially damaged by the conversion of the property

⁷¹ Kellogg v. Malick, *supra*; Howery v. Hoover, 97 Iowa 581.

⁷² Hart v. Skinner, 16 Vt. 138, 42 Am. Dec. 500; Yale v. Saunders, 16 Vt. 243, note; Fisher v. Princee, 3 Burr. 1363; Olivant v. Perineau, 2 Str. 1191; Shotwell v. Wendover, 1 Johns. 65; Green v. Sperry, 16 Vt. 390, 42 Am. Dec. 519; Kelly v. Mesier, 21 App. Div. (N. Y.) 253; Carpenter v. American B. & L. Ass'n, 54 Minn. 403, 40 Am. St. 345; Allen v. Same, 55 Minn. 86; Colby v. Kimball Co., 99 Iowa 321.

⁷³ Carpenter v. American B. & L. Ass'n, *supra*.

Suth. Dam. Vol. IV.—41.

⁷⁴ Bigelow Co. v. Heintze, 53 N. J. L. 69, quoting the text; Pickering v. Truste, 7 T. R. 53; Earle v. Holderness, 4 Bing. 462; Tucker v. Wright, 3 id. 601; Whitten v. Fuller, 2 W. Bl. 902; Hayward v. Seaward, 1 Moore & S. 459; Hiort v. London, etc. R. Co., 4 Ex. Div. 188, 195.

⁷⁵ Churchill v. Welsh, 47 Wis. 39, followed in Warder v. Baldwin, 51 Wis. 450; Farr v. State Bank, 87 Wis. 223, 41 Am. St. 40; Cernahan v. Chrisler, 107 Wis. 645.

⁷⁶ "Defendant" should read "plaintiff."

by the defendant in addition to its value at the time of its return. Or the courts will, in a proper case after verdict, upon a tender of the property, reduce the verdict to nominal damages." This practice has been recognized in several states.⁷⁷ The application for such an order is addressed to the discretion of the court.⁷⁸ The action must be for a specific chattel, quantity and quality, and unattended with any circumstances that enhance the damages above the real value; it must be a case where the real and ascertained value is the sole measure of damages.⁷⁹ Where the offer was to return a part of the number of books converted, and the offer was refused because all were not returned, it was ruled that, as each copy was a separate and distinct piece of property, the plaintiff was bound to accept such as were tendered in good condition and could only recover for the number not so tendered.⁸⁰ It has been held that after the conversion of corporate stock has become complete the wrong-doer cannot escape liability nor lessen the actual damages recoverable by a tender in court of similar stock of equal value.⁸¹ To be effectual a tender must be immediate and must not involve labor or expense to the owner.⁸² The wrong-doer cannot entitle himself to a reduction of damages by applying the property or its proceeds to the plaintiff's use without his consent.⁸³ And the fact that the defendant was a creditor of the plaintiff and took

⁷⁷ *Bueklin v. Beals*, 38 Vt. 653; *Hart v. Skinner*, 16 Vt. 138, 42 Am. Dec. 500; *Rutland, etc. R. Co. v. Bank*, 32 Vt. 639; *Cook v. Loomis*, 26 Conn. 483; *Rogers v. Crombie*, 4 Me. 274; *Tracey v. Good*, 1 Clark (Pa.), 472; *Shotwell v. Wendover*, 1 Johns. 65; *Stevens v. Low*, 2 Hill 132; *Thayer v. Manley*, 8 Hun 550; *McGraw v. Sampliner*, 107 Mich. 141; *Watson v. Coburn*, 35 Neb. 492; *Coburn v. Watson*, 48 Neb. 257; *Carpenter v. American B. & L. Ass'n*, *supra*.

⁷⁸ *Hart v. Skinner*, *Churchill v. Welsh*, *supra*.

⁷⁹ *Fisher v. Prince*, 3 Burr. 1364; *Whitten v. Fuller*, 2 W. Bl. 902;

Tucker v. Wright, 3 Bing. 601; *Gibson v. Humphrey*, 1 Cr. & M. 544.

⁸⁰ *Young Men's C. Ass'n v. Harmon*, 61 Ill. App. 639; *Southern R. Co. v. Reeder*, 152 Ala. 227, 126 Am. St. 23.

⁸¹ *Arneson v. Neger*, 34 S. D. 201.

⁸² *Sutton v. Great Northern R. Co.*, 99 Minn. 376.

⁸³ *Roach v. Rector*, 93 Ark. 521; *Wanamaker v. Bowes*, 36 Md. 42; *Sowell v. Champion*, 6 Ad. & E. 407; *Northrup v. McGill*, 27 Mich. 234; *Dalton v. Landahn*, *id.* 529; *Bringard v. Stellwagen*, 41 *id.* 54; *Isaacs v. McLean*, 106 Mich. 79; *Smith v. Hartog*, 23 N. Y. Misc. 353; *Rail-*

the property to satisfy the debt, or under void process, or by void service of valid process for such a purpose will not, in England and some of the states of the Union, mitigate the injury or reduce the damages.⁸⁴ The converter cannot mitigate the damages by applying the property to the use of another against whom the owner has legal recourse for its recovery, but against whom he does not elect to proceed.⁸⁵ An officer cannot mitigate his liability by showing that he sold the property under a mortgage while it was in his possession under an attachment levy if notices of the sale were not posted according to law; neither can the costs of the sale be deducted.⁸⁶

§ 1141. **Same subject.** A different and more liberal rule generally prevails in this country. Where the defendant, in an honest and *bona fide* endeavor to enforce a right, or a supposed right, or to exercise a power, deals with the property in such a manner as constitutes a conversion, either because the right or the power was wholly or partially wanting or has been exceeded or irregularly asserted or exercised, the courts generally consider the whole transaction and only award such damages as are necessary for complete reparation.⁸⁷ Thus, in

road Co. v. O'Donnell, 49 Ohio St. 489, 21 L.R.A. 117, 34 Am. St. 579; Smith v. Anderson, 70 Vt. 424.

⁸⁴ Kelley v. Archer, 48 Barb. 68; Butts v. Edwards, 2 Denio 164; Earl v. Spooner, 3 Denio 246; Gillard v. Brittan, 8 M. & W. 576; White v. Binstead, 76 Eng. C. L. 304; Attack v. Bramwell, 3 B. & S. 520; East v. Pace, 57 Ala. 521; Northrup v. McGill, 27 Mich. 234.

In Edmondson v. Nuttall, 17 C. B. (N.S.) 280, it appeared that the plaintiff had certain looms in the defendant's mill and demanded possession of them, the defendant having no right to detain them. The defendant, however, having obtained a judgment against the plaintiff in the county court, in respect of which he would be entitled to issue execution against him on

the next day, refused to deliver them up, and the looms were taken in execution on the following morning and sold. In an action for this conversion it was held that the liability of the looms to the county court process and the fact that by the wrongful seizure the plaintiff's debt was (apparently) satisfied were not circumstances which the jury could take into consideration in estimating the damages.

⁸⁵ First Nat. Bank v. Lyman, 59 Kan. 410.

⁸⁶ Chezum v. Parker, 19 Wash. 645.

⁸⁷ The text is quoted with approval in Farr v. State Bank, 87 Wis. 223.

Where goods sold for an illegal tax were bought by the plaintiff for a sum in excess thereof, which ex-

disposing of property rightfully distrained for rent a step was omitted which made the sale irregular, legally a conversion; but the defendant was permitted to recoup the rent which the sale was made to satisfy, or have it deducted in mitigation.⁸⁸ An officer by abuse of his process of execution was held to be a trespasser from the beginning, but was allowed in mitigation to prove the amount of the proceeds he had applied on the judgment.⁸⁹ A tax collector became a purchaser at his own sale, which was voidable for that reason; but in trover by the owner of the property against him the amount of the tax paid was deducted from the damages.⁹⁰ An officer sold without giving notice, and was liable as for a conversion; but the proceeds having been applied to the owner's debt he was entitled to recover only the damage suffered from the failure to give such notice; this was supposed to be that a less price was obtained for the property.⁹¹ An executor sold property of the estate before the will was probated under circumstances which would not have been justifiable if probate of it had been made, and which sale was not legalized by the subsequent proof of the will. The money received was paid into and remained with the funds of the estate. The purchaser's liability was thereby mitigated.⁹² In an action of trover against an attaching creditor and the officer it appeared that after the levy upon the property the attachment was abandoned and the indorsement of service erased. Without being surrendered the property was taken on a new writ for the same creditor and debt, and after judgment sold on execution and the proceeds applied to satisfy it. The action was for a conversion by the original taking. As the defendants could not justify they suffered judgment by default, and on the assessment of damages claimed the right to show such

cess was paid into court for his use, he recovered the amount paid, less that paid into court. *Spaulding v. Patterson*, 46 Colo. 317.

⁸⁸ *Cowart v. Dees*, 7 Ga. App. 601; *Tripp v. Grouner*, 60 Ill. 474; *Ball v. Campbell*, 30 Kan. 177.

⁸⁹ *Lamb v. Day*, 8 Vt. 407, 30 Am. Dec. 479.

⁹⁰ *Pierce v. Benjamin*, 14 Pick. 356.

⁹¹ *Wright v. Spencer*, 1 Stew. 576, 18 Am. Dec. 76.

⁹² *Thomas v. New York L. Ins. Co.*, 50 N. Y. Super. Ct. 225.

subsequent disposition of the property in mitigation, and were allowed to do so. The court, by Waite, J., say: "If goods are tortiously taken and a creditor of the owner afterwards attaches them and disposes of them according to law, and applies the proceeds in satisfaction of a judgment against the owner, such proceeding may be shown, not as a justification of the taking, but in mitigation of damages. For it would be palpably unjust for the owner to receive the full value of his goods in their application to the payment of his debts and then afterwards recover that value from another who has received no substantial benefit from his property. This rule is not only in conformity with justice, but has the sanction of authority."⁹³ The case was held to be within the reason of that rule although the subsequent process was in favor of one of the defendants and executed by the other. "The plaintiff," the judge continued, "has no more right to complain of a second attachment than he would if made by any other creditor, or if there had been no previous taking of the property. When the goods were attached the second time the copy left in service with him showed their situation. It was then at his option to regain the possession either by writ of replevin or by payment of the debt upon which they were attached, or suffer them to be applied in satisfaction of that debt. Had he obtained his goods in either of the former modes, it would hardly be claimed that he could afterwards recover their value of the defendants. The same result ought to follow if he suffers them to be applied in due

⁹³ *Curtis v. Ward*, 20 Conn. 204; *Bates v. Courtwright*, 36 Ill. 518; *Green v. Hollenbeck*, 66 Ore. 104, (foreclosure sale of converted property).

In *Wehle v. Butler*, 12 Abb. Pr. (N.S.) 139, it was held that evidence of payment or of the application of the fund in suit to plaintiff's benefit cannot be introduced under a general denial (in code pleading); that if a defendant, when sued for a conversion, sets up a subsequent valid sale on execution in favor of

the defendant and against the plaintiff it constitutes a defense, does not go in mitigation of damages and must be specially pleaded. *Murray v. Burling*, 10 Johns. 172; *Baker v. Freeman*, 9 Wend. 39, 24 Am. Dec. 117; *Baldwin v. Porter*, 12 Conn. 473; *Ford v. Williams*, 24 N. Y. 359; *Hurlburt v. Green*, 41 Vt. 490; *McInvoy v. Dyer*, 47 Pa. 118; *Tamvaco v. Simpson*, 19 C. B. (N.S.) 453; *Kaley v. Shed*, 10 Mete. (Mass.) 317.

form of law to the payment of his debt." This is in accordance with the course of decision in some other states.⁹⁴ It will be proper now to notice some limitations upon this right. A tort-feasor cannot mitigate his liability by proving the mere levy of an execution or attachment upon property by the creditor of its owner. He must go farther and show that the owner had the benefit of the property in such a way as to operate in law as a restoration of it.⁹⁵ In New York and some other states the application of the property in satisfaction of a judgment does not mitigate the wrong-doer's liability if his act was done in collusion with the creditor whose judgment is satisfied, or if the latter participated in such act.⁹⁶ If the converted property is exempt from the demands of creditors the application of it in satisfaction of a judgment against the owner does not affect the liability of the wrong-doer.⁹⁷ But if there is a limitation upon the value of the property which may be claimed as exempt, and non-divisible property, exempt and not exempt, is sold, the damages cannot exceed the amount specified as the limit of the exemption.⁹⁸ There is no abatement of an officer's liability for the full value of a mortgagee's property because he sold it to the mortgagor who keeps possession of it. The delivery to the latter was as purchaser, not as mortgagor, and his possession was under his new title and adverse to the mortgagee.⁹⁹ The sureties upon the bond of an executor who converts securities belonging to the estate cannot lessen their liability by claiming the commissions which would have been due him if he had not misconducted himself.¹ A wrong-doer cannot reap any benefit from payments made by

⁹⁴ *Stewart v. Martin*, 16 Vt. 397; *Board v. Head*, 3 Dana 489; *Hopple v. Higbee*, 23 N. J. L. 342; *Morrison v. Crawford*, 7 Ore. 472; *Howard v. Manderfield*, 31 Minn. 337; *Mississippi Mills v. Meyer*, 83 Tex. 433; *Jones v. Cobb*, 84 Me. 153.

⁹⁵ *Roberts v. Stuyvesant S. D. Co.*, 123 N. Y. 57, 9 L.R.A. 438, 1 Am. Neg. Cas. 535, 20 Am. St. 718; *Ball v. Lincy*, 48 N. Y. 6, 8 Am.

Rep. 511; *Watson v. Coburn*, 35 Neb. 492; *Coburn v. Watson*, 48 Neb. 257.

⁹⁶ *Wehle v. Spelman*, 25 Hun 99; § 1105.

⁹⁷ *Cone v. Lewis*, 64 Tex. 331.

⁹⁸ *State v. Harrington*, 33 Mo. App. 476.

⁹⁹ *Leonard v. Hair*, 133 Mass. 455.

¹ *State v. Berning*, 74 Mo. 87.

a third party out of the proceeds realized from the sale of the converted property. Thus, where trover was brought by the mortgagee of crops against a purchaser with notice he was not allowed to mitigate his liability by proving that a portion of the proceeds received by the mortgagor was applied by him to the payment of rent, the lien of the landlord therefor being superior to that of the mortgagee.² "When the owner has recovered converted property the measure of his damages is the expense he has necessarily incurred and the value of the time he has spent in recovering it, together with the value of the use of the property, if any, while he was wrongfully deprived of it, not exceeding the total value of the property at the time of the conversion," and, in addition, for any depreciation in the value of it between the time of the conversion and return.³ He may recover for money paid to satisfy an exaction of one having the property to obtain possession,⁴ or at a wrongful public sale.⁵ The sums so paid detract from the benefit the defendant will derive by way of mitigation of damages from its return.⁶ He will be entitled to a deduction from the damages which would otherwise be recoverable for any partial satisfaction of the wrong made by him, or by any of several jointly charged with or guilty of the same conversion and accepted by the plaintiff. Where in such a case against two the plaintiff obtained judgment by default against one and withdrew his action against the other upon receiving partial satisfaction and agreeing no further to prosecute him personally therefor, it was held that

² Keith v. Ham, 89 Ala. 590; Carpenter v. Going, 20 Ala. 587.

³ First Nat. Bank v. Rush, 29 C. C. A. 333, 85 Fed. 539; Dodson v. Cooper, 37 Kan. 346; Sprague v. Brown, 40 Wis. 612; Curtis v. Ward, 20 Conn. 204; Hurlburt v. Green, 41 Vt. 490; United States v. Pine River L. & I. Co., 24 C. C. A. 101, 78 Fed. 319.

⁴ Hough v. Bowe, 51 N. Y. Super. Ct. 207; Davis S. M. Co. v. Best, 50 Hun 76; Bennett v. Lockwood, 20 Wend. 223, 32 Am. Dec. 532; Ren-

fro v. Hughes, 69 Ala. 581; Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Ewing v. Blount, 20 Ala. 694; McDonald v. North, 47 Barb. 530; Sprague v. Brown, 40 Wis. 612. See Sprague v. McKinzie, 63 Barb. 60; Parroski v. Goldberg, 80 Wis. 339, qualifying Collins v. Lowry, 78 Wis. 329.

⁵ Keene v. Dilke, 4 Ex. 388.

⁶ Hurlburt v. Green, 41 Vt. 490; Baldwin v. Porter, 12 Conn. 473.

There cannot be a recovery of expenses incurred in anticipation of

damages might be assessed against the defaulted defendant for the value of the converted property, deducting therefrom the amount received by way of compromise from his co-defendant.⁷ Whatever the form of the action a wrong-doer is not entitled to any advantage because of the labor bestowed on property which has been recaptured by the owner and the title to which he does not divest himself of.⁸ The evidence in mitigation must be specific or it will be ineffectual.⁹

§ 1142. **Plaintiff's duty to mitigate damages.** The rights and liabilities of parties to actions for the conversion of property are determined by the facts existing at the time and place of conversion, with an exception or two, such as those which allow the highest intermediate value of the property to be recovered. The modification of the rule which allowed that value to be fixed as of any time between the conversion and the time of the trial of the action therefor to a reasonable time after the wrong has been done may be considered an application of the principle which imposes upon the wronged party the duty to lessen the damages which may result from the act of the other. How far this principle may apply to actions of this class is a question upon which the authorities do not throw much light. We incline to the view that it is not applicable, except in unusual circumstances, as where loss of profits or other consequential damages are claimed. Property reduced to rightful possession is the subject of ownership. He who interferes with the owner's rights therein must compensate him for the wrong done. The injured person who has been deprived of a deer or a fish he has taken is not bound to relieve the wrong-doer of his duty to pay the value thereof because the woods abound in deer or the waters are filled with fish. One who appropriates ice formed on public waters, in a mode recognized by persons engaged in securing ice thereon, is entitled

operating a machine without knowledge of its conversion unless the demand therefor is special. *Cushing v. Seymour*, 30 Minn. 301.

⁷ *Heyer v. Carr*, 6 R. I. 45.

⁸ *Gaskins v. Davis*, 115 N. O. 85,

25 L.R.A. 813, 44 Am. St. 439. *Quigley F. Co. v. Rhea*, 114 Va. 271; *Gates v. Rifle B. Co.*, 70 Mich. 309.

⁹ *Deri v. Union Bank*, 65 N. Y. Misc. 531.

to recover its value if another enters upon and cuts that so appropriated, regardless of the quantity which he may be at liberty to secure elsewhere. Some light may be gathered on this question from the cases referred to in the note.¹⁰

¹⁰ *Taber v. Jenny*, 1 Sprague, 320; *Bourne v. Ashley*, 1 Low. 27; *Bartlett v. Budd*, id. 223; *Ghen v. Rich*, 8 Fed. 159; *Swift v. Gifford*, 1 Low. 29. See § 1129.

In determining when one whose stocks have been converted should,

in the exercise of reasonable diligence, order a repurchase of them in order that he may have the benefit of a future advance, his financial condition is not to be considered. *Ling v. Malcom*, 77 Conn. 517.

CHAPTER XXIX.

REPLEVIN.¹

SECTION 1.

PLAINTIFF'S CASE.

- § 1143. Definitions; who may sue.
- 1144. Measure of damages.
- 1145. Exemplary damages.
- 1146. Special and consequential damages.
- 1147, 1148. Recovery if property not returned.
- 1149. Damages affected by the object of the action.
- 1150. Recovery for use and increase in value.
- 1151-1153. Intermediate injury and depreciation.
- 1154. Increase in value by defendant.

SECTION 2.

DEFENDANT'S CASE.

- 1155. Successful defendant's rights.
- 1156. A plaintiff obtaining possession and failing in his suit a wrong-doer.
- 1157. Measure of damages.
- 1158. Special and consequential damages.
- 1159. Mitigation of damages.
- 1160. Recovery affected by interest in property.
- 1161. Recoupment.
- 1162. Rights where part of property found for each party.

SECTION 1.

PLAINTIFF'S CASE.

§ 1143. Definitions; who may sue. Replevin and detinue are common-law actions for the recovery of specific personal property. The former enables the plaintiff to obtain possession at the commencement of the suit on giving security to prosecute

¹ The measure of damages in actions on replevin bonds is treated in §§ 499-509.

it and to return the property if return be adjudged; the other enforces delivery of the property by the final judgment and the process thereon. The remedy by claim and delivery under the code combines substantially the advantages of both these actions.²

One who owns and is entitled to the possession of personal property may bring replevin against whomsoever he finds in possession of it or who assumes control of the property by refusing to surrender it on demand,³ though he shares the beneficial ownership with another.⁴ A special property with the right to possession is enough in Massachusetts.⁵ According to the weight of authority an action to recover specific personal property cannot be maintained unless the defendant was in possession of it when the action was begun.⁶ In New York the rule is otherwise.⁷ In Wisconsin the action lies if the

² See *McLaughlin v. Piatti*, 27 Cal. 451; *Morgan v. Reynolds*, 1 Mont. 163.

"It is evident to our minds that recovery of damages in a proper case is as much a primary object in an action of this kind as is the recovery of the property in specie; and that the prevailing party should be permitted to maintain his rights in respect to damages, on account of a wrongful taking and detention, as well as his rights in relation to the property itself." *Buckley v. Buckley*, 12 Nev. 423.

³ *Richbourg v. Rose*, 53 Fla. 173, 125 Am. St. 1061; *Mitchell v. McLeod*, 127 Iowa 733; *Christy v. Ashlock*, 93 Ill. App. 651; *Harris v. Smith*, 132 Cal. 316.

⁴ *McDonald v. Daniels*, 76 Kan. 388.

⁵ *Field v. Fletcher*, 191 Mass. 494.

⁶ *Midland C. Co. v. Toledo F. & M. Co.*, 83 C. C. A. 489, 154 Fed. 797 (if only a wrongful detention is alleged); *Kelly v. Lewis*, 38 Colo. 18; *Redinger v. Jones*, 68 Kan. 627; *Vaughn v. Huff*, 99 Miss. 110;

Morrow v. Pryor, 125 Mo. App. 344; *Gallick v. Bordeaux*, 31 Mont. 328; *Schnitzer v. Russell*, 81 N. J. L. 146; *Webb v. Taylor*, 80 N. C. 305; *Chambers v. Emery*, 36 Utah 380; *Heidiman-B. S. Co. v. Schott*, 59 Neb. 29; *Burr v. McCallum*, 59 Neb. 326; *Moses v. Morris*, 20 Kan. 208; *State v. Jennings*, 14 Ohio St. 73; *Willis v. De Witt*, 3 S. D. 281; *McHugh v. Robinson*, 71 Wis. 565; *Gardner v. Brown*, 22 Nev. 156; *Coffin v. Gephart*, 18 Iowa 257; *Ricciotto v. Clement*, 94 Cal. 105; *Haughton v. Newberry*, 69 N. C. 456; *Hall v. White*, 106 Mass. 599; *Aber v. Bratton*, 60 Mich. 357; *Griffin v. Lancaster*, 59 Miss. 340; *Davis v. Randolph*, 3 Mo. App. 454; *Feder v. Abrahams*, 28 id. 454.

The possession must be entire and exclusive. *Oellien v. Galt*, 150 Mo. App. 537.

Possession at the commencement of the action is not required to maintain an action for damages only. *Bowen v. King*, 146 N. C. 385.

⁷ *Nichols v. Michael*, 23 N. Y.

defendant disposed of the property after demand was made;⁸ and in Nebraska if the property was transferred in bad faith.⁹ The possession of an officer, actual or constructive, is sufficient to sustain an action of replevin against him if he could maintain the action thereof if such possession was interfered with.¹⁰ Damages for unlawful seizure may be recovered though plaintiff may not recover the possession.¹¹

§ 1144. *Measure of damages.* Where the plaintiff obtains possession on his writ of replevin, as is usually the case where the defendant has no legal right to retain it by giving bond, and on the trial maintains his right to it, if the property is obtained without injury or deterioration he is only entitled to damages for its caption and detention. There cannot be a recovery for the breach of the contract out of which grew the dispute as to the right of possession.¹² The ordinary measure of these damages is interest on the value of the property.¹³

264; *Barnett v. Selling*, 70 N. Y. 492.

⁸ *Starke v. Paine*, 85 Wis. 633; *Pranke v. Herman*, 76 Wis. 428; *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428; *Gassner v. Marquardt*, 76 Wis. 579.

⁹ *Singer S. M. Co. v. Robertson*, 87 Neb. 542, 34 L.R.A.(N.S.) 887.

¹⁰ *Hyde v. Elmer*, 14 N. M. 39; *Cobbey on Replevin*, § 62.

¹¹ *Segars v. Segars*, 82 S. C. 196.

¹² *Hersberg v. Sachse*, 60 Md. 426; *Schrandt v. Young*, 62 Neb. 254.

In Iowa the right to damages for the detention is not waived by exercising the statutory privilege of taking judgment for the value of the property instead of for its return. *Cook v. Hamilton*, 67 Iowa 394. Compare *Hanselman v. Kegel*, 60 Mich. 540; *Just v. Porter*, 64 Mich. 565.

¹³ *Chattanooga State Bank v. Citizens' State Bank*, 39 Okla. 255; *Cox v. Burdett*, 23 Pa. Super. Ct. 346; *Webster v. Sherman*, 33 Mont.

448; *Brizsee v. Maybee*, 21 Wend. 144; *State v. Smith*, 31 Mo. 566; *Bigelow v. Doolittle*, 36 Wis. 115; *Gillies v. Wofford*, 26 Tex. 76; *New York G., etc. Co. v. Flynn*, 55 N. Y. 653; *McDonald v. Scaife*, 11 Pa. 381, 51 Am. Dec. 556; *Robinson v. Barrows*, 48 Me. 186; *Oviatt v. Pond*, 29 Conn. 479; *Schenuit v. Brueggestratt*, 8 Mo. App. 46; *Hainer v. Lee*, 12 Neb. 452; *Redmond v. American Mfg. Co.*, 121 N. Y. 415; *Johnson v. Bailey*, 17 Colo. 59; *Werner v. Graley*, 54 Kan. 383; *Austin v. Terry*, 13 Colo. App. 141; *Smith v. Stevens*, 14 Colo. App. 491; *Morey v. Hoyt*, 62 Conn. 542, 19 L.R.A. 611; *Earle v. Gorham Mfg. Co.*, 2 App. Div. (N. Y.) 460; *Crossley v. Hojer*, 11 N. Y. Misc. 57; *Bourda v. Jones*, 110 Wis. 52; *Honaker v. Vesey*, 57 Neb. 413; *Gardner v. Brown*, 22 Nev. 156; *Klinkert v. Fulton S. & M. Co.*, 113 Wis. 493; *Findlay v. Knickerbocker I. Co.*, 104 Wis. 375; *Wadleigh v. Buckingham*, 80 Wis. 230; *State Bank v. Showers*,

This is the rule though the usable value of it is in excess of the interest on its value if the party elects to recover the value of the property and thereby prevents the other from returning it.¹⁴ This rule will be applied to securities not bearing interest, the detention of which prevents the owner from collecting the money they represent or of making demand so as to put them upon interest if payment should be delayed.¹⁵ It, however, is not inflexible. Following the principle that the injured party is entitled to just compensation only, when there is no injury or but a slight one the damages will be only nominal or according to the injury actually sustained. If securities for money bearing interest at the legal rate are detained and the interest has not been paid no more than nominal damages can be recovered.¹⁶ Where corporate stock was the subject of the action and by statute the value at the date of the trial was recoverable it was held that, in addition, the plaintiff was entitled to the dividends that had been paid upon the stock as damages for the detention.¹⁷ Interest cannot be recovered on the value of stock under a judgment awarding its return or the

65 Kan. 431. See *Jeffrey Mfg. Co. v. Mound Coal Co.*, 215 Fed. 222 (detinue to recover property conditionally sold).

In Delaware the allowance of interest is discretionary with the jury. *Boyce v. Cannon*, 5 Houst. 409. And so in North Carolina. *Patapsco G. Co. v. Magee*, 86 N. C. 350.

In California if there is a recovery for the detention of property interest on its value from the date of the taking, if allowable at all, is to be allowed as damages for detention. *Garcia v. Gunn*, 119 Cal. 315.

¹⁴ *Schnitzer v. Russell*, 81 N. J. L. 146.

¹⁵ *McCoy v. Cornell*, 40 Iowa 457; *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242.

In the last case there was a de-

tention of a depositor's pass-book; his deposit had been paid to a stranger. The legal rate of interest was recovered though the bank was to pay less.

¹⁶ *Bartlett v. Brickett*, 14 Allen 62. For other cases in which nominal damages measured the recovery see *Treat v. Staples*, 1 Holmes 1; *Pierce v. Van Dyke*, 6 Hill 613; *Whitman v. Merrill*, 125 Mass. 127; *Hyde v. Elmer*, 14 N. M. 39.

If the value of the note sued is alleged to be the principal sum due thereon and the bond and affidavit follow the complaint there cannot be a recovery of interest on the note which accrued before the action was brought. *Peterson v. Hall*, 61 Minn. 268.

¹⁷ *MacDonald v. MacDonald*, *infra*; *Bereich v. Marye*, 9 Nev. 312.

recovery of its value if the plaintiff delays making a demand for it and finally accepts it.¹⁸

Interest on the value will not be adequate compensation and is not the measure of damages where the use of the property detained is valuable. The owner is entitled to recover the value of the use, if he prefers it to interest, during the time he was deprived of possession,¹⁹ though in some cases it must be shown that, but for the detention, the owner would have used the property.²⁰ Without alleging special injury the plaintiff may recover in replevin such damages for the detention of the property as the jury, upon all the evidence, may be satisfied that its use, considering its nature and character, was worth during the time of the detention,²¹ including damage

¹⁸ *MacDonald v. MacDonald*, 71 N. Y. Misc. 516.

¹⁹ *Glascoek v. Hays*, 4 Dana 58; *Newberry v. Gibson*, 125 Iowa 575; *Pruitt v. Gunn*, 151 Ala. 651; *Smith v. Stevens*, 33 Colo. 427; *Schnitzer v. Russell*, 81 N. J. L. 146 (it seems); *Baker & L. Mfg. Co. v. Clayton*, 40 Tex. Civ. App. 586; *Scott v. Vulean I. Works Co.*, 31 Okla. 334; *Minkwitz v. Steen*, 36 Ark. 260; *Cook v. Hamilton*, 67 Iowa 394; *Turner v. Younker*, 76 Iowa 285; *Kennett v. Fickel*, 41 Kan. 211; *Aber v. Bratton*, 60 Mich. 357; *Anchor M. Co. v. Walsh*, 24 Mo. App. 97; *Reno v. Kingsbury*, 39 id. 240; *Chauvin v. Valinton*, 8 Mont. 451, 3 L.R.A. 194; *Corn Exch. Nat. Bank v. Blye*, 56 Hun 403; *Coffin v. Taylor*, 16 Ore. 375; *Stanley v. Donoho*, 16 Lea 492; *Washington I. Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Odell v. Hole*, 25 Ill. 204; *Clark v. Martin*, 120 Mass. 543; *Davis v. Davis*, 30 Ga. 296; *Morgan v. Reynolds*, 1 Mont. 163; *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Carroll v. Pathkiller*, 3 Port. 279; *Fralick v. Presley*, 29 Ala. 463, 65 Am. Dec.

413; *Dorsey v. Gassaway*, 2 Har. & J. 413, 3 Am. Dec. 557; *Scott v. Elliott*, 63 N. C. 215; *Clapp v. Walter*, 2 Tex. 130; *Clements v. Glass*, 23 Ga. 395; *Butler v. Mehrling*, 15 Ill. 488; *Machette v. Wanless*, 2 Colo. 180; *Hanover v. Bartels*, id. 514; *McGavock v. Chamberlain*, 20 Ill. 219; *Dunnahoe v. Williams*, 24 Ark. 264; *Electric L. Co. v. Rust*, 131 Ala. 484; *Werner v. Graley*, 54 Kan. 383; *Williams v. Wood*, 61 Minn. 194; *Qualy v. Johnson*, 80 Minn. 408; *Nash v. Larson*, 80 Minn. 458; *Cook v. Clary*, 48 Mo. App. 166; *Farrar v. Eash*, 5 Ind. App. 238; *Hoyt v. Fuller*, 43 O. C. A. 466, 104 Fed. 192; *Fullerton L. Co. v. Spencer*, 81 Iowa 549; *Hutchinson v. Hutchinson*, 102 Mich. 635; *Chase County Nat. Bank v. Thompson*, 54 Kan. 307; *State Bank v. Showers*, 65 Kan. 431; *Roach v. Houston*, 15 Ky. L. Rep. 61 (Ky. Super. Ct.). See *Twinam v. Swart*, 4 Lans. 263.

²⁰ *Barney v. Douglass*, 22 Wis. 464; *Smith v. Stevens*, 14 Colo. App. 491.

²¹ *Ocala F. & M. Works v. Lester*, 49 Fla. 199; *Manning v. Grinstead*,

arising from inconvenience.²² In North Dakota the plaintiff's right to recover for the use of usable property is absolute. The

121 Ky. 802, citing the text; *Bowen v. King*, 146 N. C. 385; *Boston L. Co. v. Myers*, 143 Mass. 446; *Clark v. Martin*, 120 Mass. 543; *Farrand & V. O. Co. v. Board of Church Extension*, 17 Utah 469, citing the text.

It has been held that the failure to claim damage in a declaration in replevin is a fatal defect. *Faget v. Brayton*, 2 Har. & J. 350; *Crosse v. Bilson*, 6 Mod. 102. See *Smith v. Dodge*, 37 Mich. 354.

In Minnesota the value of the use must be specially claimed (*Gray v. Bullard*, 22 Minn. 278; *Ferguson v. Hogan*, 25 id. 135), unless the defect is waived, as it is where the parties litigate the question as though it was a proper issue. That being done, the question cannot be raised by an exception to the charge. *Qualy v. Johnson*, 80 Minn. 408.

The rule in Idaho seems to be like that in Minnesota. *Sebree v. Smith*, 2 Idaho 329.

An assessment of damages is not necessarily erroneous because the allowance for the detention of the property is in excess of its value. *Washburn v. Roberts*, 72 Ind. 213.

Where the detention continued for two years and five months the allowance of five times the value of the property was held excessive. *Anchor M. Co. v. Walsh*, 24 Mo. App. 97. And where more than twice the value of the property was allowed, no deterioration being shown, the assessment was set aside. *Romberg v. Hughes*, 13 Neb. 579. See *Farrar v. Eash*, 5 Ind. App. 238.

It is error to instruct the jury to allow the reasonable value of the

use or hire of the property without directing its attention to the consideration of whether the property could have been constantly employed at a given rate, or whether its gross earnings would have been diminished by the expense of carrying for it. *Brunell v. Cook*, 13 Mont. 497. *Haggerty v. Lash*, 34 Mont. 517.

In fixing the reasonable value of the use of property the taxes which the prevailing party would have paid had he retained possession of it and the risk incident to possession should be considered. *Sebree v. Smith*, 2 Idaho 329.

If there was no depreciation in the property during the time it was detained there should be deducted from the value of its use a reasonable sum for the deterioration which would have resulted from its use and for the repairs and other expenses the plaintiff would have incurred if he had rented it during such time. *Ocala F. & M. Works v. Lester*, 49 Fla. 199. See note to § 1157.

In Florida the *ad damnum* in a declaration seeking the recovery of goods mentioned in an attached schedule does not relate to their value, but to the damages for detaining them. *Anderson v. Carlin*, 24 Fla. 199.

²² Where business papers and documents were detained in connection with goods, the value of which was assessed by agreement, an award of 50*l.* for the detention of the former was held to be reasonable though the actual damages proven were small and the case was not one for punitive damages. It was said: It is difficult to show

defendant's bond is conditional for its delivery, and if the plaintiff recovers he takes an alternative judgment and may insist upon a delivery if it can be had; the defendant has the correlative right. The ownership of the plaintiff continues throughout the proceedings and the right to the value of the use of the property follows the title.²³ Where the complaint demands compensation for the use and specifies the time during which the plaintiff was deprived of it, it is not necessary that it set out the reasons why the use was more valuable on one day than another. Evidence of an unusual demand for the use of property at a given time is not speculative nor is it based upon prospective profits which might have been made.²⁴ As between vendor and vendee, the former holding the title until the property is paid for, the latter is liable for the value of the use from the time he refuses to deliver until verdict, regardless of any compensation due him from the vendor for services rendered by the use of the property while the vendee was legally in possession of it, and of payments made under the contract of purchase.²⁵ A life tenant may recover the value of the use of property during the time it was detained.²⁶ There is no right in a mere pledgee²⁷ or mortgagee²⁸ to recover the value of the use. Where the value at the time of the taking is adopted and interest is added to that it is erroneous to give compensation also for the use between the taking and the trial;²⁹ and so where the value of the property at the time of the trial is the test.³⁰ There is no right to recover for the use beyond the time

exactly what inconvenience a man may be put to by being deprived of his business papers. The question is whether 50*l.* is an amount that reasonable men would not give for the permanent deprivation of these documents. *Turner v. New South Wales Mont de Piete D. & I. Co.*, 10 New South Wales St. Rep. 900.

²³ *Northrop v. Cross*, 2 N. D. 433.

²⁴ *Hill v. Wilson*, 8 N. D. 309.

²⁵ *McGinnis v. Savage*, 29 W. Va. 363.

²⁶ *Glascock v. Hays*, 4 Dana 58.

²⁷ *McArthur v. Howett*, 72 Ill. 358; *Johnson v. Bailey*, 17 Colo. 59.

²⁸ *Thompson v. Scheid*, 39 Minn. 102, 12 Am. St. 619; *Klinkert v. Fulton S. & M. Co.*, 113 Wis. 493.

²⁹ *Powers v. Benson*, 120 Iowa 428, citing the text; *Bigelow v. Doolittle*, 36 Wis. 115; *Freeborn v. Norcross*, 49 Cal. 313; *White v. Sheffield, etc. R. Co.*, 90 Ala. 253; *Hanselman v. Kegel*, 60 Mich. 540.

³⁰ *Reno v. Kingsbury*, 39 Mo. App. 240.

the verdict is rendered.³¹ There may be a recovery of the damages sustained down to the date of the verdict.³² Where the damages are measurable by the unpaid rental value of the property as fixed by the parties, with interest upon the stipulated sums from the time each became due, the allowance of rentals intermediate the institution of the action and judgment was erroneous under the pleadings.³³ If the property was mortgaged the mortgagor's right to damages for its detention cannot extend beyond the period when his right of possession ceased.³⁴ Where the property involved is manufactured for sale there is no presumption that the plaintiff would have put it to any use which would have been more profitable to him than the interest on its value; hence, that will limit his recovery.³⁵ He may recover for the use of property while it is detained, but not in addition for the natural depreciation in its value while in the defendant's possession.³⁶ In trespass for the wrongful taking and detention of personal property the plaintiff may recover the value of the use of the property during detention any unnatural depreciation of the property during detention due to abuse or want of reasonable care.³⁷ Where the recovery has been for lost profits the value of the use of the property which would have been employed in the making of the profits cannot be recovered.³⁸

If there is a wrongful levy upon and sale of property and the owner purchases it, his damages are measured by the price paid; the defendant cannot be heard to allege that the actual value was less than that.³⁹ Expense incurred in replacing the property is spoken of, in at least one case, as an element of damage.⁴⁰ In replevin for materials which, before their

³¹ Coffin v. Taylor, 16 Ore. 375.

³² Lesser v. Norman, 51 Ark. 301.

³³ Compressed A. M. Co. v. West San Pablo L. & W. Co., 9 Cal. App. 361.

³⁴ Gaar, Scott & Co. v. Lyons, 99 Ky. 672.

³⁵ Redmond v. American Mfg. Co., 121 N. Y. 415, 56 N. Y. Super. Ct. 372.

³⁶ Odell v. Hole, 25 Ill. 204; Mayberry v. Cliffe, 7 Cold. 117; White v. Sheffield, etc. R. Co., *supra*.

³⁷ Smith v. Miller, 145 Ill. App. 606.

³⁸ Bowen v. King, 146 N. C. 385.

³⁹ Leonard v. Maginnis, 34 Minn. 506; Northrup v. Cross, *supra*.

⁴⁰ Klinkert v. Fulton S. & M. Co., *supra*.

removal, composed a fence attached to and a part of the realty the plaintiff can recover only the value of the materials after their removal, not the value of the fence as it stood before removal.⁴¹ But where a house was sold, removed and placed upon a permanent foundation it was held that the recovery should "have been the value of the house, not the house itself".⁴² The damages for the detention of a building are not measured by its rental value, but by the damages in fact sustained.⁴³ In an action of claim and delivery for standing trees, sold as personal property, and which the defendant cut and removed, their salable value at the time they were cut measured the recovery.⁴⁴ As against one who was not a trespasser damages cannot antedate the writ unless demand is made for the property.⁴⁵

§ 1145. **Exemplary damages.** These may be recovered where the taking is accompanied with outrage and insult or the detention is aggravated by bad faith and oppression.⁴⁶ On the question of damages, the means by which the goods have been taken or retained will be considered. In Pennsylvania damages beyond the value of the property may be given in replevin where the taking was accompanied with any wrong or outrage though the declaration contains no count for special damages, nor any averment of such aggravation;⁴⁷ and the same rule has been recognized in Mississippi⁴⁸ and New York.⁴⁹ In

⁴¹ *Pennybecker v. McDougal*, 48 Cal. 160.

⁴² *Reese v. Jared*, 15 Ind. 142, 77 Am. Dec. 88.

⁴³ *Eastman v. Commissioners*, 114 N. C. 524.

⁴⁴ *Hogg v. Frazier*, 24 Ky. L. Rep. 930.

⁴⁵ *Daniel v. Jordan*, 146 Ala. 229.

⁴⁶ *Morris v. Anderson* (Tex. Civ. App.), 152 S. W. 677; *Heard v. James*, 49 Miss. 236; *Craig v. Kline*, 65 Pa. 399, 3 Am. Rep. 636; *Schofield v. Ferrers*, 46 Pa. 438; *Burrage v. Melson*, 48 Miss. 237; *Cable v. Dakin*, 20 Wend. 172; *McDonald v. Scaife*, 11 Pa. 381, 51

Am. Dec. 556; *Gross v. Hays*, 73 Tex. 515; *Arzaga v. Villalba*, 85 Cal. 191; *Wiley v. McGrath*, 194 Pa. 498, 75 Am. St. 709. See *Duroth Mfg. Co. v. Caufliel*, 243 Pa. 24. *Contra*, *Tittle v. Kennedy*, 71 S. C. 1; *Brayton v. Beall*, 73 S. C. 308; *Vance v. Vandercook*, 170 U. S. 468, 42 L. ed. 1111 (ruled under South Carolina statutes).

⁴⁷ *Cox v. Burdett*, 23 Pa. Super. Ct. 346; *Schofield v. Ferrers*, 46 Pa. 438.

⁴⁸ *Burrage v. Melson*, 48 Miss. 237.

⁴⁹ *Cable v. Dakin*, 20 Wend. 172; *Brizsee v. Maybee*, 21 id. 144.

Iowa the purchaser of mortgaged property is not liable to the mortgagee for exemplary damages because he refused to deliver and maliciously concealed it.⁵⁰ Such damages may be awarded in California although the plaintiff obtains possession of the property under provisional process.⁵¹ Where the replevin suit has been decided against the plaintiff and *retorno* awarded, and the defendant therein has recovered judgment upon the replevin bond, which judgment has been paid, such defendant cannot maintain another suit to recover punitive damages for the institution of the replevin suit and the execution of the writ.⁵² A defendant who has wilfully or indiscriminately mixed the goods of the plaintiff with his own, so that they are indistinguishable, if they are of different qualities or values loses the whole.⁵³

§ 1146. **Special and consequential damages.** There may be a recovery of such special and consequential damages as arise naturally and proximately from the wrongful caption or detention of property.⁵⁴ A very interesting case involving the remoteness of damage was decided in the supreme court of Victoria in 1887. The plaintiff was indebted to the defendant on three several accounts, one of which was secured by title deeds to lands owned by the former, which were deposited with the latter. The defendant insisted upon the payment of more than was due it, and refused to deliver the deeds. The plaintiff made an arrangement with his mother for the loan of 600*l.* to lift the deeds held by the defendant and carry on his business. The defendant was informed that one-half of said sum was in possession of the plaintiff for the purpose stated, and that the other one-half was to be delivered to him on his delivery of the deeds to the lender, and that, failing to deliver them, the money in hand was to be returned. The court said: We think this evidence shows that the manager of the defend-

⁵⁰ McDonald v. Norton, 72 Iowa 652.

⁵¹ Arzaga v. Villalba, 85 Cal. 191.

⁵² Kapischki v. Koch, 79 Ill. App. 238, aff'd 180 Ill. 44.

⁵³ Root v. Bonnema, 22 Wis. 539.

⁵⁴ Scofield v. Ferrers, 46 Pa. 438;

Saling v. Bolander, 60 C. C. A. 469, 125 Fed. 701; Bowen v. King, 146 N. C. 385; Burge v. Hinds, 46 Tex. Civ. App. 134 (loss of contract).

ant bank, at the time he did the wrongful act of refusing to deliver up the deeds, had reasonable means of knowing that the consequence of the inability of the plaintiff to obtain the loan from his mother was likely to follow the refusal, and even if the inability to procure a loan could not be considered to be a natural or ordinary consequence of such an act of refusal, that he had then the reasonable means of knowing that this unusual consequence was likely to occur as a result of his wrongful act; if so, the evidence relating to the inability to procure the loan, the refusal of the loan, the insistence by the mother on the return of the money, is admissible in evidence, and is not too remote. The continuation of the wrongful act was the cause of the other damages complained of. The plaintiff was unable to pay his workmen, and had to discharge some. He was unable to meet his liabilities; he appears to have been sued for some debts; he was unable to collect the debts due to him, and his business fell away. We think all these consequences naturally followed from his inability to procure the loan from his mother; and unless it can be shown that he himself conducted by his own conduct or omissions to swell the amount of damage, these damages would be the natural and ordinary consequences of the first damage resulting from the detention of his deeds.⁵⁵ Under a statute providing that when judgment is given for the plaintiff he shall recover damages for the detention of the property there may be a recovery for the depreciation in the value of bonds between the time he became entitled to their possession and the time of receiving them.⁵⁶

In replevin to recover possession of a heifer secretly taken

⁵⁵ *O'Connor v. Bank*, 13 Vict. L. R. 820. In reaching its conclusion the court accepted the test as to what damage is too remote laid down by Bovill, C. J., in *Sharp v. Powell*, L. R. 7 C. P. 258, 41 L. J. (C. P.) 95: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not

the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that the consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person."

⁵⁶ *Clow v. Yount*, 93 Ill. App. 112.

from the plaintiff by the defendant damages were held recoverable for time spent and expenses incurred in searching for the heifer after she was so taken; but such damages should be specially alleged,⁵⁷ as should expense incurred in keeping the property.⁵⁸ Money expended for a more valuable article than that detained may be recovered if the owner acted with discretion in procuring it.⁵⁹ The defendant is not usually liable for the personal expenses of the plaintiff or his loss of time in connection with the prosecution of his action,⁶⁰ nor for his attorney's fees therein.⁶¹ The owner of a horse who pays entrance

⁵⁷ *Miller v. Garling*, 12 How. Pr. 203; *Blackwell v. Acton*, 38 Ind. 425; *Mitchell v. Burch*, 36 Ind. 529; *Davis S. M. Co. v. Best*, 50 Hun 76; *Dutro v. Kennedy*, 9 Mont. 101; *Arzaga v. Villalba*, 85 Cal. 191, overruling *Kelly v. McKibben*, 54 Cal. 192; *Redington v. Numan*, 60 id. 632; *Laughlin v. Barnes*, 76 Mo. App. 258; *Loeb v. Mann*, 39 S. C. 465; *Cain v. Cody (Cal.)*, 29 Pac. 778. See § 1129, especially quotation from *Parroski v. Goldberg*, 80 Wis. 339. *Contra*, *Taylor v. Welsh*, 138 Ill. App. 190.

In *Wilson v. Thomson*, 4 Vict. L. R. (law) 281, the plaintiff proved that he was subjected to very considerable inconvenience, being prevented from obtaining a loan elsewhere, and put to some expense in endeavoring time after time to obtain an interview with the defendant. Though the property was returned, these grounds of damage were held tenable.

The opinion of a party that he has been damaged in a specified sum for trouble, expense and time consumed in the pursuit of property, no particulars being given, is not sufficiently certain to justify the recovery of damages for such pursuit. *Hays v. Windsor*, 130 Cal. 230.

⁵⁸ *Cook v. Clary*, 48 Mo. App. 166.

Injury done to lumber cannot be recovered for under an allegation that the defendant has wrongfully retained the property to the damage of the plaintiff. *Whitney v. Levon*, 34 Neb. 443. See *Rosecrans v. Asay*, 49 Neb. 512; *Armagost v. Rising*, 54 Neb. 763.

The expense of seizing and carrying for the property is an element of the damages. *Hendricks v. Ireland*, 162 N. C. 523.

⁵⁹ *Ocala F. & M. Works v. Lester*, 49 Fla. 199.

⁶⁰ *Taylor v. Morton*, 61 Mass. 24; *Jandt v. South*, 2 Dak. 46; *McKay v. Wishert (Tex. Civ. App.)*, 152 S. W. 508; *Hampton & B. R. & L. Co. v. Sizer*, 35 N. Y. Misc. 391; *Loeb v. Mam*, 39 S. C. 46.

⁶¹ *Id.*; *Martland v. Bekins V. & S. Co.*, 19 Cal. App. 283 (at least if they have not been paid); *Jandt v. South*, 2 Dak. 46; *Gregory v. Woodbery*, 53 Fla. 566; *Sinski v. Brust*, 66 App. Div. (N. Y.) 34; *Howard v. Haas*, 139 Mo. App. 591; *Hodkinson v. McNeal M. Co.*, 161 Mo. App. 87; *Kepner v. Mix*, 81 Mo. 93; *Winstead v. Hulme*, 32 Kan. 568; *Cowden v. Lockridge*, 60 Miss. 385; *Smith v. Bryant*, 1 Kan. App. 754; *Laughlin v. Barnes*, 76 Mo. App. 258; *Hampton & B. R. & L. Co.*

fees and fines pursuant to the rules of a trotting association in order that the horse may compete for purses in future races, such payments being made after the horse was taken on process, cannot recover the amount.⁶² The loss of employment as the result of taking and detaining the tools of a mechanic is too remote to be the basis of a recovery;⁶³ and so is injury to credit where a mercantile stock is taken.⁶⁴ The rule concerning the recovery of prospective profits is the same in replevin as in actions upon contract, in the absence of any circumstances showing malice. They cannot be recovered for if the testimony shows that they could have been realized only under the most favorable circumstances.⁶⁵ The profits which the plaintiff might have made from the performance of particular threshing contracts if the defendant had not deprived him of the use of his threshing machine are too conjectural and uncertain to furnish a basis for recovery.⁶⁶ There may be a recovery of the profits which would have been realized from keeping hens if the evidence warrants it.⁶⁷

In Wisconsin a complaint under a code, being in the statutory form (which does not allege damages), will let in proof of special damages for the detention, as the statute provides for their recovery. For that reason the rule that such damages must be alleged is to that extent inapplicable. In replevin for a horse it was held the plaintiff might recover as damages, not only the value of its use during the time it was unjustly

v. Sizer, 35 N. Y. Misc. 391; Knight v. Beekwith C. Co., 6 Wyo. 500; Hays v. Windsor, 130 Cal. 230; Trimble v. Keer M. Co., 56 Mo. App. 683; Wright v. Broome, 67 id. 32; Cook v. Gross, 60 App. Div. (N. Y.) 446.

A section of the California code permitting the recovery of money expended in pursuit of converted property does not cover attorney's fees in an action of claim and delivery. Harris v. Smith, 132 Cal. 316.

⁶² Riley v. Littlefield, 84 Mich. 22.

⁶³ Kelly v. Altemus, 34 Ark. 184, 36 Am. Rep. 6. See § 1117.

⁶⁴ Winstead v. Hulme, 32 Kan. 568; Smith v. Bryant, 1 Kan. App. 754.

⁶⁵ Talcott v. Crippen, 52 Mich. 633; Aber v. Bratton, 60 Mich. 357.

⁶⁶ Williams v. Wood, 55 Minn. 323, 61 Minn. 194, following Cushing v. Seymour, 30 Minn. 301. *Contra*, Bowen v. King, 146 N. C. 385.

⁶⁷ Eitzen v. Hilbert, 165 Mich. 650.

detained, but, if injured by defendant's neglect while so detained, the plaintiff's expenses in taking care of and doctoring it, in excess of what those expenses would have been but for the injury, and for the loss of the animal's services after the plaintiff had gained possession, as well as for the permanent depreciation of its value resulting from the injury.⁶⁸ In an English case the plaintiff in replevin, after obtaining judgment for the expenses incurred in giving the replevin bond, brought an action of trespass to recover for the breaking and entering of his shop and dwelling and removing fixtures and other property therefrom, whereby, it was alleged, he was prevented from carrying on his business, and was believed by his customers to be incapable of doing so, and was put to expense in and about replevying his goods. It was held that the judgment in replevin was a bar to the action of trespass so far as the personalty was concerned,⁶⁹ because that element of damage was recoverable in the replevin suit; but it was otherwise as to the trespass to the realty.⁷⁰ Bovill, C. J., said: "When the goods were not redelivered by the sheriff, according to the books, it would appear that the plaintiff could recover the full amount of the damages that he had sustained. * * * I see no reason in principle why there should be any limitation as to the amount of the damages recoverable in such a case. I do not know any ground in law for confining the damages to the amount of the expenses of the replevin bond. In practice these expenses are all that are recovered merely because there is generally no other damage. * * * Whatever damages have been actually sustained may be recovered." In a New York case replevin was brought for a machine, the invention of plaintiff, made as a model and for experiment and exhibition at fairs soon to be held. The defendant had entered into a contract for its purchase and took possession of it for the ostensible purpose of testing it, but in fact with the object of preventing its exhibition. The plaintiff was permitted to re-

⁶⁸ *Zitske v. Goldberg*, 38 Wis. 216; *Wadleigh v. Buckingham*, 80 id. 230.

⁶⁹ See *Kapischki v. Koch*, 79 Ill.

App. 238, aff'd 180 Ill. 44.

⁷⁰ *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; *Graham v. O'Callaghan*, 14 Ont. App. 477.

cover the expense incurred in a partially successful attempt to manufacture another machine for the purpose of showing it at the fairs and interest on such expense, though the invention was practically worthless.⁷¹ Damage sustained by the defendant in consequence of being wrongfully arrested for having concealed the property sued for cannot be recovered in the replevin suit.⁷² Where other horses than those involved in the action were awaiting shipment elsewhere with those involved the cost of feeding the former during the time the others were detained could not be recovered because it was remote, contingent and speculative.⁷³ It has been held that the expense of cleaning goods soiled by an officer is too remote.⁷⁴ Losses sustained because of the plaintiff's delay in availing himself of a legal remedy are not recoverable.⁷⁵ Under a statute providing for the assessment of damages sustained by the unlawful taking and detention of property or by the unlawful detention of it, there may be a recovery of the expense of replacing a building wrongfully removed; such expense is not a part of the taxable costs.⁷⁶

§ 1147. **Recovery if property not returned.** The plaintiff may still proceed with his action where he does not obtain the property and will be entitled to recover, in addition to damages, the property or its value,⁷⁷ or interest on the value in lieu

⁷¹ Scattergood v. Wood, 14 Hun 269. The second machine was made at less expense than the original, and the court thought the damages were as favorable to the defendant as he had a right to ask.

⁷² Hodges v. Nall, 66 Ark. 135.

⁷³ Haas v. Tough, 67 Kan. 253.

⁷⁴ Schnitzer v. Russell, 81 N. J. L. 146.

⁷⁵ Bowen v. King, 146 N. C. 385.

⁷⁶ Byrnes v. Palmer, 113 Mich. 17.

⁷⁷ Hendricks v. Ireland, 162 N. C. 523; American-G. Nat. Bank v. Gray II. Co., 129 Ky. 105; Taylor v. Mills, 148 N. C. 415; Oil Co. v. Grocery Co., 136 N. C. 354; Baum

v. Harrison, 9 Ohio N. P. (N.S.) 257 (vendor under a conditional sale against an assignee for the benefit of creditors); Murdough v. Tuten, 76 S. C. 502; Ford L. Co. v. Cornett, 146 Ky. 475; Harrisburg E. L. Co. v. Goodman, 129 Pa. 206; Ryan v. Fitzgerald, 87 Cal. 345.

Where a mortgagee unlawfully seizes a mortgaged chattel and the mortgagor sues to recover its possession, if that cannot be delivered he is entitled to recover its value, and not merely the value of its use for the time intervening between the seizure and the maturity of the mortgage debt, for the reason that, until breach of condition, the prop-

of damages.⁷⁸ If he is entitled to recover the value the measure of damages is the same as in trover or trespass.⁷⁹ But the value and damages must be proved, otherwise the plaintiff will recover only a nominal sum.⁸⁰ This principle will not be strictly adhered to if the property has no market value. Thus, where the owner of Sioux half-breed scrip is wrongfully deprived of the same he may recover its value to him, although the scrip, being unassignable, is valueless in the hands of third persons, and notwithstanding duplicates might be obtained on proof of the loss of the originals. A wrong-doer, it was held, will not be permitted to resort to such a defense.⁸¹ The plaintiff furnished the defendant vouchers, a statement of expenditures and an affidavit for inspection. They had a peculiar value to him which might be affected by circumstances, and such value measured his recovery.⁸² In several states the defendant has a right to retain the property by giving a counter-bond, either to pay for or deliver it, if the plaintiff shall succeed in establishing a right to it. In Pennsylvania the defendant has an elec-

erty belongs absolutely to the mortgagor subject only to a lien for the payment of the debt. *Finley v. Cudd*, 42 S. C. 121.

⁷⁸ *Sheffield v. Hanna*, 136 Iowa 579; *Follett W. Co. v. Utica T. & D. Co.*, 84 App. Div. (N. Y.) 151 (though the property was held subject to the order of the court); *Taylor v. Mills*, *supra*; *Hall v. Tillman*, 110 N. C. 220; *Norwood v. Interstate Nat. Bank*, 92 Tex. 268.

⁷⁹ *Bigelow v. Doolittle*, 36 Wis. 115; *Frazier v. Fredericks*, 24 N. J. L. 162; *Hanselman v. Kegel*, 60 Mich. 540; *Aultman v. Stichler*, 21 Neb. 72; *Romberg v. Hughes*, 18 Neb. 579; *Payne v. King*, 141 Mo. App. 246; *Holly v. Flournoy*, 54 Ala. 99; *Johnson v. Marshall*, 34 id. 521; *Hisler v. Carr*, 34 Cal. 641; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102.

⁸⁰ *Hensley v. Orendorff*, 152 Ala. 599; *Sopris v. Webster*, 1 Colo. 507;

Burke v. Graham, 106 App. Div. (N. Y.) 108; *Phenix v. Clark*, 2 Mich. 327; *Seabury v. Ross*, 69 Ill. 533; *Mann v. Grove*, 4 Heisk. 403; *Maguire v. Dutton*, 54 N. J. L. 597.

Damages cannot be recovered for articles not named in the writ, though it be proven they were taken or detained. *Ott v. Specht*, 8 Houst. 61.

In replevin for a building there cannot be a recovery for injury to personal property resulting from the removal of the building. *Jameison v. Kent*, 42 Neb. 412.

A verdict that the defendant is guilty and a judgment thereon, no mention being made of damages or costs, entitles the plaintiff to at least nominal damages and costs. *Starkey v. Waite*, 69 Vt. 193.

⁸¹ *Bradley v. Gamelle*, 7 Minn. 331.

⁸² *Drake v. Auerbach*, 37 Minn. 505. The defendant had the right

tion to deliver the property on the writ when the sheriff calls for it or to retain it by giving security. If the property be delivered and the plaintiff sustains his action the defendant is answerable in damages for the taking and detention up to the time of delivery. If the property be retained he is answerable in addition for its full value. In either case the action thenceforth proceeds for damages alone. The property itself can in no event be recovered at law from the defendant; nor can he tender it afterwards in discharge of the action or even in satisfaction *pro tanto* of the damages claimed.⁸³ The action of "claim and delivery" of the code as generally adopted allows the defendant to retain the property by executing the counter-bond. The judgment, if for the plaintiff, where this right to retain the property has been exercised, is in the alternative after the form of the judgment in detinue; it is for delivery of the property or for its value if delivery cannot be had and for damages absolutely. The value is found, and usually of the date of the trial. But the statutes are not entirely uniform on these points, nor the decisions where the statutes are similar. Where the statute provides for judgment for delivery of the property or for its value if delivery cannot be had the judgment must conform to the statute unless it appears that a return cannot be had.⁸⁴ But if the record shows the latter fact a simple judgment for the value of the property is good.⁸⁵ The inquiry as to value must be directed to the value of the property in question in the condition and under the circumstances which would have governed its disposition if the possession of the attaching officer had not been interfered with.⁸⁶

§ 1148. Same subject. In Missouri if the plaintiff succeeds he has the choice of taking the property or its value; by the

to satisfy the judgment by surrendering the property and paying the costs.

⁸³ Fisher v. Whoollery, 25 Pa. 197; Schofield v. Ferrers, 46 id. 438; Collins v. Bellefonte Cent. R. Co., 171 Pa. 243; Swope v. Crawford, 16 Pa. Super. Ct. 474.

⁸⁴ Hanf v. Ford, 37 Ark. 544; Jetton v. Smead, 29 Ark. 372.

⁸⁵ Boley v. Griswold, 20 Wall. 486, 22 L. ed. 375; Burton v. Platter, 53 Fed. 901; Brown v. Johnson, 45 Cal. 77.

⁸⁶ Merchants' Nat. Bank v. McDonald, 63 Neb. 363.

value is meant the value at the time of the verdict.⁸⁷ In New York this option does not exist; at the termination of the suit by judgment in his favor the plaintiff must take the property if the defendant has it and will permit him to take it.⁸⁸ The jury are required to assess its value and damages for the detention. The value is assessed of the date of the trial; and any intermediate deterioration or depreciation must be recovered for as damages.⁸⁹ The value at the time of the trial is the usual subject of the inquiry and the proper subject of proof. Such value is to be accepted as a substitute for the property itself if the sheriff cannot deliver possession and it should be the equivalent thereof.⁹⁰ An action of claim and delivery may be brought against a wrong-doer although he has parted with the possession of the property before the commencement of the action. If the jury find that the acts of the defendant in obtaining and sending away the property were fraudulent the plaintiff has a right to recover its value if possession cannot be delivered.⁹¹ In Minnesota the alternative form of the judgment

⁸⁷ *Payne v. King*, 141 Mo. App. 246; *Chapman v. Kerr*, 80 Mo. 158; *Mix v. Kepner*, 81 id. 93; *Pope v. Jenkins*, 30 id. 528; *Miller v. Brynden*, 34 Mo. App. 602; *Hinchey v. Koch*, 42 id. 230; *Kirkendall v. Hartsock*, 58 id. 234.

If an agreement is made as to the value at the commencement of the action it will be presumed, nothing appearing to the contrary, that there has not been any change in value. *Merrill C. Co. v. Niekells*, 66 Mo. App. 678.

Where the plaintiff claimed under a chattel mortgage and the sale took place within a reasonable time after the replevin suit was brought, and was fairly conducted, the price at which the property was sold fixed its value as between the parties. *Hume Bank v. Hartsock*, 56 Mo. App. 291.

If it is impracticable to assess the value of the property as of the

time of the trial because it has been scattered by the wrong-doer the plaintiff may show its value when it was last accessible to him, and such value will, nothing appearing to the contrary, be presumed to be its value at a trial three or four years later. *Jennings v. Sparkman*, 48 Mo. App. 246. See *Willison v. Smith*, 60 id. 469; § 1148.

⁸⁸ *Dwight v. Enos*, 9 N. Y. 470; *Fitzhugh v. Wyman*, id. 559; *Brewster v. Silliman*, 38 id. 423.

⁸⁹ *Id.*; *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Redmond v. American Mfg. Co.*, 121 N. Y. 415; *National C. R. Co. v. Agne*, 43 App. Div. 605.

There cannot be a recovery of the expense of installing replevied chattels in a building. *Roth v. Felt*, 60 N. Y. Misc. 116.

⁹⁰ *Brewster v. Silliman*, 38 N. Y. 423.

⁹¹ *Ellis v. Lersner*, 48 Barb. 539.

is required.⁹² It is there held not to be necessary for the jury to assess the value of the several articles in question separately, unless requested by the plaintiff, with a view to obtaining a part of the property where all cannot be delivered on final process.⁹³ Where part has been replevied and a part not, only the value of the latter need be found;⁹⁴ and that is to be assessed at the time of the wrongful taking or detention. If the defendant recovers, the value is fixed at the time the property is replevied from him.⁹⁵ The time the right of action accrued is that at which the value of the property is to be fixed.⁹⁶ If a levy is made upon growing crops by filing a certified copy of the execution and a statute forbids their sale until they are ripe or fit to be harvested their value is to be found as of the date of the sale made in pursuance of the statute.⁹⁷ In Tennessee where the sheriff returns that he cannot get possession of the property described in the writ and has made known the contents of the writ to the defendant, the plaintiff may elect to declare in trover or detinue and proceed in the form of action selected.⁹⁸ In Nevada the judgment for the plaintiff in claim and delivery, where the property has remained in the possession of the defendant, is for the property or its value if delivery cannot be had. The defendant has a right to deliver it instead of paying the value.⁹⁹ The value is there fixed at the time of trial.¹ The rule is the same in Kansas² and Nebraska.³ The Oklahoma statute is similar to that of Kansas.⁴ In Wisconsin, Mon-

⁹² *Berthold v. Fox*, 13 Minn. 51.

⁹³ *Caldwell v. Bruggerman*, 4 Minn. 270.

⁹⁴ *Hecklin v. Ess*, 16 Minn. 51.

⁹⁵ *Sherman v. Clark*, 24 Minn. 37.

⁹⁶ *McLeod v. Capehart*, 50 Minn. 101.

⁹⁷ *Howard v. Rugland*, 35 Minn. 388.

⁹⁸ Act of 1816, ch. 65; *Nashville Ins. & T. Co. v. Alexander*, 10 Humph. 378.

⁹⁹ *Lambert v. McFarland*, 2 Nev. 58; *Carson v. Applegarth*, 6 id. 187; *Buckley v. Buckley*, 12 id. 423.

¹ *O'Meara v. North American M.*

Co., 2 Nev. 112; *Bercich v. Marye*, 9 id. 312; *Gardner v. Brown*, 22 Nev. 156.

² *Russell v. Smith*, 14 Kan. 366; *Chase County Nat. Bank v. Thompson*, 54 Kan. 307. Compare *Werner v. Graley*, 54 Kan. 383.

³ *Deck v. Smith*, 12 Neb. 839.

⁴ *Jackson v. Glaze*, 3 Okla. 143.

A judgment for a mortgagee of chattels should be for the possession of the property, or the value of the same in case a delivery cannot be had, not to exceed the amount due on the note and mortgage, together with damages for the deten-

tana, Texas and Iowa the value is fixed as of the time of the taking.⁵ In North Carolina it is determined as of the time of the taking, at least where it has been sold *pendente lite* by order of the court.⁶ And such is the rule in New Jersey regardless of whether such a sale has been made.⁷ In Iowa the successful plaintiff may elect to take a money judgment, in which case he can recover the value of the use of the property while it was detained and not merely interest on its value.⁸ The recovery by a mortgagee is measurable by the value of the property up to the amount of his lien with interest.⁹ The time demand is made upon a third person who has become possessed of the property is that at which its value will be fixed as against him.¹⁰

§ 1149. **Damages affected by the object of the action.** In this contrariety of practice it is important to observe, with reference to the subject of damages, the distinction between those cases in which the actual pursuit of the property in specie ceases upon the return of the writ showing that it has not been obtained, either because it has been elained or retained by execution of a counter-bond and those cases in which the plaintiff continues the pursuit until final judgment. At common law if the plaintiff declares in the *detinuit* he can recover damages for the detention only until replevin, though he should prove the property still in the defendant's possession.¹¹ Such declaration implies that the property has been taken and delivered to the plaintiff and that the detention does not continue. The declaration depends on the return of the sheriff. If that shows he has replevied the property and delivered it to the plaintiff his declaration is necessarily in the *detinuit*, for

tion thereof and costs. *King v. King*, 42 Okla. 405.

⁵ *Findlay v. Knickerbocker Ice Co.*, 104 Wis. 375; *Aultman Co. v. McDonough*, 110 Wis. 263; *Neeb v. McMillan*, 98 Iowa 718; *Osmers v. Furey*, 32 Mont. 581; *Norwood v. Inter-State Nat. Bank*, 92 Tex. 268.

⁶ *Hall v. Tillman*, 110 N. C. 220.

⁷ *Maguire v. Dutton*, 54 N. J. L. 597.

⁸ *Hartley Estate Bank v. McCorkell*, 91 Iowa 660; *Cook v. Hamilton*, 67 Iowa 394; *Newberry v. Gibson*, 125 Iowa 575.

⁹ *Gallick v. Bordeaux*, 31 Mont. 328.

¹⁰ *Peters B. & L. Co. v. Lesh*, 119 Ind. 98, 12 Am. St. 367.

¹¹ *Truitt v. Revill*, 4 Harr. 71.

he has got the property and complains only of the taking and detention until replevied. If, however, the return shows that the property has not been delivered to the plaintiff the declaration is in the *detinet* and goes for damages, including the value of the property.¹² Then the action is like trespass or trover: solely for damages; it is in effect trespass when the plaintiff was deprived of the property by a tortious taking; trover, if the wrong consists in an unlawful detention merely. The measure of damages is the same as in those actions upon a similar state of facts. The same proof is admissible for compensatory and exemplary damages. The defendant is charged, by the rule generally recognized, with the value at the time of the taking or conversion and interest from that time to the trial.¹³

§ 1150. **Recovery for use and increase in value.** There is no principle upon which the defendant can be charged with the use of the property, though valuable, after the date at which he is charged with its value; that would involve the inconsistency of allowing the plaintiff compensation for such use after he will have ceased to be the owner of the property on the satisfaction of the judgment. The same consideration is adverse to allowing him any benefit from any subsequent appreciation in market value or by the defendant's labor.¹⁴ But other principles are invoked to sustain such recoveries. One is that the defendant should not be permitted to make a profit out of his own wrong. This principle is sound; but it is often loosely applied. If the wrong-doer is sued for the value of property which he has taken and converted it is in anticipation that the judgment will be collected or paid. When it is satisfied this principle does not derogate from the defendant's title to the property, nor from the beneficial incidents of his ownership. The owner is to have just compensation for the

¹² *Id.*; *Kehoe v. Rounds*, 69 Ill. 351; *Karr v. Barstow*, 24 Ill. 580; *Frazier v. Fredericks*, 24 N. J. L. 162; *Bruen v. Ogden*, 11 id. 370; *Field v. Post*, 38 id. 346.

¹³ *Id.*; *Fisher v. Whoollery*, 25 Pa. 197; *Schofield v. Ferrers*, 46 Pa. 438; *Heard v. James*, 49 Miss.

236; *Hanselman v. Kegel*, 60 Mich. 540; *Just v. Porter*, 64 Mich. 565; *Romberg v. Hughes*, 18 Neb. 579.

¹⁴ See *Sommer v. Adler*, 36 App. Div. (N. Y.) 107, as to the right to recover enhanced value under the New York code.

injury; this has been held to entitle him to any advance in price from general causes which he would immediately have realized, or which the defendant has or might have obtained. When any departure is properly allowed from the price at the time of the taking or conversion it is justified only on the ground of giving full and adequate compensation. When that is paid the property belongs to the defendant, and by relation from the time he was charged with and convicted of taking and converting it. Whatever use, otherwise, he can make of the property and whatever advantages he can derive from it belong to him without any prejudice from the circumstance that his title had a tortious inception. The plaintiff is entitled to the value at the time of the wrongful appropriation and to interest from that date at least; and therefore is not affected by any depreciation afterwards. If the property perishes or is in any manner injured after the time when the defendant's title by relation attaches, it is his loss, a loss incident to ownership.

Where the judgment in replevin is required, in case the property has not been replevied and delivered to the plaintiff, to be in the alternative for its delivery or for its value if delivery cannot be had there is a strong implication that the value shall be assessed at the time when delivery is adjudged in favor of the prevailing party. The value is the substitute for the delivery, and where the property is still within the defendant's control it has been deemed proper in detinue, from which this feature of the code remedy of claim and delivery is derived, to magnify the estimate of value to insure its actual delivery.¹⁵ So it has been held proper to reduce it under particular circumstances, on the principle of limiting the compensation to the actual injury.¹⁶ It is, however, consonant to legal analogies to fix the value at the time when delivery is required to be made rather than at another time.¹⁷ But that is not the time

¹⁵ *Goodman v. Floyd*, 2 Humph. 59; *Mayberry v. Cliffe*, 7 Cold. 120; *Cochrane v. Winburne*, 13 Tex. 143; *Hoeser v. Kraeka*, 29 id. 450; *Johnson v. Marshall*, 34 Ala. 522.

¹⁶ *Gustin v. Embury-C. L. Co.*, 145 Mich. 101; *Single v. Schneider*, 24 Wis. 299; *Buckley v. Buckley*, 12 Nev. 423.

¹⁷ *Swift v. Barnes*, 16 Pick. 194;

to which the whole injury is referred; on the contrary, it is then merely adjusted and the due recompense ascertained. The wrong is done when the taking or conversion occurs; that wrong is a continuing one while property belonging to the plaintiff is tortiously withheld from him. By the remedy for the recovery of specific property by which he is entitled and obliged to resort to final process for its delivery to him he continues to assert a right to it until he voluntarily receives the value for it. The law aims to compensate the entire injury. It is usually satisfied if the plaintiff succeeds in obtaining the property in as good condition, not depreciated, but worth as much as when taken, and he receives interest on its value, unless he has been put to greater expense and inconvenience from being deprived of its use¹⁸ than the interest will compensate; then, in lieu of interest, he may recover the value of the use; and where this is allowed there ought not to be any compensation for the wear and depreciation naturally consequent upon such use.¹⁹ Under a statute authorizing the recovery of "damages for the detention" the value of the use of personal property which has a distinct usable value may be recovered.²⁰ If the defendant by his wrongful conduct has deteriorated the property or a loss on its value has proximately and with certainty resulted from the wrongful detention, that should be recovered for in addition to the value in order to give the owner full indemnity. He is entitled to any advance in market value, for it is an appreciation of his own property. But in some cases where the alternative judgment is rendered the value is fixed at the inception of the wrong.²¹ This may be done without materially changing the result by keeping in view that the time of trial is the day of final reckoning for surrender of the title if the property itself cannot be had. In making up the account

Johnson v. Groff, 22 Pa. Super. Ct. 85. See Pettingill v. Goulet, 137 Wis. 285, applying the statutory rule of highest market value to trees.

¹⁸ Cunningham v. Stoner, 10 Idaho 549.

¹⁹ Odell v. Hole, 25 Ill. 204.

²⁰ Weleetka Light & Water Co. v. Castleberry, 42 Okla. 745.

²¹ Sherman v. Clark, 24 Minn. 37.

the owner is credited with the value at the time of the defendant's wrongful appropriation; this cannot be diminished by any injury to or depreciation of the property after that date, for which the defendant is the responsible cause, and whether any could occur for which he is not responsible will be considered presently. But if it subsequently appreciates so that it is worth more at the trial the owner must consider himself thereby injured and add to the value noted at the date of the conversion the amount of such appreciation; so if the use of the property is worth more than the interest he may elect to consider himself more injured by loss of the use than the interest will compensate and claim the former. In this way, though the computation is very illogical, the same practical result may be reached.

Where it was sought to recover the difference between the highest price that corn reached during its detention and its market value on the day the levy was released the court said: If on the day the levy was made the plaintiff had a contract with some responsible party to buy this corn at the highest price it should attain during the period of detention, and if he was prevented by the levy from performing his part of this contract, and the market value of corn rose during the detention above the price on the day of the release, there would be some show of reason in the claim. But because the claim rested on the simple facts that the market price of corn was higher during the detention than it was when the levy was released, that the plaintiff might have sold it if there had been no levy upon it, and that the sheriff held it under a levy, it was not sustained. It was competent for the defendant to show that within thirty days after the corn was returned to the plaintiff, while he held it, and before the action was commenced, its market value was as high and its sale as feasible as during the time it was detained.²² In Alabama the jury may, if it sees fit, assess the highest value of the property at any time between the commencement of the suit and the trial.²³

²² Hoyt v. Fuller, 43 C. C. A. 466, 104 Fed. 192.

²³ Holly v. Flournoy, 54 Ala. 99; Johnson v. Marshall, 34 Ala. 521.

Suth. Dam. Vol. IV.—43.

§ 1151. *Intermediate injury and depreciation.* The property may suffer injury or depreciation in the hands of the defendant intermediate the taking or wrongful detention and the bringing of replevin when it is taken and delivered to the plaintiff; and in other cases it may suffer it during the pendency of the action when the defendant retains the property and the plaintiff, on recovery, is obliged to take an alternative judgment. The question whether the plaintiff, if he maintains his suit, must bear this loss is the same in each of these cases. It is a loss relative to the property while it belongs to him by his original title and by the effect of the adjudication. The defendant should be charged with this loss if he is the occasion of it; be responsible for it if it is the natural and proximate consequence of the wrongful taking or detention; or if in like manner it resulted from any subsequent act or negligence on his part during such detention.²⁴ Such a ground of liability existed in some of the cases which are sometimes cited to support a broader responsibility. A stock of merchandise is likely to suffer deterioration by seizure, removal and detention,²⁵ and so of household goods,²⁶ and also by the lapse of time.²⁷ A loss may also result in such case from keeping the stock from market through the proper season for sale.²⁸

²⁴ *Taylor v. Welsh*, 138 Ill. App. 190.

²⁵ *Cooper v. Ratliff* (Ky.), 116 S. W. 748; *Rice v. Cassells*, 48 Colo. 73; *Rowley v. Gibbs*, 14 Johns. 385; *Beveridge v. Welch*, 7 Wis. 465; *Riley v. Littlefield*, 84 Mich. 22; *Anderson v. Sloane*, 72 Wis. 566, 7 Am. St. 885; *Klinkert v. Fulton S. & M. Co.*, 113 Wis. 493; *Chapman v. Kerr*, 80 Mo. 158; *Miller v. Bryden*, 34 Mo. App. 602.

Where a stock of drugs was replevied it was ruled that in estimating the damages during the week plaintiff was deprived of possession the evidence was not confined to the net income of the business at or about the time of the

levy; the elements of damage were the closing of the store and handling the goods in making an inventory. *Schars v. Barnd*, 27 Neb. 94.

²⁶ *Baldrige v. Dawson*, 39 Mo. App. 529.

²⁷ *Young v. Willet*, 8 Bosw. 486; *Russell v. Smith*, 14 Kan. 366; *Merchants' Nat. Bank v. Bales*, 148 Ala. 279; *Fair v. Citizens' State Bank*, 69 Kan. 353, 105 Am. St. 168 (as where an action on a note becomes barred by the statute); *Hendricks v. Ireland*, 162 N. C. 523.

²⁸ *Carson v. Golden*, 36 Kan. 705; *Morisette v. Howard*, 62 Kan. 463; *Mac Donald v. Mac Donald*, 71 N. Y. Misc. 516; *Vauter v. Elders*, 2 Mill, Const. 184.

As the defendant, in the cases supposed, retains the property upon an honest claim of ownership he should preserve, manage and dispose of it as men having such property ordinarily do to make it most beneficial to them. On this principle, if it has a usable value he is charged with it;²⁹ so if it is kept as a commodity for sale he may be presumed to judiciously dispose of it at a seasonable time.³⁰ If the property has been mingled with the property of the defendant in such a way as to make it difficult to ascertain what part of it came to his hands from the plaintiff, the latter may supply any deficiency from the property with which his is intermingled.³¹

There are cases which hold and some *dicta* in the books favoring the doctrine that the wrong-doer must make good all injury to the property and all deterioration which it suffers while he detains it, whether such damage accrues through his fault or not. The owner can hold him responsible for such loss by suing in trespass or trover; for by that form of action the plaintiff gives effect to the wrongful taking or conversion to clothe the wrong-doer with the title from the date of his interference with the property; the wrong-doer is charged with the property at the time he takes or detains it; and the effect of recovery in such actions, followed by satisfaction, is to make him the owner from that time. Hence the subsequent loss, though wholly by accident, falls upon him as the owner. It is optional with the injured party to acquiesce in such taking or detention to make it a disposition of his property; by bringing trespass or trover he does so, even though he takes it back; for when it is returned in such cases it does not affect the cause of action, but only goes in mitigation of damages. But by bringing replevin he expresses his determination not to acquiesce; his purpose then is to recover his property, and

²⁹ Crossley v. Hojer, 11 N. Y. Misc. 57.

³⁰ Gordon v. Jenney, 16 Mass. 465.

In an action to recover notes deposited as collateral the damages may include the amount received on them and any depreciation in their

value arising from the defendant's failure to present them to the assignee of their maker. Sullivan v. Sullivan, 20 S. C. 509.

³¹ Starke v. Paine, 85 Wis. 633; Swafford D. G. Co. v. Jacobs, 66 Mo. App. 362.

there is no interruption of his ownership; he continues his pursuit if it in specie till judgment. Every question affecting his indemnity, therefore, is to be decided on the theory and assumption of his continued and uninterrupted title to it. If it has suffered injury or deterioration he must bear the loss as an incident of ownership unless he can make a case for charging it upon some other person. He must be able to show that such loss naturally and proximately resulted from the defendant's act or he cannot hold him liable for it, unless, indeed, there is some consideration of policy that imposes the loss on the defendant on some other terms.

The general rule in Pennsylvania is to value the property as of the time of the issuance of the writ and to allow as damages for detention any decrease or difference between the value at the date of the conversion and at the time of the writ which is properly attributable to the defendant. And, when the plaintiff by his own act after conversion and before issuance of the writ reduces the value of corporate stock to a nominal sum, nominal damages only may be awarded.³²

In an early Kentucky case³³ the court held in such an action for a slave that, though the defendant acquired the possession rightfully, yet if he continued the detention after suit brought to recover it the possession became wrongful; that he who wrongfully detains the property of another does it at his own peril and will be responsible to the proprietor though it be destroyed by accident or taken from him by violence. And that doctrine seems to have become the settled law at that state³⁴ as well as of Alabama.³⁵ A case in the latter state was commenced in 1861 for the recovery of certain slaves. The action was of the nature of detinue and therefore did not disturb the defendant's possession during its progress. It was tried in 1866, and the plaintiff succeeded in establishing his title. The judgment was for the delivery of the property or

³² *Duroth Mfg. Co. v. Cauffiel*, 243 Pa. 24.

³³ *Carrel v. Early*, 4 Bibb 270.

³⁴ *Caldwell v. Fenwick*, 2 Dana 333; *Gentry v. Burnett*, 6 T. B.

Mon. 115; *Scott v. Hughes*, 9 B. Mon. 104.

³⁵ *White v. Ross*, 5 Stew. & P.

123; *Rose v. Pearson*, 41 Ala. 692; *Fragin v. Pearson*, 42 id. 335.

the payment of the alternate value, assessed at \$20,000, although, pending the suit, general emancipation had taken effect, of which the court had, of course, judicial notice. This change in the *status* of the subject was treated, not as a determination of the plaintiff's title to the several negroes named in the declaration, but as a death or destruction of the property; and because it occurred while the defendant had a wrongful possession he was liable for the value; and the value, not when the delivery was ordered, but at any time between the commencement of the suit and its termination.³⁶ Walker, C. J., said: "When an owner's property has been converted there immediately springs up in his favor a right to have its value, and that right may be enforced in an action of trover, without the peril of defeat by the death or destruction of the property. If in detinue a recovery of the property or its alternate value is prevented by its death or destruction it is obvious that that form of action is inadequate to redress the wrong or enforce the right in its full extent. The plaintiff must yield his desire to obtain the specific property, or he must incur the peril of losing it in the possession of the tort-feasor. The policy of this court has been so to shape its adjudications in reference to the action of detinue as to encourage the delivery of property wrongfully withheld. This policy, which seems to us to be wise, would not be consulted by placing the subject of litigation at the hazard of the owner and relieving the wrong-doer from responsibility. Indeed, the contrary policy, when the property is of a perishable nature, would enable the defendant, by retaining possession and prolonging the litigation, to defeat the plaintiff's right to enjoy his own property." The plaintiff was a mortgagee, and it was plausibly said that if he had obtained the possession he might have sold the property and realized its full value. And the judge further remarked: "It is unjust and unconscientious under such circumstances that the loss, if it had resulted from death, should fall upon the plaintiff."

³⁶ *Rose v. Pearson*, 41 Ala. 690; 517. See *Johnson v. Marshall*, 34 Wilkerson v. McDougal, 48 Ala. Ala. 522.

§ 1152. **Same subject.** In *Snydam v. Jenkins*,³⁷ which is noted for furnishing the opportunity improved by a learned jurist to write one of the best judicial opinions on the law of compensation to be found in the English language, Duer, J., expressed himself strongly in favor of the same doctrine. He said: "We cannot think that a wrong-doer is ever to be treated as a mere bailee and that the property in his possession is to any extent at the risk of the owner. We have seen that the defendant in trover or trespass is in all cases responsible for the value of the property when taken or converted, and certainly it has never been supposed that he can discharge himself from this responsibility, in whole or in part, by showing that the property had been destroyed or injured by an inevitable accident after he had obtained its possession. A plaintiff who, without right or title, has seized the property of another by a writ of replevin is as much a wrong-doer as a defendant in trover. No reason can be given why his liability should be less extensive; and in fact, when the replevin suit is terminated, although he cannot be treated as a trespasser, he may be sued in trover at the election of the defendant."³⁸ The decision in *Carpenter v. Stevens*³⁹ is plainly inconsistent with the prior decision of the same court in *Rowley v. Gibbs*,⁴⁰ in which the defendants in a replevin, in addition to a return of the goods, were held to be entitled to damages for deterioration in their value from the time of the replevy, although it was not pretended that the decrease in value was attributable in any degree to the act or default of the plaintiff, and it is irreconcilable with numerous cases in which it has been held, expressly or by implication, that, in a suit upon a replevin bond, the value of the property as fixed by the penalty of the bond is, at the election of the plaintiff, the measure of damages."⁴¹ The question

³⁷ 3 Sandf. 614.

³⁸ *Yates v. Fassett*, 5 Denio 21. In *Ritchie v. Talcott*, 10 N. Y. Misc. 412, it is held that a subsequent action cannot be brought.

³⁹ 12 Wend. 589.

⁴⁰ 14 Johns. 385.

⁴¹ Citing *Middleton v. Bryan*, 3

M. & S. 158; *Mattoon v. Pearce*, 12 Mass. 406; *Huggeford v. Ford*, 11 Pick. 223; *Wood v. Braynard*, 9 id. 322; *Barnes v. Bartlett*, 15 id. 71; *Brizsee v. Maybee*, 21 Wend. 144; *McCabe v. Morehead*, 1 W. & S. 513. To these may be added, as supporting the same view, *Young v. Wil-*

is the same, and is here treated as identical, where the plaintiff has obtained the property by his writ of replevin and the defendant succeeds in his defense and is entitled to a return or the value of his election. The taking of an appeal by the defendant in replevin does not constitute a new and independent detention of the plaintiff's property where it has been delivered to the defendant by the officer in accordance with law; hence depreciation in value after the rendition of a judgment and pending an appeal therefrom cannot be recovered for.⁴²

In Massachusetts the replevin bond was formerly by statute expressly conditioned for return of the goods in like good order and condition as when taken; and when that special requirement was dropped by revision no change was deemed to have been contemplated.⁴³ Therefore, the defendant was entitled at least to have the property or what it was worth when taken; but being entitled to the property itself, its value when demanded on the writ of restitution could be recovered.⁴⁴ This is the rule in Iowa⁴⁵ and in Illinois.⁴⁶ In Wisconsin it is said that the true rule, where the plaintiff recovers either possession or value fixed as of a date later than the tortious taking, is that he shall recover in addition, as damages, any depreciation in the value of the property which has taken place pending the detention from any cause.⁴⁷ "That rule is eminently just, in that it relieves the innocent owner from the risks of depreciation or destruction, against which he is prevented from guarding by the wrongful detention by another, and requires such risks to be borne by him who illegally withholds the property. The peril should rest upon the guilty, rather than the

lett, 8 Bosw. 486; Mayberry v. Cliffe, 7 Cold. 117; Pabst B. Co. v. Rapid S. F. Co., 56 N. Y. Misc. 445. See Penny v. Ludwick, 152 N. C. 375.

⁴² Commerce Exch. Nat. Bank v. Blye, 123 N. Y. 132; Bracken v. Atlantic T. Co., 167 N. Y. 510.

⁴³ See Parker v. Simonds, 8 Metc. (Mass.) 205.

⁴⁴ Swift v. Barnes, 16 Pick. 194.

⁴⁵ Hinkson v. Morrison, 47 Iowa

167; Lillie v. McMillan, 52 id. 463. See Ewald v. Boyd, 24 S. D. 16, 24 L.R.A.(N.S.) 739.

⁴⁶ Suppiger v. Gruaz, 137 Ill. 216; Clow v. Yount, 93 Ill. App. 112; McDonough v. Reilly, 131 id. 553. See Taylor v. Welsh, 138 id. 190.

⁴⁷ Citing Ingram v. Rankin, 47 Wis. 415, 32 Am. Rep. 762; Wadleigh v. Buckingham, 80 Wis. 230; Carrel v. Early, 4 Bibb 270; Cobbey on Replevin, § 867.

innocent.”⁴⁸ In a case, ruled in the exchequer chamber in 1847, in detinue for railway scrip which had been delivered to the plaintiff after action brought, under a judicial order it was determined that, in estimating the damages, it was proper for the jury to consider (as they were directed by the judge to do) the difference in value of the scrip at the time of the demand and at the time of its delivery pursuant to such order. It was also determined that, inasmuch as the scrip had been redelivered, the verdict and judgment were properly confined to an assessment of damages for the detention—by analogy to the case of the redelivery of charters being rendered impossible by reason of their having been burnt, in which event the value of the land was recovered in damages.⁴⁹

In Maine the bond requires the property to be returned in like good order and condition as when taken.⁵⁰ But there the plaintiff in replevin was held not liable for a horse which died without his fault while he held it pending the suit, on judgment being recovered by the defendant for a return. This was held in an action on the replevin bond. Such a loss of property had been previously held available to exonerate a receiptor⁵¹ and also an officer having the property in custody on *mesne* process;⁵² and the same principle was deemed applicable to a plaintiff in replevin because his possession was a lawful one. The court say, by Kent, J.: “The distinction in fact is that in the case at bar the replevin suit was instituted on the day the animal was seized on execution by the officer for the purpose of selling it to satisfy the same. It is urged that this distinction is vital on the ground that if the replevin suit had not been interposed the animal would have been sold in four days and the proceeds thus secured to the creditors, whereas, in the cases cited, the animal was attached on *mesne* process and held only as security to await final judgment, the animal dying before such judgment.” After adverting to the

⁴⁸ Findlay v. Knickerbocker I. Co., 104 Wis. 375.

⁴⁹ Williams v. Archer, 5 C. B. 318; Archer v. Williams, 2 C. & K. 26.

⁵⁰ Berry v. Hoeffner, 56 Me. 170.

⁵¹ Shaw v. Laughton, 20 Me. 266.

⁵² Melvin v. Winslow, 10 Me. 397.

grounds on which those cases were decided, and also *Carpenter v. Stevens*,⁵³ he continued: "The result from these authorities seems to be that the writ of replevin is one authorized by law to enable a party who in good faith asserts a claim of title or right of possession in a chattel to have his claim investigated and determined judicially." The property is treated as, in a certain sense, in the custody of the law. "The party who replevies, having given the bond required by the statute, is not a wrong-doer if he acts fairly, although the result may show that he was mistaken in his belief of his right of property."⁵⁴ Why should not the same reasoning apply in favor of a defendant who got possession and retains it in good faith and in a manner which would be justified if "his belief of his right of property" had been well founded, though the result of the suit may show that he was mistaken? No rule can be adopted in such a case for the purpose of deterring one who believes himself to be the owner from exercising an owner's dominion and right of possession. He is technically a wrong-doer if he fails to maintain his title; and he is such if he gets possession by a writ of replevin without having a right and title which will sustain it. Where there is an honest dispute about the ownership of specific property and the parties determine to contest to obtain and retain it in specie rather than for its value one or the other must hold while the controversy is being settled; and if in such a case it perishes without the custodian's fault it seems more just to regard the loss as one which must be borne by him who is really the owner. The subject of the controversy ceases to exist; and as it has gone out of existence without either's fault why, from that point, should not the controversy cease and be confined to the adjustment of compensation to the owner for any damage which occurred before that time?

§ 1153. **Same subject.** It has been held in Missouri that if slaves are sued for and die in the hands of the defendant during the pendency of the suit the plaintiff has no just claim for more than damages for the detention up to the time of the

⁵³ 12 Wend. 539.

⁵⁴ *Walker v. Osgood*, 53 Me. 422.

death; that if the depreciation or death be produced by the defendant's ill-treatment or neglect or if the slaves be sold to another the rule might be otherwise.⁵⁵ Napton, J., said: "In relation to the death of three of the slaves sued for, which occurred after the institution of the suit and was suggested by a supplemental answer, the question presented is not free from difficulty and doubt, and, it must be confessed, has been very differently viewed by different courts. Our opinion, however, will be based principally upon our statute, which regulates the action brought in this case, and upon what we believe to be principles of sound public policy and natural equity. * * * Before the adoption of our present code of practice, which abolishes the forms and names of actions as known to the common law, there was a distinction between detinue and trover, although in many cases it was at the option of the plaintiff to bring whichever he preferred. In trover the plaintiff admitted the title to the property sued for, to be in the defendant, and only asked damages for the conversion which he asserted was wrongful. In detinue the plaintiff claimed to be the owner still and demanded the specific property detained. As an act of God does an injury to no one, though it may occasion a loss, the loss of course falls upon the owner, and, therefore, where detinue was brought and an accidental loss occurred by the death of the property sued for it must fall upon the plaintiff if determined to be the owner. But it was otherwise in trover where the plaintiff admitted the change of title and only claimed damages for its conversion; there the loss would be the defendant's upon the same principle that it would be the plaintiff's in detinue."⁵⁶ A plaintiff in replevin, retain-

⁵⁵ Pope v. Jenkins, 30 Mo. 528; Jennings v. Sparkman, 48 Mo. App. 246.

In Bradley v. Campbell, 132 Mo. App. 78, a majority of the judges held that the loss of a chattel in the defendant's possession under a delivery bond by fire before the trial fell upon him.

⁵⁶ Bethca v. McLennon, 1 Fred.

530; Austin v. Jones, Gilmer 341, per Coalter, J.; Buckley v. Buckley, 12 Nev. 423; Frey v. Drahos, 7 Neb. 194; Parker v. Simonds, 8 Mete. (Mass.) 205; Bobo v. Patton, 6 Heisk. 172, 19 Am. Rep. 593. See Mosely v. Baker, 2 Sneed 362; Boylston Ins. Co. v. Davis, 70 N. C. 485.

ing the articles replevied until judgment in the suit, cannot claim damages for any depreciation in their value during that period because he may sell them immediately in such manner as will ascertain their value, for which alone he is answerable on his bond.⁵⁷ There cannot be a recovery of the usable value of property and also for the ordinary wear and tear; the former includes the latter.⁵⁸

§ 1154. Increase in value by defendant. If a wrong-doer has taken or converted the property without wilful fault and by labor or money has improved it and thus added to its value, if its identity has not been destroyed, the right of the owner to retake it, subject to some fixed, and some vague and unsettled, limitations, is universally admitted. Extreme cases can be mentioned where the exercise of the right would be very unjust, where a retaking would give the owner more than he ought to have and impose an undeserved loss on the wrong-doer. This injustice, when it occurs, results from necessity; for the owner cannot be divested of his property without his consent or fault, and no wrong-doer can divest him by any unauthorized act done to it which does not destroy its legal identity. While the owner's right subsists he cannot take his own without taking also the labor which has been bestowed upon it; therefore, the wrong-doer, however innocent of intentional wrong, is unfortunate in having inseparably annexed his work to another's property so that the latter must take it when he asserts his right to enjoy his own. The loss to the wrong-doer does not result from any principle or rule of damages, but from the exercise of an undoubted right of property. We have seen that where trover is brought for a conversion, which has been succeeded by such improvement of the property, the plaintiff is ordinarily confined in his recovery to the value of the property in the place or condition in which the defendant converted it.⁵⁹ The damages are measured against such a wrong-doer on the principle of compensation; they do not include the value added by his labor when he has improved the property under a

⁵⁷ *Gordon v. Jenney*, 16 Mass. 465.

⁵⁹ See §§ 1126-1128.

⁵⁸ *White v. Sheffield & T. St. R.*

Co., 90 Ala. 253.

mistaken belief that he owned it. The same rule has been applied in replevin where the defendant has retained the property—logs made from timber by him—and the value assessed as a part of the damages.⁶⁰ Agnew, J., said: “It is in the power of the defendant in replevin to relinquish that proportion of its value which his labor or money has added to it by suffering the sheriff to return it to the owner. But this result depends on himself. If he claim the additional value it is always his right to retain the property by giving a property bond, and the effect of a verdict for damages in favor of the plaintiff is to transfer the title to the defendant. If, therefore, he denies that his trespass was wilful and wanton, and claims a right to the additional value given to the chattel by his labor and money in converting and transporting it to the place where it is replevied, he has it in his power to bring the damages of the plaintiff to their true standard. In a case of inadvertent trespass or one done under a *bona fide*, but mistaken, belief of right, this would generally be the value of the logs at the boom (the place of replevy), less the cost of cutting, handling and driving to the boom. Such a standard of damages, growing out of the nature of the act and of the form of action, is reasonable and does justice to both parties. It saves the otherwise innocent defendant his labor and money and gives the owner the enhancement of the value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities or other adventitious causes.” The same ruling has been made in Wisconsin and Nebraska though the judgment is for delivery of the property if delivery can be had; otherwise for its value.⁶¹ A licensee who cuts logs under a lumber permit from the defendant may, in an action of assumpsit, recover their value when and where replevied by the true owner of the land, less the stumpage he was to pay together with the costs

⁶⁰ Herdie v. Young, 55 Pa. 176, 93 Am. Dec. 739; Peters' B. & L. Co. v. Lesh, 119 Ind. 98, 12 Am. St. 367 (innocent purchaser); Schnitzer v. Russell, 81 N. J. L. 146.

⁶¹ Single v. Schneider, 24 Wis.

299, 30 Wis. 570; Carpenter v. Lingenfelter, 42 Neb. 728. See Brewster v. Silliman, 38 N. Y. 423. The Wisconsin case has been expressly followed in Gustin v. Embury-C. L. Co., 145 Mich. 101.

of defending the replevin suit, and interest on such sum from the date of the taking under the writ.⁶²

In Mississippi if timber is unlawfully cut and converted into staves which are mingled with others owned by the defendant so that the plaintiff is unable to identify his property he may maintain replevin for part of the common lot equal to that which was made from his timber. If the defendant retains the property by giving a bond and it appears that he wilfully cut the timber or did not take reasonable precautions to ascertain its ownership the value of the property in the form it was in at the time and place of seizure measures the recovery.⁶³ If the cutting was done in good faith under the belief that the title was in the trespasser he may show the cost of getting out and floating the timber to the place where it was seized.⁶⁴ In Michigan, where the writ of replevin is peremptory for delivery of the property to the plaintiff on his executing the requisite bond, it has been held that where the property had been taken by the wrong-doer in good faith and immensely improved by converting it into a new species of property, as timber into hoops, replevin would not lie; that the defendant's labor had added such value to the original material that the latter was a mere incident, and to prevent the injustice of allowing the owner in such a case to retake it by judicial process, and thus obtain so much more than compensation and subject the defendant to a loss so disproportioned to the injury he had done, it should be deemed that the identity of the property was lost.⁶⁵ In Arkansas a plaintiff in replevin for standing timber cut by an innocent trespasser and converted into cross-ties is entitled to judgment for the delivery of the timber in the form of ties, though its value has been increased six-fold; but if delivery cannot be had he can recover the value of the ties, less the labor expended on them, if such expense does not exceed the increase in value.⁶⁶ In Kentucky though the action is against a *bona fide*

⁶² Pierce v. Banton, 98 Me. 553.

⁶³ Peterson v. Polk, 67 Miss. 163;
Nitz v. Bolton, 71 Mich. 388.

⁶⁴ Acrel v. Bufford, 80 Miss. 565.

⁶⁵ Wetherbee v. Green, 22 Mich.

311, 7 Am. Rep. 653. Compare Isle
Royale M. Co. v. Hertin, 37 Mich.
332.

⁶⁶ Eaton v. Langley, 65 Ark. 448,
42 L.R.A. 474, citing, to the last

purchaser of the property the change of its form does not prevent the recovery of it.⁶⁷ Under a statute providing for such a judgment as shall be just between the parties in view of the nature of the ownership of the property in controversy, the purchaser of logs which, to his knowledge, were cut from lands concerning which there existed a controversy as to the title, may not require repayment from the owner of the amount it cost to cut them as a condition of his recovery.⁶⁸ The measure of liability in the respect under consideration is governed by the motive of the wrong-doer. If the property was wilfully and wrongfully taken or detained and money or labor expended in increasing its value he is not entitled to any deduction therefor in fixing its value for the purpose of the alternative judgment; but if the act was done in good faith and the increase in the value of the property is great the recovery will include only its

proposition, *Herdic v. Young*, 55 Pa. 176, 93 Am. Dec. 739; *Single v. Schneider*, 24 Wis. 299, 30 Wis. 570; *Isle Royale M. Co. v. Hertin*, *supra*; *Peters' B. & L. Co. v. Lesh*, 119 Ind. 98, 12 Am. St. 367; *Heard v. James*, 49 Miss. 236. It is observed in the opinion that the extent of the limitation of an innocent trespasser's liability is a question upon which the authorities are not agreed. But we think that, inasmuch as this is an exception to the general rule, made for the purpose of protecting the unintentional trespasser, it should be allowed to prevail only to the extent it is necessary to give protection, and that the owner, in actions for the possession of personal property in the new form into which it has been converted inadvertently, under a *bona fide* but mistaken belief of right, in case a delivery cannot be had, is entitled to recover the value of the property in its new form, less the labor and material expended in transforming

it, provided the expenditures do not exceed the increase in value which was added to the transformation, in which event he should recover the value of the property in its new form, less the increase. *Weymouth v. Chicago & N. R. Co.*, 17 Wis. 550. Some courts hold that the owner, in such cases, should recover the value of his property in its new form, less the expense incurred in converting it into such form and increasing its value. *Goller v. Fett*, 30 Cal. 482; *Maye v. Tappan*, 23 Cal. 306; *Herdic v. Young*, 55 Pa. 176, 93 Am. Dec. 739. Be we do not think this is a correct rule in all cases, for the expense may exceed the increase in value, and in that event the rule would require the owner to pay for something that he never received.

⁶⁷ *Strubbee v. Trustees Cincinnati R.*, 78 Ky. 481, 39 Am. Rep. 251.

⁶⁸ *Cunningham v. Metropolitan L. Co.*, 110 Fed. 332.

original value.⁶⁹ In England the plaintiff will not be required to pay the defendant the expense connected with his act, though it may properly, but not necessarily, be regarded in estimating the alternative damages.⁷⁰

SECTION 2.

DEFENDANT'S CASE.

§ 1155. **Successful defendant's rights.** Damages in favor of a defendant from whom property has been taken by a writ of replevin were not allowed at common law, but merely a judgment for its return.⁷¹ But this deficiency has been remedied to some extent in England and fully in this country, generally by statute. Defendants are not only allowed a return of the property; but are permitted to recover in the replevin suit its value under some conditions in lieu of the thing itself, and damages for the detention.⁷² The latter may be recovered whether the property is returned or not;⁷³ but are not recoverable if the defendant elects to regard the property as converted at the time it was taken and to take a money judgment for it.⁷⁴

⁶⁹ Nashville L. Co. v. Barefield, 93 Ark. 353.

⁷⁰ Glenwood L. Co. v. Phillips, [1904] App. Cas. 405.

⁷¹ White v. Lloyd, 3 Blackf. 390; Parnell v. Hampton, 10 Ired. 463; Hopewell v. Price, 2 Har. & G. 275.

⁷² Keen v. Fletcher, 31 Okla. 791. See Whitwell v. Wells, 24 Pick. 25; Brown v. Stanford, 22 Ark. 76; Pierce v. Van Dyke, 6 Hill 613; Ditmars v. Sackett, 81 Hun 317; Lorenzo v. Hunter, 185 Ill. App. 574; Roth v. Yara, 19 N. M. 8.

The right to a return of the property or its value is absolute. Harvey v. Ivory, 35 Wash. 397.

As to the right to recover under § 667, California code of civil procedure, and § 3336 of the civil code, where the property was not deliv-

ered to the plaintiff, see Black v. Hilliker, 130 Cal. 190.

In School Dist. v. Shoemaker, 5 Neb. 36, it was held under the code in an action of replevin if the jury find in favor of the defendant they must assess for him such damages as they shall think just and proper, whether he pleads a general denial, new matter as a defense or a demand for damages.

⁷³ Schrandt v. Young, 62 Neb. 254, modifying Romberg v. Hughes, 18 Neb. 579; Buckley v. Buckley, 12 Nev. 423; Haskins v. Everett, 4 Sneed 531; Mayberry v. Cliffe, 7 Cold. 117; Nichols & S. Co. v. Paulson, 10 N. D. 440; Underwood T. Co. v. Veal, 12 Ga. App. 11.

⁷⁴ Newberry v. Gibson, 125 Iowa

In that case his right is measured by the value of the property when it was taken and interest to judgment; ⁷⁵ he cannot recover expenses incurred in preparing to defend the case after the taking. ⁷⁶ In Texas the value at the time of the trial governs. ⁷⁷ The defendant will be entitled to a return on any termination of the plaintiff's case for irregularity before pleading; and afterwards, where he succeeds upon such an issue as gives him a right to a return. ⁷⁸ A separate action cannot be maintained to recover damages if the defendant has refused to have them assessed in the action in which judgment for return was rendered. ⁷⁹ Under a statute of Alabama in an action of detinue brought by a mortgagee against the mortgagor the latter may plead any defense available in an action on the debt except the statute of limitations. This authorizes evidence of the consideration of the debt and a special plea of damages arising out of a breach of the warranty of the goods sold up to the limit of the mortgage debt; but does not justify the mortgagor in setting up a debt not due though it is part of the consideration for the mortgage. ⁸⁰

§ 1156. A plaintiff obtaining possession and failing in his suit a wrong-doer. ⁸¹ Dispossessing a defendant of personal

575; *Blaul v. Wandel*, 137 Iowa 301; *Powers v. Benson*, 120 Iowa 428.

⁷⁵ *Hitch v. Riggins*, 3 Boyce (Del.) 84.

⁷⁶ *Becker v. Staub*, 114 Iowa 319.

⁷⁷ *Tiefel v. Maxwell*, — Tex. Civ. App. —, 154 S. W. 319.

⁷⁸ *Gould v. Barnard*, 3 Mass. 199; *Hill v. Bloomer*, 1 Pin. 463; *Hopkins v. Burney*, 2 Fla. 42.

In *Fleet v. Lockwood*, 17 Conn. 233, it was held that an avowry, or suggestion in the nature of an avowry, by the defendant in replevin is not necessary to authorize the court to render a judgment of return where the writ is abated or set aside on account of an irregularity or defect in the replevin process. See *Potter v. North*, 1 Saund. 347, and note 1; *Crosse v. Bilson*, 6 Mod.

102; *Anonymous*, 1 Vent. 127; *Foot's Case*, 1 Salk. 93; *Anonymous*, id. 94; 18 Vin. Abr. 586, 591-2; *Parker v. Mellor*, Carth. 398, 1 Ld. Raym. 217; *Butcher v. Porter*, Carth. 243; *Shower* 400; *Salkold v. Skelton*, Cro. Jac. 519; *Wildman v. North*, 2 Lev. 92; s. e., *nomine*, *Wildman v. Norton*, 1 Vent. 249; *Allen v. Darby*, 1 Show. 99. See, also, *Hartgraves v. Duval*, 6 Ark. 506.

⁷⁹ *Drewyour v. Merrell*, 112 Mich. 681, citing *Hohenthal v. Watson*, 28 Mo. 360; *White v. Van Houten*, 51 Mo. 577; *Thisler v. Miller*, 53 Kan. 520, 42 Am. St. 302; *Cobbey on Replevin*, § 1170.

⁸⁰ *McDaniel v. Sullivan*, 144 Ala. 583.

⁸¹ See § 1157.

property by means of a writ of replevin is in legal contemplation a wrong where the plaintiff does not prosecute his writ and suit to effect, and subjects the plaintiff to damages for the taking and detention on the same principles that govern the recovery of damages in favor of a prevailing plaintiff against a defendant. But the redress which a defendant can obtain in the replevin suit beyond a return of the property on a discontinuance, nonsuit or trial depends upon local statute. He is, however, generally allowed to recover damages where he is entitled to a return.⁸² It is ruled otherwise, however, in Vermont, Massachusetts and Michigan under conditions stated in the note below.⁸³

⁸² *Mikesill v. Chaney*, 6 Ind. 52; *Ramsey v. Thomas*, 45 Mo. 111; *Berghoff v. Heckwolf*, 26 Mo. 511; *Collins v. Hough*, 26 Mo. 149; *Smith v. Winston*, 10 Mo. 299; *Dickinson v. Noland*, 7 Ark. 25; *Haviland v. Parker*, 11 Mich. 103; *Campbell v. Head*, 13 Ill. 122; *Broadwell v. Paradise*, 81 Ill. 474; *Hooker v. Hammill*, 7 Neb. 231; *Gould v. Seannell*, 13 Cal. 430; *Bonner v. Coleman*, 3 B. Mon. 464; *Smith v. Snyder*, 15 Wend. 324.

Where the writ was void because the property was not described in it as required by statute an assessment of damages was refused; for the right to an assessment given by statute was limited to cases where the property is described in the writ. *Parsell v. Circuit Judge*, 39 Mich. 542.

On waiving a return the defendant is entitled to nominal damages only, where shortly after the property was nominally turned over to the plaintiff by the sheriff, without in fact being removed, it was delivered to third persons acting in collusion with the defendant, upon a second writ. *Joseph v. Brandy*, 112 Mich. 579.

⁸³ In *Collamer v. Page*, 35 Vt. Suth. Dam. Vol. IV.—44.

387, a replevin suit for a flock of sheep was dismissed because brought in the wrong county. The error in the proceedings was treated as an irregularity, not a want of jurisdiction of the subject-matter. It was held to be the duty of the court to render judgment for return of the property, and without any plea or avowry by the defendant, and that the plaintiff had no right to contest such a judgment on the ground that he owned the property. But a judgment of return, in such a case, was held not conclusive of the right in another action; and the court also held that, after a dismissal of the plaintiff's action on some ground not relating to the merits of the case, the defendant is not entitled to have his right to damages for the taking and detention or improper use of the replevied property tried or adjudicated. The damage sought to be recovered was wool shorn from the sheep after the replevy. See *Hoag v. Breman*, 3 Mich. 160; *Haviland v. Parker*, 11 id. 103.

In *Ware River R. v. Vibbard*, 114 Mass. 458, the court refused an order for return upon this state of facts. Motion was made after non-

§ 1157. **Measure of damages.** When the defendant is entitled to a return and damages for the detention the general measure of the latter is interest on the value of the property to the date of the judgment.⁸⁴ He is entitled to damages for the interruption of his possession, the loss of the use of the goods from the time they were replevied till their restoration and for any deterioration resulting from the taking or detention,

suit in replevin for the return of the property, which was a large quantity of imported railroad iron, and for damages for its detention. It appeared by the officer's return that he had replevied the iron and delivered it to the plaintiff, and, by an indorsement upon the writ, that the plaintiff had received it; but it also appeared that from the time of its importation by the defendant it had been in bond under the laws of the United States; that the plaintiff had never obtained actual possession, the warehouse receipt and the custom-house delivery order, the possession of which the parties regarded as a necessary means of obtaining possession, and without which the warehouseman refused to deliver, being in the possession of the defendant, who refused to transfer them to the plaintiff; held, that the defendant, having prevented the plaintiff's obtaining actual possession of the property, was not entitled to damages for its detention, and that, as there had never been an actual change of possession, an order for return was unnecessary.

Under the Michigan statutes a defendant who waives a judgment for the return of the property or for its value is not entitled to damages. *Bateman v. Blake*, 81 Mich. 227.

⁸⁴ *Three States L. Co. v. Blanks*, 66 C. C. A. 353, 133 Fed. 479, 69

L.R.A. 283; *Cox v. Burdett*, 23 Pa. Super. Ct. 346; *Schrandt v. Young*, 62 Neb. 254; *Suydam v. Jenkins*, 3 Sandf. 614; *Smith v. Dillingham*, 33 Me. 384; *Barnes v. Bartlett*, 15 Pick. 71; *McCabe v. Morehead*, 1 W. & S. 513; *Wood v. Braynard*, 9 Pick. 322; *Miller v. Whitson*, 40 Mo. 97; *Hooker v. Hammill*, 7 Neb. 231; *Moore v. Kopner*, id. 291; *Hurd v. Gallaher*, 14 Iowa 394; *Washington I. Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Dornan v. Benham F. Co.*, 102 Tenn. 303.

In *Atherton v. Fowler*, 46 Cal. 323, the action was brought for hay in May, 1863, and the plaintiff obtained possession at the commencement of the suit, finally tried in April, 1871. The defendant obtained a verdict and judgment was rendered in October, 1872. The value of the hay was taken in pursuance of the opinion in *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462, about a year subsequent to the taking by the replevin, with a view to giving the owner the price he would have realized if he had kept it and interest on that value from the commencement of the suit; held, it was erroneous to add interest from a date prior to that when the value was taken. Interest was computed on the verdict to the date of the judgment, and this was held erroneous. But see *McCarty v. Quimby*, 12 Kan. 494; *Smith v. Robey*, 6 Heisk. 546.

or plaintiff's misuse or want of care.⁸⁵ The replevin is to the defendant a wrong; and he is entitled to damages on the same principles as a plaintiff.⁸⁶ If the property is valuable for use the value of the use may be recovered instead of interest.⁸⁷ No deduction is to be made from the value of the use because the property increased in value while detained.⁸⁸ The right to recover for the value of the use is not vested in an officer who prevails in a replevin suit as against a person who has the right to the use because he has no title to the property and no right to use it or recover for being deprived of its use. The fact that he may be made to respond to somebody for its use if his

⁸⁵ *Blaul v. Wandel*, 137 Iowa 301; *Morris v. Allen*, 17 Cal. App. 684; *Schrandt v. Young*, *supra*; *Chapman v. Kerr*, 80 Mo. 158; *Mix v. Kepner*, 81 id. 93; *Washington I. Co. v. Webster*, *supra*; *Hinchey v. Koch*, 42 Mo. App. 230; *Whitwell v. Wells*, 24 Pick. 25; *Beveridge v. Welch*, 7 Wis. 465.

In Massachusetts depreciation in the value of property is not an element of damages in the defendant's favor except in a suit on the bond. *Citizens' Nat. Bank v. Oldham*, 136 Mass. 515.

The right to recover for depreciation is not dependent upon any act or default of the plaintiff. *Cox v. Burdett*, *supra*.

⁸⁶ *Suydam v. Jenkins*, 3 Sandf. 614; *Berghoff v. Heckwolf*, 26 Mo. 512; *Fallon v. Manning*, 35 Mo. 274; *McArthur v. Lane*, 15 Me. 245; *Pierce v. Van Dyke*, 6 Hill 613; *Dawson v. Wetherbee*, 2 Allen 461; *Jansen v. Effey*, 10 Iowa 227; *Wilkins v. Treynor*, 14 Iowa 391; *Anchor M. Co. v. Walsh*, 20 Mo. App. 107. See § 1152.

Unless it appears that a machine was not carefully housed during the time it was detained and was not used, there should be deducted

from its fair rental value the damage which would have resulted from the wear and tear of use. *Peerless M. Co. v. Gates*, 61 Minn. 124. See note to § 1144.

⁸⁷ *Underwood T. Co. v. Veal*, 12 Ga. App. 11 (though the property was in *custodia legis*; *McCarty v. Kepreta*, 24 N. D. 395; *Arnold v. Wurlitzer*, 12 Ohio C. C. (N. S.) 309; *Hunt v. Thompson*, 19 Wyo. 523; *Thomas v. First Nat. Bank*, 32 Okla. 115; *Adams v. Wright*, 74 Conn. 551; *Boston L. Co. v. Myers*, 143 Mass. 446; *Allen v. Fox*, 51 N. Y. 562; *Schrandt v. Young*, 62 Neb. 254; *Williams v. Wood*, 61 Minn. 194; *Ditmars v. Sackett*, 81 Hun 317; *First State Bank of Mansville v. Howell*, 41 Okla. 216. See *Roberts v. Wilkins*, 40 Okla. 138, § 1144.

In determining the value of the use of a threshing machine evidence of its fitness and capacity for earning money is proper, as is evidence that the owner had made contracts for its use, and that the value of the machine to him consisted in its use in performing such contracts. *Williams v. Wood*, *supra*.

⁸⁸ *McGrath v. Wilder*, 77 Vt. 431.

levy fails to protect him is immaterial.⁸⁹ But if property is taken from an officer by a stranger and his action is dismissed and a return awarded the damages assessed in the defendant's favor, it has been ruled, should include the value of the use. In such a case the officer holds the entire proceeds of the property, including such damages, for the benefit of those who have a right to it.⁹⁰ An officer who holds property under process against a mortgagor is entitled, on succeeding against the mortgagee, to recover the amount called for in his writ if the value of it equals or exceeds that sum.⁹¹ In some states judgment for return is not rendered, but for the value, and it is assessed at the time of the replevy together with interest.⁹² In others the value is assessed for an alternative judgment to be paid or collected if return cannot be had, or because it can be and is waived. In the former case it is assessed at the date of the trial;⁹³ in the other when taken, and then interest is added.⁹⁴ Where the

⁸⁹ *Tandler v. Saunders*, 56 Mich. 142.

⁹⁰ *Broadwell v. Paradise*, 81 Ill. 474; *Burt v. Burt*, 41 Mich. 82.

⁹¹ *Kersenbroek v. Martin*, 12 Neb. 374.

⁹² *Blaul v. Wandel*, 137 Iowa 301; *Messer v. Bailey*, 31 N. H. 9; *Kendall v. Fitts*, 22 N. H. 1; *Bell v. Bartlett*, 7 N. H. 178.

If there is no evidence of the value of the property the jury may find it to be as alleged in the complaint. *North Star H. F. Co. v. Rinkey*, 92 Minn. 80.

⁹³ *Three States L. Co. v. Blanks*, 69 L.R.A. 283, 66 C. C. A. 353, 133 Fed. 479; *La Vie v. Crosby*, 43 Ore. 612; *Chapman v. Kerr*, 80 Mo. 158; *Mix v. Kepner*, 81 id. 93 (overruling earlier cases); *Walls v. Johnson*, 16 Ind. 374; *Kendall B. & S. Co. v. Bain*, 46 Mo. App. 581.

In *Treman v. Morris*, 9 Ill. App. 237, it was held that the defendant was entitled to the value of the property when taken and interest

from that time; and if the property increased in value the increase at the date of the order for return should also be added.

⁹⁴ *Just v. Porter*, 64 Mich. 565; *Nitz v. Bolton*, 71 Mich. 388; *Hanselman v. Kegel*, 60 Mich. 550; *Berthold v. Fox*, 13 Minn. 501, 97 Am. Dec. 243; *Brizsee v. Maybee*, 21 Wend. 144; *McCabe v. Morehead*, 1 W. & S. 513; *Swift v. Barnes*, 16 Pick. 194; *Ormsbee v. Davis*, 18 Conn. 555; *Walker v. Osgood*, 53 Me. 422; *Smith v. Dillingham*, 33 Me. 384; *West v. Caldwell*, 23 N. J. L. 736; *Huggeford v. Ford*, 11 Pick. 223; *Hopkins v. Ladd*, 35 Ill. 178; *Barnes v. Bartlett*, 15 Pick. 71; *Hurd v. Gallaher*, 14 Iowa 394; *Middleton v. Bryan*, 3 M. & S. 155; *Story v. O'Dea*, 23 Ind. 326; *Kreibohm v. Yancey*, 154 Mo. 67. *Contra*, *La Vie v. Crosby*, *supra*.

In *Darling v. Tegler*, 30 Mich. 54, it was held that where judgment is given in favor of a defendant for the value of his special interest that in-

alternative judgment is given, the value, being collectible only on the contingency of the specific property not being delivered or returned, must be separately assessed.⁹⁵ The party injured is entitled to full indemnity for the injury he suffers in consequence of being deprived of his goods, and the time when their value will be estimated and the manner of the estimate may be varied to meet any peculiarities of the case with a view to adjusting the compensation to the actual loss.⁹⁶ Such damages are frequently recovered most beneficially in an action on the bond, as where there is a judgment for return simply and return is not effected.⁹⁷ But this is not always the case since the scope of recovery depends on the terms and comprehensiveness of the obligation and the statute governing the remedies.⁹⁸ The value of the property will be based on such use of the property as the owner might lawfully make of it; if it could be used only by virtue of a license from the patentee the recovery will be confined to its value as material, regardless of its value in connection with the right to use it.⁹⁹

§ 1158. Special and consequential damages. In the action of replevin under statutes or a practice allowing a recovery of the damages for detention special and consequential, and even exemplary, damages¹ may be recovered. The expenses

cludes all his damages, and to give other damages is erroneous.

In Oklahoma the defendant who has been deprived of the possession of property may recover the price at which he could have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such purchase. Stats. of 1893, sec. 2650; Barse L. S. C. Co. v. McKinster, 10 Okla. 708, modifying Wade v. Gould, 8 Okla. 690.

⁹⁵ Sayers v. Holmes, 2 Cold. 259; Pickett v. Bridges, 10 Humph. 172.

⁹⁶ Parker v. Simonds, 8 Mete. (Mass.) 205; Eaton v. Caldwell, 3 Minn. 134; Berry v. Vantries, 12 S. & R. 89; Backenstoss v. Stahler, 33 Pa. 257, 75 Am. Dec. 592. The text is quoted in Clow v. Yount, 93 Ill. App. 112, 117, and its doctrine held to be applicable to the rights of a plaintiff.

⁹⁷ §§ 501-504; Swift v. Barnes, 16 Pick. 194; Howe v. Handley, 28 Me. 251; Smith v. Dillingham, 33 Me. 384. See Hemstead v. Colburn, 5 Cranch C. C. 655; also Nickerson v. California S. Co., 10 Cal. 520.

⁹⁸ See White v. Van Houten, 51 Mo. 577.

⁹⁹ United Shoe M. Co. v. Dean, 51 Pa. Super. Ct. 88.

¹ Fuller v. McLeod, 91 S. C. 328;

actually incurred in procuring teams and appurtenances for the purpose of removing ice, the subject of the suit, were recovered, they having been rendered useless by the wrongful replevin.² But damages resulting from the possible loss of customers were too remote and contingent, and losses caused by inability to fulfill existing contracts were not recoverable because the supply necessary for that purpose might have been obtained in the market.³ The defendant cannot recover for counsel's services in defense of the action.⁴ A manufacturer from whom the entire machinery of his cloth-printing factory, in running order and actual use, was replevied, including steam apparatus for supplying the power, took judgment for a return and the damages were assessed by computing interest on the appraised value of the property, from the date of the writ to that of the judgment, under an agreement expressly provided to be without prejudice to his action on a replevin bond. On demand of the officer upon the writ of return tender was made of all the machinery except the steam apparatus, with an offer to pay the value of that or replace it. The tender was not accepted and the writ was returned in no part satisfied, and suit brought on the bond. It was held, 1, that the officer had a right to treat the property as an organized whole and refuse the offer to return part of it; 2, that the manufacturer's claim for damages in the action of replevin included compensation for the general inconvenience and loss resulting from the interruption of his possession and for the expense, trouble and delay of restoring the factory to its former condition as well as interest on the value of the property; but, 3, that the claim was entire, and no portion of it recoverable in the suit on the bond, notwithstanding the proviso in the agreement under which he took his judgment; and 4, that the measure of his damages in the suit on the bond was the sum which, under the ordinary circumstances

McCabe v. Morehead, 1 W. & S. 513;
Cable v. Dakin, 20 Wend. 172; Briz-
see v. Maybee, 21 id. 144.

Sickness resulting from the manner in which a writ of replevin is served cannot be recovered for unless it is specially pleaded Bate-

man v. Blake, 81 Mich. 227.

² Washington I. Co. v. Webster, 62 Me. 341, 16 Am. Rep. 462.

³ Id.

⁴ Black v. Hilliker, 130 Cal. 190; Gregory v. Woodbery, 53 Fla. 566; McCarty v. Kepreta, 24 N. D. 395.

attending a sale, might reasonably be agreed on as a fair price for the property between a seller desirous of selling and a buyer desirous of buying it as a whole, to be used in the place from which it was taken and for the purposes for which it was intended and arranged.⁵ The damages recoverable are for the withholding or detention of the property, "not all damages generally which may be connected with the subject in dispute or grow out of the relations of the several parties to each other or to the property. They must arise from, and be incident to, the contest over possession of the property, and unless they do so arise they are not recoverable merely because connected with the transaction by reason or virtue of which the plaintiff's alleged right of taking possession accrued."⁶

An interesting case arose in Nevada, illustrating and containing an instructive discussion of the distinction between matters which must be estimated as part of the value if return cannot be had and damages which are to be paid or collected in any event. An action of replevin was brought for a flock of sheep, and was pending for several years. The defendant, in her answer, claimed to be their owner and demanded a return. She succeeded in establishing her right to that judgment. During the pendency of the action the flock, which was large, was largely increased by lambs, and the plaintiff yearly derived considerable sums from the wool which he marketed; and during this period many of the sheep died without his fault, and he bestowed much care, labor and attention and incurred considerable expense in the keeping, preservation and management of the flock and in shearing and marketing the wool. These facts were the subject of supplemental answers. The trial court treated not only the flock replevied, but the lambs added by natural increase and the wool shorn after the plaintiff got possession, as constituent parts of the property in controversy and adjudged a return of each separately or, if it could not be had, that their value respectively be collected. Evidence of the necessary cost and expense of keeping and preserv-

⁵ *Stevens v. Tuite*, 104 Mass. 328. *Spears v. Fields*, 72 S. C. 395. See § 1146.

⁶ *Schrandt v. Young*, 62 Neb. 254; § 1146.

ing the flock, raising the lambs, shearing and marketing the wool, etc., was rejected.⁷ On appeal it was held that the judgment was erroneous; that the lambs were a constituent part of the property and might be included in the judgment for return and the alternate value be paid,⁸ but that the wool must be recovered for as damages for the use of the property, and from these damages should be deducted the reasonable and necessary labor and expense of keeping, preserving and managing the flock and shearing and marketing the wool. It was also considered that the plaintiff should not be charged with the loss of such sheep as had died without his fault.⁹

The defendant is entitled to damages for the time the sheriff holds the property for the plaintiff to give security, where he fails to furnish it, and the property is returned to the defendant and he recovers in the action. He is entitled to damages for that disturbance of his possession; and he may recover interest on the value and any depreciation in consequence of the taking and expense of replacing the property.¹⁰ The expense incurred in obtaining property to take the place of that converted and adapting it to the purpose for which the former was used and the loss caused by interrupting business, may be recovered. Where these elements were recognized and there was also a recovery of the rental value of the property it was not permis-

⁷ The following is sec. 202 of the Nevada Practice Act: "In an action to recover the possession of personal property judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the detention or the value of the use thereof. If the property have been delivered to the plaintiff and the defendant claims a return thereof judgment for the defendant may be for the return of the property or the value thereof in case a return cannot be had, and damages for the taking and withholding the same, or the value of the use thereof."

⁸ *Deck v. Smith*, 12 Neb. 389.

⁹ *Buckley v. Buckley*, 12 Nev. 423. See *Sherman v. Clark*, 24 Minn. 37.

In *Cunningham v. Stoner*, 10 Idaho 549, it is held that if the plaintiff recovers sheep or their value and the value of the wool shorn from them the defendant may lessen his liability to the extent of the value of shearing them and marketing the wool; he could claim compensation for keeping the sheep only from the date of the judgment appealed from until the subsequent termination of the retrial ordered by the appellate court.

¹⁰ *Morris v. Baker*, 5 Wis. 389.

sible in a judgment for its return to award the value of such property.¹¹ Loss of time consumed in regaining possession of the property is an element of the damages.¹² A plaintiff who rightfully removes property is not liable for an unintentional injury done to other property in removing his own.¹³

§ 1159. *Mitigation of damages.* The plaintiff may show on the assessment of value and damages under a judgment for return and damages for the detention that shortly after the delivery of the property to him the defendant repossessed himself of the greater part of it.¹⁴ It is held in some states that where an animal replevied dies without the fault of the plaintiff while in his possession pending the suit the fact may be proved to exonerate him from liability for its value.¹⁵ In Arkansas death of the property after judgment does not relieve the party bound to deliver;¹⁶ and in some other jurisdictions the party having a wrongful possession is liable for the property though it perish without his fault.¹⁷ In Illinois where a replevin suit is dismissed and the court proceeds to assess the plaintiff's damages for the detention of the property it is competent for the plaintiff to prove that the defendant is a mere pledgee of it to secure a debt from the plaintiff, as the defendant would not in such a case be entitled to recover anything for its use.¹⁸ In

¹¹ *Adams v. Wright*, 74 Conn. 551.

¹² *McCarty v. Kepreta*, 24 N. D. 395.

¹³ *Hall v. Tillman*, 110 N. C. 220.

¹⁴ *De Witt v. Morris*, 13 Wend. 496.

In *Case v. Babbitt*, 16 Gray 278, the action was against the officer who served the writ by the defendant in replevin for taking an informal bond, after obtaining a dismissal of the action on that ground. The court held that the officer might show in mitigation that the property replevied, at the time of the service of replevin, was, and has since remained, the property and in the possession of the plaintiff in the replevin.

In *Archer v. Long*, 47 S. C. 556, the jury found for the plaintiff as to the right of possession and awarded a gross sum in case of non-delivery. A portion was delivered; the defendant being unable to deliver the whole. The court was equally divided as to the right of the defendant to show the value of the part not delivered.

¹⁵ *Walker v. Osgood*, 53 Me. 422. See § 1151.

¹⁶ *May v. Jameson*, 11 Ark. 368.

¹⁷ See §§ 1151-1153; *Three States L. Co. v. Blanks*, 66 C. C. A. 353, 133 Fed. 479, 69 L.R.A. 283.

¹⁸ *McArthur v. Howett*, 72 Ill. 358. See *Levise v. Lochiel I. & S. Works*, 129 Pa. 238; § 1157.

Michigan where a plaintiff is nonsuited the defendant has, by statute, a right to a return of the property or to waive return and recover the value. If he waives a return he is entitled to a judgment for its full value; and in an action on the replevin bond afterwards the measure of damages is the amount of the judgment; the obligors cannot show in mitigation that the defendant in replevin was but a part owner of the property.¹⁹ A plaintiff cannot mitigate his liability to the defendant by delivering a portion of the property to the receiver of the latter's vendor unless it is established, between the receiver and the defendant, that the former was entitled thereto.²⁰ Payment of rent for the use of the property in suit may be proven in mitigation, notwithstanding the claim that the defendant's title was divested by a sale under a mortgage.²¹ If a mortgagee obtains possession of the mortgaged property and sells it for more than is due him the defendant may recover, in the replevin action, the excess.²² All the circumstances bearing upon the rights of the parties, including the situation of the property, the interest of each therein and the right to possession after default, will be regarded in fixing the damages.²³ A debt of the plaintiff paid by the defendant on account of the property in question is to be credited to the latter.²⁴

§ 1160. Recovery affected by interest in property. Where the plaintiff or defendant is entitled to recover the value the same principles apply as in trover or trespass in regard to recovering full value or only that of his special interest.²⁵ If the

¹⁹ *Williams v. Vail*, 9 Mich. 162.

²⁰ *Yallop-De G. Co. v. Minneapolis, etc. R. Co.*, 33 Minn. 482.

²¹ *Collins v. Bellefonte Cent. R. Co.*, 171 Pa. 243.

²² *Rhoads v. Gatlin*, 2 Colo. App. 96.

²³ *Ferris v. Johnson*, 136 Mich. 227. See *Cunningham v. Stoner*, stated in note to § 1158.

²⁴ *Cooper v. Ratliff* (Ky.), 116 S. W. 748.

²⁵ *Peck v. Bonebright*, 75 Iowa 98, 1 L.R.A. 155; *Glascock v. Hays*, 4

Dana 58; *National C. R. Co. v. Richards*, 159 Mich. 128; *Gage v. Allen*, 84 Wis. 323; *Aultman Co. v. McDonough*, 110 Wis. 263; *Creighton v. Haythorn*, 49 Neb. 526; *Hall v. Bramel*, 87 Mo. App. 285; *Dillard v. McClure*, 64 id. 488; *Witkowski v. Hill*, 17 Colo. 372; *Barse L. S. O. Co. v. Adams*, 2 Indian T. 119; *Guy v. Doak*, 47 Kan. 370; *Union Nat. Bank v. Moline, etc. Co.*, 7 N. D. 201, §§ 1097, 1136, 1137.

If a special ownership is pleaded it must be proven; there cannot be

party made liable is a stranger and has no right or title whatever in the property the judgment will be for the full value to the party whose possession or right thereto has been invaded.²⁶ If a party has a general or special property in goods, either alone or in connection with others, he can maintain replevin in the *detinet* against a stranger; and the mere fact that the plaintiff owns the property with others, and not alone, is not a bar, either under the plea of *non detinet* or when it is specially pleaded; but it is proper matter of a plea in abatement.²⁷ On the other hand, where the party recovering has but a limited interest and is under no duty to account for any surplus to any other party, and the defendant represents that residue, the recovery will be limited to the special interest of the prevailing party.²⁸ Where the assignee of a senior mortgage on chattels is successful as defendant in replevin by a junior mortgagee, and the latter is unable to return the property, the damages should be limited to the unpaid principal of the debt and accrued interest thereon to date of the verdict and costs of the action.²⁹

a recovery on proof of general ownership. *Suckstorf v. Butterfield*, 54 Neb. 757.

²⁶ *Merchants' Nat. Bank v. McDonald*, 63 Neb. 363; *Madison Nat. Bank v. Farmer*, 5 Dak. 282; *Allen v. Butman*, 138 Mass. 586; *Stevenson v. Lord*, 15 Colo. 131; *First Nat. Bank v. Crowley*, 24 Mich. 492; *Frei v. Vogel*, 40 Mo. 149; *Dilworth v. McKelvey*, 30 Mo. 149; *Nelson v. Leichtenmeyer*, 49 Mo. 56; *Fallon v. Manning*, 35 Mo. 271; *Morss v. Stone*, 5 Barb. 516.

Valid and subsisting liens against the property when the writ was issued and which had not then or subsequently been waived, abandoned or lost by the claimant are to be deducted from its value. *Woods v. Klein*, 223 Pa. 256.

²⁷ *Wright v. Bennett*, 3 Barb. 451.

If the plaintiff is a lienholder and the property has been sold for more than his claim and interest thereon

the amount of the claim with interest may be recovered under an ordinary petition. *Dolan v. Van Demark*, 25 Kan. 304.

²⁸ *Hickman v. Dill*, 32 Mo. App. 509; *Balbridge v. Dawson*, 39 id. 527; *Allen v. Judson*, 71 N. Y. 77; *Lillie v. Dunbar*, 62 Wis. 198, 51 Am. Rep. 718; *Cruts v. Wray*, 19 Neb. 581; *Schwab v. Owens*, 10 Mont. 381; *Union L. Co. v. Tronson*, 36 Wis. 126; *Hass v. Prescott*, 38 Wis. 146; *Wolfley v. Rising*, 12 Kan. 535; *Weber v. Henry*, 16 Mich. 399; *Jennings v. Johnson*, 17 Ohio 154, 49 Am. Dec. 451; *Scrugham v. Carter*, 12 Wend. 131; *Dodge v. Chandler*, 13 Minn. 114; *Walrath v. Campbell*, 28 Mich. 111. See *Veazie v. Somerby*, 5 Allen 280; *Empire State T. F. Co. v. Grant*, 44 Ill. 434; *Smith v. Willoughby*, 24 N. D. 1.

²⁹ *Weber Implement Co. v. Dunard*, 181 Mo. App. 658.

If property is replevied from an officer who holds it under process with no other interest in it than that of the creditor whom he represents and the officer is successful his recovery cannot exceed the amount owing by the debtor and the costs of the suit.³⁰ The amount called for by writs which are received by an officer after he has been served with process in the replevin suit and has delivered the property to the plaintiff is not to be regarded.³¹ Where damages were claimed for detention, although the original taking might have been wrongful, yet, if the next day, by virtue of attachments in his hands, the sheriff attach the goods, his detention of them from the time they were so attached would be lawful.³² Ordinarily it is incumbent upon the officer to prove the value of the property; but when the plaintiff admits on the record the value of the defendant's possession and no evidence is given as to the general value of the property it will be presumed that such value is equal to or exceeds the amount admitted by the plaintiff as the value of the defendant's special interest.³³ Where property is replevied from an officer who holds it under a writ of attachment issued on a debt not due there cannot be a recovery thereof unless he proves that the jurisdictional steps preceding the issue of the writ have been taken.³⁴ Where goods are wrongfully taken in replevin by a sheriff who holds them under attachments the measure of damages is the loss accruing to the attachment plaintiffs because of the deprivation of the right to have their writ executed; the value of the property is to be fixed by its value in the only market and manner in which the sheriff could have disposed of it.³⁵ If the defendant's right of possession expires before trial judgment for return will not be ordered and dam-

³⁰ *Clark v. Lamoreaux*, 70 Wis. 508; *Smith v. Phillips*, 47 Wis. 202; *Sloan v. Coburn*, 26 Neb. 607, 4 L.R.A. 470; *Gates v. Parrott*, 31 Neb. 581; *Gamble v. Wilson*, 33 Neb. 270; *Witkowski v. Hill*, 17 Colo. 372; *Hayden v. Anderson*, 17 Iowa 158.

Where the property is owned by a partnership the sale may be of the apparent interest of the defendant

member in it; the whole property cannot be sold. *Ferguson v. Day*, 33 Ind. App. 213.

³¹ *Sloan v. Coburn*, *supra*; *Merrill v. Wedgewood*, 25 Neb. 283.

³² *Blackman v. Wheaton*, 13 Minn. 299.

³³ *Gamble v. Wilson*, *supra*.

³⁴ *Gamble v. Wilson*, *supra*.

³⁵ *Merchants' Nat. Bank v. McDonald*, 63 Neb. 363.

ages for detention will be limited accordingly.³⁶ The same rule applies to a plaintiff when he is entitled to recover value and damages; he can recover only the value of the right while it existed and damages for detention.³⁷ As between partners contesting the right to firm property the value of the possession by one of them should be ascertained at its full worth, because no accounting can be had between them to ascertain the extent of their interests.³⁸

§ 1161. **Recoupment.** Set-off does not exist in replevin,³⁹ but when the goods are the subject of a lien or charge it may be enforced by way of recoupment; for the charge is inseparable from the thing itself and, therefore, when the value of the thing is to be allowed in damages the charge may be admitted to reduce them by way of recoupment in order to do justice to both parties.⁴⁰ So where property is distrained for rent and replevied the plaintiff may answer the justification of seizure for rent by way of recoupment that the landlord has failed to keep his covenants in the lease.⁴¹ Damages arising out of a breach of warranty of the property replevied, including damages for the loss of time and expenses incurred in trying to operate such property, may be counter-claimed. Such counter-claim arose out of the transaction by which the property was sold and is connected with the subject of the action, the sale being made with a warranty, and the replevin action being brought by a mortgagee to recover possession.⁴² But, a conditional sale purchaser may not claim damages for a breach of warranty as a defense.⁴³

³⁶ Deal v. Osborne, 42 Minn. 102; Wheeler v. Train, 4 Pick. 168.

³⁷ Barham v. Massey, 5 Ired. 192.

³⁸ Jenkins v. Mitchell, 40 Neb. 664.

³⁹ Blair v. Johnson, 111 Tenn. 111.

⁴⁰ Mackey v. Dillinger, 73 Pa. 85; Babb v. Talcott, 47 Mo. 343; Cooper v. Kipp, 52 App. Div. (N. Y.) 250; Bottoms v. Clark, 38 Okla. 243 (damages done by animals taken damage feasant), § 183.

⁴¹ Lindley v. Miller, 67 Ill. 248;

Fairman v. Fluck, 5 Watts 516; Phillips v. Monges, 4 Whart. 226; Peck v. Brewer, 48 Ill. 55; Peterson v. Haight, 3 Whart. 150; Warner v. Caulk, id. 193; Nichols v. Dusenbury, 2 N. Y. 283; Guthman v. Castleberry, 49 Ga. 272; Wade v. Halligan, 16 Ill. 508; Hatfield v. Fullerton, 24 Ill. 279.

⁴² Aultman Co. v. McDonough, 110 Wis. 263.

⁴³ People's Elec. R. Co. v. Me-

§ 1162. Rights where part of property found for each party.

On the issue made by the plea of property in the defendant a jury may find that a part of the property belonged to the plaintiff and assess damages for its detention, and that the residue did not belong to the plaintiff and assess damages for the defendant. In such case the verdict is considered as rendered upon an issue, because effect is given to it in the same manner as though the declaration had contained two counts for the respective articles or the defendant had avowed for each separately.⁴⁴ Each party may have judgment for damages and costs as far as he is successful.⁴⁵ And doubtless the general power of the court will extend to the setting off of these mutual recoveries and issuing execution for the balance where no reason exists for a contrary course.⁴⁶

Keen Motor Car Co., 130 C. C. A. 513, 214 Fed. 73.

⁴⁴ Williams v. Beede, 15 N. H. 483; Powell v. Hinsdale, 5 Mass. 342; Wright v. French, 94 Pa. 26.

⁴⁵ Id.; Brown v. Smith, 1 N. H. 36; Wright v. Mathews, 2 Blackf. 187; Clark v. Keith, 9 Ohio 72; Sey-

mour v. Billings, 12 Wend. 286; Vollum v. Simpson, 2 Bos. & P. 368; McLarren v. Thompson, 40 Me. 284; Poor v. Woodburn, 25 Vt. 239; Lanyon v. Woodward, 65 Wis. 543.

⁴⁶ Poor v. Woodburn, Lanyon v. Woodward, *supra*.

CHAPTER XXX.

FRAUD.

§1163-1165. Scope of the natural and proximate consequences.

1166. False representations.

1167. Same subject; materiality.

1168. Same subject; reliance upon representations.

1169. Same subject; defendant's belief in representations.

1170. Same subject; representations need not be made to plaintiff.

1171. The measure of damages; general rule.

1172. Same subject; another rule.

1173, 1174. Same subject; other elements of damage.

1175, 1176. Remote, conjectural and contingent damages.

1177. Expenses of litigation.

1178. Exemplary damages.

1179. Parties.

1180. Pleading.

§ 1163. Scope of the natural and proximate consequences.

Fraud is an odious tort, and when actual injury proceeds from it damages are allowed as for other tortious injuries. It is necessary to a cause of action for fraud that it produce actual injury; damage is of the gist of the action; in other words, fraud and damage must concur to give a cause of action.¹ By

¹Young v. Aylesworth, 35 R. I. 259 (conspiracy); Stratton's Independence v. Dines, 68 C. C. A. 161, 135 Fed. 449; Bailey v. Oatis, 85 Kan. 339; Anderson v. Heileman B. Co., 104 Minn. 327; Thompson v. Newell, 118 Mo. App. 405; Ettlinger v. Weil, 184 N. Y. 179; Sonnensyn v. Akin, 14 N. D. 248; Jones v. Holmes, 7 New South Wales St. Rep. 821; McConnell v. Wright, [1903] 1 Ch. 546; Zabriskie v. Smith, 13 N. Y. 322; Bennett v. Terrill, 20 Ga. 83; Hanson v. Edgerly, 29 N. H. 343; Upton v. Vail, 6 Johns. 181; Tryon v. Whitmarsh, 1 Mete. (Mass.) 1, 35 Am. Dec. 339; Carvill v. Jacks, 43 Ark. 454; Hol-

ton v. Noble, 83 Cal. 7; Brown v. Blunt, 72 Me. 415; London & F. Ins. Co. v. Liebes, 105 Cal. 203; Knowles v. Elyton L. Co., 88 Ga. 642; Carrington v. Omaha L. Ass'n, 59 Neb. 116; Potter v. Necedah L. Co., 105 Wis. 25; Bank v. Byers, 139 Mo. 627, quoting the text.

"If any pecuniary loss is shown to have resulted the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced if the amount is at all appreciable." Pomeroy's Eq., § 898; Wainseott v. Occidental B. & L. Ass'n, 98 Cal. 253.

The question whether damage re-

"damage," as here used, is meant legal wrong, not, necessarily, financial loss.² The violation of a legal right, as by fraudulent interference with the right to dispose of one's property for a limited use, though he receive full compensation for it, is ground for the rescission of the conveyance, damage having resulted to others than the plaintiff from the fraud.³ Sometimes the wrong is done directly by the defendant; at other times the injured party is duped into becoming the immediate and unwilling agent to consummate it. He is entitled to recover compensation for the injury, including all the natural and proximate consequences of the fraud. In determining the scope of these consequences the law applies no new principle, but that which guides and controls the inquiry of damages in all cases of tort, namely, that the wrong-doer is answerable for all those consequences of his misconduct which happen in the natural course of things and were to be expected to ensue according to the general experience of mankind.⁴ The scope of the natural and probable consequences is not enlarged because the fraud was the result of a conspiracy.⁵ The rule of non-liability for avoidable consequences applies in actions based on fraud as in all others.⁶ A fraud may be acted upon by the owner of

sulted to the vendee of stock from its purchase depends upon the value of the stock when its purchase was negotiated, and not upon what he accomplished thereafter in the management of the corporation. *Townsend v. Felthousen*, 156 N. Y. 618.

² *Spreckels v. Gorrill*, 152 Cal. 383.

³ *Brett v. Cooney*, 75 Conn. 338.

⁴ *Western U. Tel. Co. v. Totten*, 72 C. C. A. 591, 141 Fed. 533; *Rice v. Pulliam*, 141 Ky. 10 (damage to standing as a merchant in consequence of having "pinchbeck jewelry" palmed off on him and his customers is too remote); *Stewart v. Joyce*, 205 Mass. 371; *Fottler v. Moseley*, 185 Mass. 563 (loss of value of stocks by embezzlement of third person); *Cunningham v. Peace*

H. F. Co., 74 N. H. 435, 20 L.R.A. (N.S.) 236, 124 Am. St. 979; *Dranow v. MacDonald*, 76 N. J. L. 259; *Isman v. Loring*, 130 App. Div. (N. Y.) 845; *Nearing v. Hathaway*, 128 App. Div. (N. Y.) 745; *Morgan v. Hodge*, 145 Wis. 143; *Potter v. Nece-dah L. Co.*, 105 Wis. 25, quoting the text; *Crater v. Binninger*, 33 N. J. L. 513; *Weaver v. Shriver*, 79 Md. 245, 530; § 15.

Actual damages cannot be based on contingencies. *Benson v. Murton*, 66 Ore. 199.

⁵ *Boston v. Simmons*, 150 Mass. 461, 6 L.R.A. 629, 15 Am. St. 230; *Brackett v. Griswold*, 112 N. Y. 454; *Von Au v. Magenheimer*, 126 App. Div. (N. Y.) 257.

⁶ *Empire L. Ins. Co. v. Beaumont*

property by recalling his order to sell it because of representations that certain fictitious sales were genuine.⁷

Whenever one person by breach of confidence, deception or departure from the course of fair dealing deprives another of his property or any pecuniary advantage the law gives the latter adequate compensation for the injury in damages as for a fraud.⁸ If the plaintiff or injured party is not chargeable with negligence in yielding to the deceit,⁹ it is immaterial whether the party who practices the fraud is the chief actor in causing the loss or whether the injured party, while under the influence of the deception, contributes to his own injury in a manner which was antecedently probable and might and should have been foreseen. A few examples will make these propositions clear. An auctioneer pretended to have received a bid not actually made and thus ran up the price of the property he was employed to sell from \$20,000, which was the last real bid, to \$40,000. The vendee had no knowledge of this deception. In a suit for redress it was decreed that the vendor should refund \$20,000, the excess above the highest bid.¹⁰ A broker undertook to invest money for a customer upon a safe bond, well secured by mortgage; he was employed by and received remuneration from a borrower, which he did not disclose to the lender, to whom he falsely represented that the security offered was ample. Such broker was held liable to

L. & B. Co., — Tex. Civ. App. —, 146 S. W. 335.

⁷ Fottler v. Moseley, 179 Mass. 295.

⁸ Wells v. Western U. Tel. Co., 144 Iowa 605, 138 Am. St. 317; Von Au v. Magenheimer, *supra*; Shaw v. Holland, [1900] 2 Ch. 305; Montgomerie's B. Co. v. Blyth, 26 Viet. L. R. 612 (these cases are dealt with, so far as the measure of damages is concerned, in § 1123); Hayward v. Leeson, 176 Mass. 310, and cases cited on 318, 49 L.R.A. 725; Wilson v. Nichols, 72 Conn. 173; Leonard v. Springer, 197 Ill. 532.

⁹ See Schmidt v. Mesmer, 116 Suth. Dam. Vol. IV.—45.

Cal. 267, and cases cited in opinion; Shaw v. Gilbert, 111 Wis. 165.

One guilty of fraudulent conduct, whereby he induces another to act to his prejudice, cannot be heard to allege negligence on the part of such other. Leonard v. Springer, *supra*.

A tradesman who is indiscreet in giving credit cannot recover of the person who made a false representation concerning the person credited the loss occasioned thereby. Corbett v. Brown, 5 C. & P. 363, per Tindal, C. J.

¹⁰ Veazie v. Williams, 8 How. 134, 12 L. ed. 1018.

make good the loss arising from the insufficiency of the security.¹¹ Another broker was employed to sell real estate under a contract by which he was to have as his commission all he could obtain above \$6,000. He procured G. to become a joint purchaser with himself for \$8,000, concealing from him that he was acting as the vendor's agent. After the consummation of the sale by which the vendor conveyed three-fourths to G., who paid \$6,000, and one-fourth to the broker, who paid \$2,000, and which was, according to the vendor's agreement, refunded to him as commission, it was held that the transaction as between the broker and G. was a fraud on the latter and that the law would not permit the former to retain the advantage he had gained.¹² Where a debtor was induced by fraudulent representations to go into a foreign state for the purpose of being arrested there he was entitled to recover the money paid to secure his release,¹³ and also a sum paid by him to settle another suit.¹⁴

§ 1164. **Same subject.** Where several persons are engaged in a joint enterprise for their mutual benefit each has a right to demand and expect from his associates good faith in all that relates to their common interest; and no one of them will be permitted to take to himself a secret and separate advantage to the prejudice of the others; and where, unknown to his associates, one causes to be transferred to the association property previously purchased by himself, at a price exceeding that paid by him therefor, he is accountable to his associates for the profits thus made. Thus, four persons owning and having interests in certain oil lands which cost them

¹¹ *Turnbull v. Gadsden*, 2 Strobb. Eq. 14; *Bacon v. Bronson*, 7 Johns. Ch. 194, 11 Am. Dec. 449; *Horne v. Walton*, 117 Ill. 130; *Thorp v. Hough*, 160 Iowa 694.

¹² *Grant v. Hardy*, 33 Wis. 668; *Johnson v. Gavitt*, 114 Iowa 183; *Bergeron v. Miles*, 88 Wis. 397, 43 Am. St. 911; *Cook v. Southern Columbian C. Co.*, 75 Miss. 121; *King v. White*, 119 Ala. 429.

In a similar case the perpetrator of the fraud was liable for interest on the difference between the buying and the selling price. *Mayo v. Wahlgreen*, 9 Colo. App. 506.

¹³ *Sweet v. Kimball*, 166 Mass. 332, 55 Am. St. 406; *Clark v. Woods*, 2 Ex. 395, 406; *Grainger v. Hill*, 4 Bing. N. C. 212.

¹⁴ *Sweet v. Kimball*, *supra*.

about \$30,000, agreed to combine their interests to organize a company and transfer the land to it at a price largely above its cost, and divide the profits. To carry out this purpose they procured a subscription paper to be drawn up by which the subscribers agreed to pay the sums subscribed for "the purchase of property," specifying therein the lands mentioned, at the sum of \$125,000. Each of them subscribed \$5,000 and caused certain others to sign as decoy subscriptions for about one-half the amount to be subscribed. These subscriptions were not intended to be paid, and were not in fact paid, although so marked. The plaintiffs, induced to believe by the fraudulent assurances of one of the originators of the scheme and of their agent that the lands originally cost \$125,000, and also upon the belief that they would become subscribers on a footing of equality with the others, subscribed also and paid in their subscriptions, as did others, to the amount required. The moneys so paid were received and divided by the four associates. A company was thereupon organized, the property transferred to it and the stock taken in payment and divided among the subscribers, those who had not as well as those who had paid, in proportion to their subscriptions. The plaintiffs subsequently made loans to the company, and under executions issued upon judgments rendered thereon sold a portion of the lands. In an action for the fraud it was held that said four associates were each and all liable. 1st, because putting the subscription paper in circulation with their names subscribed, under the circumstances, was a gross fraud upon every subscriber ignorant of the facts; 2d, because the original purchases inured to the benefit of the *bona fide* subscribers, and in receiving and dividing the large profits a fraud was perpetrated upon them; 3d, because the four associates might be regarded as partners in that adventure and all were responsible for false representations made by either or by their agent; that the plaintiffs could not, on account of such fraud, recover all the moneys paid by them because they could not restore said associates to the position they were in before the transfers to the company; but that such associates could be required to account for the profits made upon the lands thus

fraudulently appropriated and the plaintiffs could recover their *pro rata* share.¹⁵

§ 1165. **Same subject.** In such cases the fraud consists in the wrong-doer appropriating to himself by deceptive practices profits belonging to the injured party; the undue gain of the defrauding party is the amount of the injury to the defrauded party. The latter is in all cases entitled to be made good for the injury suffered, and the advantage gained by the fraud is not the measure of that injury, though, as in the foregoing instances, the gain of one and the loss to the other may be the same amount. An interesting and instructive case arose in New Jersey, and was decided in the court of errors and appeals in 1869. As an example it illustrates the scope of the natural and proximate consequences taken into account to give compensation for injury and loss caused by fraud. The defendant had purchased, in connection with another party, a tract of oil lands. Proposing to form an oil company, he applied to the plaintiff and solicited him to become a member. The defendant represented that the original cost of the land was \$28,000, and that the scheme would require a working capital of \$4,000, making the amount of immediate investment \$32,000. His proposition was to divide the property into eight shares of \$4,000 each, one of which he offered to the plaintiff, who accepted and paid for it. In a few months the associates, finding themselves in debt, each paid in the further sum of \$500. A small portion of the property was subsequently sold with the assent of all the members for \$16,000. The property purchased originally had been conveyed to the defendant in trust for the members of the association. The speculation turned out a failure. The false representation relied on to support the action for fraud was that relating to the cost of the property. The real price paid

¹⁵ *Getty v. Devlin*, 54 N. Y. 403. See *Pittsburg M. Co. v. Spooner*, 74 Wis. 307; *St. Paul D. Co. v. Pratt*, 45 Minn. 215; *Gruber v. Baker*, 20 Nev. 453, 9 L.R.A. 302; *Leeds & H. Theatres of Varieties*, [1902] 2 Ch. 809; *Rutledge v. Tarr*, 95 Mo. App. 265.

A director who purchases property of the corporation at much less than its value must respond to its creditors to the extent of the difference between the price paid and the value of the property. *Fishel v. Goddard*, 30 Colo. 147.

did not exceed \$18,000. Other facts in the case are referred to as giving this false representation force to induce the plaintiff to make the purchase at the price paid. The trial court instructed that the proper measure of damages was the entire loss sustained by the plaintiff in the transaction into which he was inveigled by the fraud. A verdict was given accordingly, but erroneously ignoring the value of the plaintiff's interest in the land standing in the defendant's name in trust. The defendant contended for reversal on the ground that the proper measure of damages was one-eighth of the difference between \$18,000, the real cost of the property, and \$28,000, the false price, constituting the fraudulent representation. The measure of liability adopted was held erroneous; the defendant was bound to respond for the moneys lost by the plaintiff in the speculation without fault on his part.¹⁶

The directors of an insolvent national bank are personally liable to one who has purchased stock thereof for damages sustained because of its insolvency when he was induced to make such purchase by false representations of solvency contained in reports made by the bank to the comptroller of the currency and attested by the directors and published in pursuance of law.¹⁷ It is immaterial that they did not know that the statements in such reports were untrue and had no intention to deceive in making them.¹⁸ Liability of the directors to depositors and persons who have made loans on the security of bank stock or purchased the same in reliance on the published state-

¹⁶ *Crater v. Binninger*, 33 N. J. L. 513. The opinion specially refers, on the question of damages, to *Cary v. Gruman*, 4 Hill 627; *Van Epps v. Harrison*, 5 id. 63; *Medbury v. Watson*, 6 Mete. (Mass.) 257. See *Rohrschneider v. Knickerbocker L. Ins. Co.*, 76 N. Y. 216, 32 Am. Rep. 290; *Morgan v. Hodge*, 145 Wis. 143.

¹⁷ *Stuart v. Bank*, 57 Neb. 569.

¹⁸ *Gerner v. Mosher*, 58 Neb. 135, 46 L.R.A. 244. It is said in the opinion that the following authori-

ties to some extent sustain the doctrine that a director of a bank is liable for damages resulting from permitting a statement to be held out to the public that the institution was solvent, even though the director was unaware that such report was false: *Delano v. Case*, 121 Ill. 247; *Kinkler v. Junica*, 84 Tex. 119; *German Sav. Bank v. Wulfe-kuhler*, 19 Kan. 60; *Salmon v. Richardson*, 30 Conn. 360; *Morse v. Switz*, 19 How. Pr. 275.

ments of bank officers has been declared in several cases.¹⁹ But such liability does not attach to the bank in favor of one who loans money on its shares in reliance on the statements made by its directors in their reports made pursuant to law.²⁰ Promoters of a corporation who, before any capital stock has been issued to the public, cause one-third of it to be issued to themselves as compensation for their services and then invite the public to subscribe to the stock, making no statement of such action, must account for the net profits they received, less the expenses of the formation of the corporation paid by them.²¹

Where the vendor of a mare falsely and fraudulently represented her to be perfectly gentle and kind and the purchaser, confiding in the truth of the representation, attempted to drive her soon after the purchase before a buggy, and she by running and kicking broke the buggy, and he broke one of his legs in jumping to the ground to save himself, he recovered, among other things, for the injuries to himself and to the buggy, if the jury believed they resulted from the viciousness of the mare and were the probable and natural consequences of the fraud.²² The same rule and scope of responsibility is recognized in cases of sales of domestic animals known by the vendor to have a contagious disease, and either warranting them to be sound or even concealing the fact of their having such disease. The association of such animals with others is a possible consequence of the sale and the ignorance of the purchaser that they have the disease; and, therefore, such sale is a fraud and the vendor is held liable for any loss in respect to the animals sold, as well as by communication of the disease to others.²³ Where the

¹⁹ *Tate v. Bates*, 118 N. C. 287, 2 Am. St. 81; *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. 725; *Seale v. Baker*, 70 Tex. 289; *Hubbard v. Weare*, 79 Iowa 678; *Merchants' Nat. Bank v. Thoms*, 28 Weekly L. Bul. 164 (Cincinnati Super. Ct.). See s. c., *id.* 137, on the question of privity between the pledgee of bank stock and the bank directors who made statements concerning the condition of the bank for the pur-

pose of securing additional deposits.

²⁰ *Merchants' Nat. Bank v. Armstrong*, 65 Fed. 932. This case is considered in § 1170.

²¹ *Hayward v. Leeson*, 176 Mass. 310, 322, 49 L.R.A. 725. •

²² *Sharon v. Mosher*, 17 Barb. 518; *Allen v. Truesdell*, 135 Mass. 75.

²³ *Mullett v. Mason*, L. R. 1 C. P. 559; *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658; *Jeffrey v.*

plaintiff had invented a certain medicine and the defendant prepared an inferior article which he sold, as and for the medicine of the plaintiff, it was a fraud for which the plaintiff might maintain an action without proof of special damage.²⁴ The purchaser of a vessel falsely represented by the seller to be eighteen instead of twenty-eight years old, having sent her to sea before he had knowledge that such representation was false, recovered as part of his damages those occasioned by such sending, she having been condemned in a foreign port.²⁵ The vendor of an article who knows it to be dangerous because of concealed defects is liable to any person who suffers an injury by reason of his fraudulent deceit and concealment.²⁶ A tenant who is farming land on shares and purchases seed oats falsely represented to be of a particular kind and variety is entitled to recover such damages as proximately resulted from the wrong and were in the contemplation of the parties as limited by the proportionate amount of the entire loss which his interest in the crop amounted to.²⁷

§ 1166. False representations. A large number of the cases of fraud in which damages are sought are those where the deceit consists of false representations. The principle of compensation for the injury readily adapts itself to each individual case though the class is of infinite variety; it embraces very obviously the direct and immediate injury; it extends, also, as has been shown, to all the natural and proximate consequences, and these are construed to comprehend all those which ensue naturally from the fraud and could be foreseen as its probable effect according to the usual course of events and the general experience. A count for deceit averring that the defendant, who was employed by the plaintiff to procure a lease, represented

Bigelow, 13 Wend. 518, 28 Am. Dec. 476; Faris v. Lewis, 2 B. Mon. 375; Bradley v. Rea, 14 Allen 20; Marsh v. Webber, 13 Minn. 109, 16 id. 418; Langdon v. Sherrod, 21 Iowa 518; Johnson v. Wallower, 18 Minn. 288, 15 id. 472; Smith v. Green, 1 C. P. Div. 92 See § 675.

²⁴ Thomson v. Winchester, 19 Pick. 214.

²⁵ Tuckwell v. Lambert, 5 Cush. 23.

²⁶ Kuelling v. Lean Mfg. Co., 183 N. Y. 78, 2 L.R.A.(N.S.) 303, and cases cited.

²⁷ Handy v. Roberts, — Tex. Civ. App. —, 165 S. W. 37.

that the lessor required a premium of 150*l.*, whereas he is in fact only required 100*l.*, whereby the defendant fraudulently obtained from the plaintiff 50*l.*, which he converted to his own use, was held sufficient.²⁸ A fraudulent misrepresentation may result from a person's conduct as well as be made in words; it is then usually a fraudulent concealment. Thus, a vendor is liable in an action for deceit if he sells an article having a secret defect rendering it essentially less valuable than it appears for such price as it is apparently worth. Knowing the defect and not revealing it, and knowing or believing that the purchaser would not buy if he knew of its existence, is a fraud.²⁹ Wherever confidence is reposed the law exacts frank truthfulness; the truth and the whole truth. In *Bench v. Sheldon*³⁰ the court say: "In the case of the sale of property the law presumes that the purchaser reposes confidence in the vendor as to all such defects as are not within the reach of ordinary observation, and therefore it imposes upon the vendor the duty to disclose fully and fairly his knowledge of all such defects."³¹ Where one undertakes to recommend another as worthy of credit, either voluntarily or in answer to inquiry, even statements which imply only a favorable opinion, if there be a suppression of facts known to the person making such recommendation and material as tending to contradict the opinion, will amount to a fraud if made with intent to deceive and the person relying upon them is injured.³² So selling a note which

²⁸ *Pewtriss v. Austen*, 6 Taunt. 522.

²⁹ *Hartford L. Ins. Co. v. Hope*, 40 Ind. App. 354; *Larson v. Metropolitan Stock Exch.* 200 Mass. 367; *Cunningham v. Pease H. F. Co.*, 74 N. H. 435, 20 L.R.A.(N.S.) 236, 124 Am. St. 979; *Paddock v. Strobridge*, 29 Vt. 470; *Brown v. Gray*, 6 Jones 103, 72 Am. Dec. 563; *Wainscott v. Occidental B. & L. Ass'n*, 98 Cal. 253; *Antle v. Sexton*, 137 Ill. 410; *Hecht v. Metzler*, 14 Utah 408, 60 Am. St. 906; *Loewer v. Harris*, 6 C. C. A. 394, 57 Fed. 368; *Leonard v. Springer*, 197 Ill. 532; *Miller v.*

Wissert, 38 Okla. 808. See *Paul v. Hadley*, 23 Barb. 521.

³⁰ 14 Barb. 66, 72.

³¹ *Nickley v. Thomas*, 22 Barb. 654; *Stevens v. Fuller*, 8 N. H. 463; *Potter v. Taggart*, 59 Wis. 1; *Mantler v. Truesdale*, 57 Mo. Ap. 435, 443; *McAdams v. Cates*, 24 Mo. 223. See *May v. Dyer*, 57 Ark. 441.

³² *Gibbens v. Bourland*, — Tex. Civ. App. —, 145 S. W. 274, citing the text; *Eyre v. Dunsford*, 1 East 327; *Ward v. Center*, 3 Johns. 271; *Upton v. Vail*, 6 id. 181; *Allen v. Addington*, 7 Wend. 9; *Corbett v. Gilbert*, 24 Ga. 454; *Viele v. Goss*,

the seller had fraudulently procured to be indorsed by a minor is an implied assertion of the liability of such indorser that he is a person who could bind himself. Any person buying the note in reliance upon that indorsement may have an action on the case for the injury he sustains from the falsity of such representation.³³ An action lies for selling land which has no existence,³⁴ and for unlawfully assuming authority to sell land.³⁵

Fraudulent representations with reference to the amount of property belonging to either party to a proposed marriage, made by a third person for the purpose of bringing about the marriage, constitute an actionable wrong, and the usual remedy is to require the person guilty of the fraud to make his representations good.³⁶ One who marries a woman in the belief that she was virtuous, such belief being induced by the representations of the defendant to that effect, when, in fact, she was at the time pregnant by the defendant, may recover from him such damages as have been sustained by the loss of *consortium* to which the plaintiff as husband was entitled and of which the fraud deprived him.³⁷ A woman who is induced by the fraud of a married man to marry him may recover damages, and on the question as to the amount of the recovery of compensatory damages evidence is admissible to show the value of the defendant's property. The court said there were two grounds upon which such evidence was admissible: 1. It was within the rule that so far as the cause of action rests upon an injury to character or an insult to the person compensatory damages may be increased by proof of the wealth of the defendant, upon the ground that wealth is an element in a man's social rank and influence, and the greater the wealth the higher the rank,

49 Barb. 96; *Haddock v. Osmer*, 153 N. Y. 604; *Browning v. National Capital Bank*, 13 App. Cas. (D. C.) 1.

³³ *Lobdell v. Baker*, 3 Metc. (Mass.) 469, 1 id. 193, 35 Am. Dec. 358.

³⁴ *Wardell v. Fosdick*, 13 Johns. 325, 7 Am. Dec. 383.

³⁵ *Place v. Dodge*, 54 Ill. App. 167.

³⁶ *Piper v. Hoard*, 107 N. Y. 73, 1 Am. St. 789; *Montefiori v. Montefiori*, 1 Wm. Black. 363; *Beach v. Beach*, 160 Iowa 346, 46 L.R.A. (N.S.) 98. But compare *Brennen v. Brennen*, 19 Ont. 327.

³⁷ *Kujek v. Goldman*, 150 N. Y. 176, 55 Am. St. 670, 34 L.R.A. 156, 9 N. Y. Misc. 34.

and, therefore, the greater the injury or insult. 2. It was also admissible in support of the allegations in respect to the value of the plaintiff's services and the property acquired by the joint labors of herself and the defendant. The greater the wealth acquired, the greater the value of the services.³⁸

It was decided long ago, in *Pasley v. Freeman*,³⁹ that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby he received damage, is the ground of an action in the nature of deceit and that it is not necessary that the defendant should be benefited by the deceit or collude with the person who received the benefit. The doctrine of this case is now universally acknowledged.⁴⁰ Where a person falsely pretending to be the agent of the injured party collected money of trespassers they recovered the money so paid.⁴¹ All false affirmations, however, made with such intent, even though relied on and damage results, will not support an action. The representation must be as to a past or existing fact substantially or materially affecting the interests of the other party and relating to a matter as to which he may be presumed to repose confidence and is thereby in fact deceived.⁴² The representation must be of facts as contradistinguished from statements of opinion or judgment. The mere affirmation or expression of opinion by a seller in regard to the property he is attempting to sell, or of a purchaser in regard to the value of the property or chose in action he desires the seller to take in payment for property

³⁸ *Morrill v. Palmer*, 68 Vt. 1, 14, 33 L.R.A. 411.

³⁹ 3 T. R. 51.

⁴⁰ *Goldsmith v. Koopman*, 140 Fed. 616; *Andahman v. Chicago & N. R. Co.*, 153 Ill. App. 169; *Kueling v. Lean Mfg. Co.*, 183 N. Y. 78, 2 L.R.A.(N.S.) 303; *Griffin v. Lumber Co.*, 140 N. C. 514, 6 L.R.A.(N.S.) 463; *Stickel v. Atwood*, 25 R. I. 456; *Hayeraft v. Creasy*, 2 East 92; *Russell v. Clark*, 7 Cranch 69, 3 L. ed. 271; *Upton v. Vail*, 6 Johns. 181; *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141; *Medbury v. Watson*, 6 Mete (Mass.) 246;

Ewins v. Calhoun, 7 Vt. 79; *Hubbard v. Briggs*, 31 N. Y. 529; *De May v. Roberts*, 46 Mich. 160, 41 Am. Rep. 154; *Carpenter v. Wright*, 52 Kan. 221.

⁴¹ *Wells v. Waterhouse*, 22 Me. 131.

⁴² *Homer v. Perkins*, 124 Mass. 431, 26 Am. Rep. 677; *Hazard v. Irwin*, 18 Pick. 105; *Benton v. Pratt*, 2 Wend. 385; *Belcher v. Costello*, 122 Mass. 189; *Mason v. Raplee*, 66 Barb. 182; *Vernon v. Keys*, 12 East 632; *Matlock v. Reppy*, 47 Ark. 148.

he is attempting to buy can never be safely relied on by the other party. To such affirmations the maxim *carcat emptor* applies. The party to whom they are made has no right to rely upon them, and though they are false and intended to deceive he who confides in them is not entitled to relief.⁴³ If, in connection with false representations as to the value of land offered in exchange, misrepresentations are made as to the net revenue derived from it an action will lie;⁴⁴ and so of statements by a vendor as to an offer made for property by a third person,⁴⁵ and where a person makes false representations as

⁴³ *Homer v. Perkins*, *supra*; *Medbury v. Watson*, 6 Mete. (Mass.) 246; *Manning v. Albee*, 11 Allen 520; *Veasey v. Doton*, 3 id. 380; *Watkins v. West Wytheville L. & I. Co.*, 92 Va. 1; *Moore v. Recek*, 163 Ill. 17; *Nostrum v. Halliday*, 39 Neb. 828; *Mayo v. Wahlgreen*, 9 Colo. App. 506; *Farr v. Peterson*, 91 Wis. 182; *Lehigh Z. & I. Co. v. Bamford*, 150 U. S. 665, 37 L. ed. 1215; *Gustafson v. Rustemeyer*, 70 Conn. 125, 66 Am. St. 92, 39 L.R.A. 644; *Shanks v. Whitney*, 66 Vt. 405; *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166; *Pittsburg L. & T. Co. v. Northern Cent. L. Ins. Co.*, 140 Fed. 888; *Donnelly v. Baltimore T. & G. Co.*, 102 Md. 1; *Bretzfelder v. Waddle*, 122 Mo. App. 462; *Frey v. Middle Creek L. Co.*, 144 N. C. 759; *Cash Register Co. v. Townsend*, 137 N. C. 652, 70 L.R.A. 349; *Morgan v. Hodge*, 145 Wis. 143. See *Oneal v. Weisman*, 39 Tex. Civ. App. 592; *Van Slochem v. Villard*, 207 N. Y. 587.

The rule has its limitations. It does not apply when representations are falsely made concerning the use to which the intending purchaser will put the property if it is sold to him and such statements are made to induce its sale. *Henderson v. San Antonio, etc. R. Co.*,

17 Tex. 580, 67 Am. Dec. 675; *Greenwood v. Pierce*, 58 Tex. 130.

The general rule is that representations made by a vendor to the vendee as to the cost of the property they are negotiating about, though false and made with intent to deceive, do not support an action. *Hemmer v. Cooper*, 8 Allen 334; *Holbrook v. Connor*, 60 Me. 578; *Bishop v. Small*, 63 id. 12; *Netting v. Wright*, 72 Ill. 390; *Sowers v. Parker*, 59 Kan. 12.

The result is otherwise if a fiduciary relation exists between the parties or if the vendor makes a false statement concerning the cost of property he has bought upon the joint account of himself and his vendee. *Hauk v. Brownell*, 120 Ill. 161; § 1164.

⁴⁴ *Hecht v. Metzler*, 14 Utah 408; *Wise v. Fuller*, 29 N. J. Eq. 257; *Speed v. Hollingsworth*, 54 Kan. 436; *Lee v. Tarplin*, 183 Mass. 52.

⁴⁵ *Isman v. Loring*, 130 App. Div. (N. Y.) 845.

Statements as to the price another person was to pay for the same kind of property as was offered the plaintiff do not "fall within the class of such lying talk as dealers may indulge in with impunity." *Kilgore v. Bruce*, 166 Mass. 136. "Misrepre-

to his professional skill and knowledge.⁴⁶ Aside from an exception to the general rule in respect to the nature of statements concerning value in favor of a purchaser between whom and the vendor fiduciary relations exist, there are other exceptions to the rule which forbid the buyer from relying on the statements of the seller as to value. Thus, a distinction has been made where one party has had opportunity to ascertain the value of the property being bargained for and he has made representations because of special knowledge concerning it.⁴⁷ The ignorance of one of the parties and the absence of the means of obtaining knowledge, especially if an artifice has been employed, is also cause for not applying the general rule.⁴⁸ The

sentations as to the price paid by a third person or as to the selling price have heretofore been held actionable or indictable. *Manning v. Albee*, 11 Allen 520; *Belcher v. Costello*, 122 Mass. 189; *Commonwealth v. Wood*, 142 Mass. 459; *Fairchild v. McMahon*, 139 N. Y. 290, 36 Am. St. 701; *Kohl v. Taylor*, 62 Wash. 678, 35 L.R.A.(N.S.) 174. Falsehood as to rents received is similar in principle. *Brown v. Castles*, 11 Cush. 348, 350. False statements as to market value may not be actionable if made to an experienced dealer in the article spoken of. *Lilienthal v. Suffolk B. Co.*, 154 Mass. 185, 12 L.R.A. 821, 26 Am. St. 234; *Graffenstein v. Epstein*, 23 Kan. 443, 33 Am. Rep. 171. But it is otherwise if they are made to an unskilled person. *Dawe v. Morris*, 149 Mass. 188, 191, 14 Am. St. 404, 4 L.R.A. 158. Per *Allen, J.*, in *Kilgore v. Bruce*, *supra*.

⁴⁶ *Barron Est. Co. v. Woodruff Co.*, 163 Cal. 561, 42 L.R.A.(N.S.) 125.

⁴⁷ *McKibbin v. Day*, 71 Neb. 280.

When the seller makes representations as to the value of the property which, as a reasonable man, he should not have believed and they are part of a scheme resorted to by

him to induce the purchase, and the purchaser has no opportunity of examination, and is otherwise uninformed as to the value, and is inexperienced as to such matters, and relies upon them and is deceived and injured by them, they being false, he may maintain an action. *Whitney v. Richards*, 17 Utah 226.

⁴⁸ *Scott v. Burnight*, and cases cited.

Where a stock of goods was sold as a whole upon a value fixed by a private mark used by the defendant and the plaintiff had no knowledge as to what the letters used in making that mark represented until they were inserted in the written contract, and such mark represented the selling price of the goods instead of the wholesale price as was stated, the goods being also marked in figures at a higher price, the statement as to the significance of the letters was not one of value, but of fact, and constituted, in connection with the other facts indicated, actionable fraud. *Elerick v. Reid*, 54 Kan. 579.

The vendor of stock stated to the vendee that it was selling at a dollar a share. The statement was false, and was regarded as one of

case is also clear where trickery or fraud prevents the person to whom representations are made from ascertaining the facts.⁴⁹

§ 1167. **Same subject; materiality.** To entitle a party to maintain an action for deceit by means of false representations he must, among other things, show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts, or to the condition of things as then existent. It is not every misrepresentation relating to the subject-matter of a contract which will render it void or enable the aggrieved party to maintain an action for deceit. It must be as to matters of fact substantially affecting his interests, not as to matter of opinion, judgment, probability or expectation.⁵⁰ Representations made in respect to a fact to transpire in the future must be a mere promise or an opinion, and will not of themselves support an action for fraud,⁵¹ though a party may be liable for fraud by obtaining property on promises which he never intends to fulfill.⁵² Fraud cannot be predicated of misrepresentations of the law, however false they may be, whether the deception is by misrepresentation or

fact which would materially influence the vendee. The court said: Where the defendant knows that the plaintiff is ignorant of the value of the property and knows that he is relying upon the defendant's representation, which is in the nature of a statement of fact, the rule of *caveat emptor* does not necessarily apply. *Maxted v. Fowler*, 94 Mich. 106, citing *Picard v. McCormick*, 11 Mich. 68; *Manning v. Albee*, 11 Allen 520; *Lawton v. Kittredge*, 30 N. H. 500; *Bradley v. Poole*, 98 Mass. 169, 93 Am. Dec. 144; *Miller v. Barber*, 66 N. Y. 558; *Gerhard v. Bates*, 20 Eng. Law & Eq. 129, 22 L. J. (Q. B.) 364, 17 Jur. 1097.

⁴⁹ *Dresher v. Becker*, 88 Neb. 619.

⁵⁰ *Brown v. South Joplin L. & Z. M. Co.*, 194 Mo. 681; *Long v. Wood-*

man, 58 Me. 49; *Martin v. Eagle D. Co.*, 41 Ore. 448; *State Bank v. Gates*, 114 Iowa 323; *Warner v. Benjamin*, 89 Wis. 290; *Spence v. Geilfuss*, 89 Wis. 499.

⁵¹ *Gallager v. Brunel*, 6 Cow. 347; *Markel v. Moudy*, 11 Neb. 213; *Dickinson v. Atkins*, 100 Ill. App. 401.

⁵² *Oldham v. Bentley*, 6 B. Mon. 430; *Schufeldt v. Schintzler*, 21 Hun 462; *Johnson v. Monell*, 2 Keyes 663; *Eaton, etc. Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389; *Burrill v. Stevens*, 73 Me. 395, 40 Am. Rep. 366; *Durell v. Haley*, 1 Paige 492, 19 Am. Dec. 444; *Buckley v. Artcher*, 21 Barb. 585; *Nichols v. Pinner*, 18 N. Y. 306; *Rawdon v. Blatchford*, 1 Sandf. Ch. 344; *Morrill v. Blackman*, 42 Conn. 324.

suppression of the truth. Every person is bound to know the law.⁵³ This general principle is not without exceptions. "Where in the making of a contract there has been a mutual mistake, or where one knows the law and knows another to be ignorant thereof fraudulently misleads him as to the legal effect of a contract, or where one who is shown to have been ignorant of the law is misled by another with whom he stands in a confidential relation, equity may give relief. In such cases he who has apparently acquired legal rights through his own fraud will not be permitted to assert them and the misrepresentations must be made good."⁵⁴ Another exception is made where the misrepresentations are respecting the laws of another state or country and these govern the parties' rights.⁵⁵

If the representations were of such a nature that they will bear either the interpretation that they were intended as a mere expression of opinion or as a statement of facts the question of the actual intention must be decided by the jury.⁵⁶ But to justify a finding that they were representations of fact they must be statements susceptible of knowledge as distinguished from matters of mere belief or opinion.⁵⁷ They must relate to

⁵³ *Burt v. Bowles*, 69 Ind. 1.

A statement of law made upon the advice of competent counsel is not fraudulent. *Donnelly v. Baltimore T. & G. Co.*, 102 Md. 1.

⁵⁴ *Martachowski v. Orawitz*, 14 Pa. Super. Ct. 175, 183, citing *Rankin v. Mortimere*, 7 Watts 372; *Tyson v. Passmore*, 2 Pa. 122, 44 Am. Dec. 181; *Light v. Light*, 21 Pa. 407; *Gross v. Leber*, 47 Pa. 520; *Whelen's App.*, 70 Pa. 410.

⁵⁵ *Travelers' Protective Ass'n v. Smith* (Ind.), 101 N. E. 817; *Wood v. Roeder*, 50 Neb. 476; *Van Slochem v. Villard*, 207 N. Y. 587.

⁵⁶ *Robertson v. Halton*, 156 N. C. 215, 37 L.R.A.(N.S.) 298; *Teague v. Irwin*, 127 Mass. 217; *Litchfield v. Hutchinson*, 117 id. 195; *Morse v. Shaw*, 124 id. 59; *American Nat. Bank v. Hammond*, 25 Colo. 367,

quoting the text; *Tuscaloosa County v. Foster*, 132 Ala. 392.

When representations of value are not treated as mere expressions of opinion, but of a fact, see *Bacon v. Frisbie*, 15 Hun 56; *Nowlin v. Snow*, 40 Mich. 699; *Dwight v. Chase*, 3 Ill. App. 67; *Medbury v. Watson*, 6 Mete. (Mass.) 246.

⁵⁷ *Stewart v. Puck S. Co.*, 154 Iowa 411; *Morse v. Shaw*, *Litchfield v. Hutchinson*, *supra*; *Safford v. Grout*, 120 Mass. 20; *Nounnan v. Sutter County L. Co.*, 81 Cal. 1, 6 L.R.A. 219; *Williams v. McFadden*, 23 Fla. 143, 11 Am. St. 345; *Parker v. Moulton*, 114 Mass. 99, 19 Am. Rep. 315; *Scholfield G. & P. Co. v. v. Scholfield*, 71 Conn. 1; *Warner v. Benjamin*, 89 Wis. 290; *Sheldon v. Davidson*, 85 Wis. 138.

An opinion falsely expressed,

material facts and have been relied upon.⁵⁸ What facts are material is matter of law. A misrepresentation of such facts may induce a party to enter into a contract when he would not have entered into it if he had known the truth; or the falsehood may have had the effect of enhancing the price, or subjecting him to some specific loss on some detail of the transaction. The nature and effect of the representations in these aspects will be important on the question of damages.⁵⁹ It is not necessary that they be the sole inducements to the act of the injured party from which the injury arises.⁶⁰ "It is enough to entitle a plaintiff to recover if the false representation complained of was a material inducement to the contract or transaction which occasioned the injury, although there may have been other co-operating inducements."⁶¹ It has been held that where misrepresentations made by a seller are shown to be material and false it is for him to prove that the buyer did not rely upon them and that without them the purchase would have been made.⁶²

§ 1168. **Same subject; reliance upon representations.** It is a question of some importance in all such cases whether the injured party relied upon the representations, was negligent in

with intent to defraud, may, in special cases, where there is a disparity of knowledge and the parties do not stand on a basis of equality be actionable. See *Hedin v. Minneapolis, M. & S. Inst.*, 62 Minn. 146, 54 Am. St. 628, 35 L.R.A. 417; *Vilett v. Moler*, 82 Minn. 12.

⁵⁸ *Security Sav. Bank v. Smith*, 144 Iowa 203; *Macleay v. Tait*, (1906) App. Cas. 24; *Dobell v. Stevens*, 3 B. & C. 623; *Bower v. Fenn*, 90 Pa. 359, 35 Am. Rep. 662; *Markel v. Moudy*, 11 Neb. 213; *McAleer v. Horsey*, 35 Md. 439; *Stafford v. Maus*, 38 Iowa 133; *Crosland v. Hall*, 33 N. J. Eq. 111; *Stout v. Merrill*, 35 Iowa 47; *Matlock v. Reppy*, 47 Ark. 148, 165; *Enfield v. Colburn*, 63 N. H. 218; *Dady v. Condit*, 163 Ill. 511; *Wimer v.*

Smith, 22 Ore. 469; *Upton v. Levy*, 39 Neb. 331; *American Nat. Bank v. Hammond*, 25 Colo. 367; *Dorr v. Cory*, 108 Iowa 725.

⁵⁹ *Hodges v. Smith*, 159 N. C. 525; *Crater v. Binninger*, 33 N. J. L. 513, quoted from in § 1165; *Shaw v. Gilbert*, *infra*.

⁶⁰ *Shaw v. Stine*, 8 Bosw. 157; *Hubbard v. Weare*, 79 Iowa 678; *Dashiel v. Harshman*, 113 Iowa 283; *Handy v. Waldron*, 19 R. I. 618.

⁶¹ *Sioux Nat. Bank v. Norfolk State Bank*, 5 C. C. A. 448, 56 Fed. 139; *Safford v. Grout*, 120 Mass. 20; *Matthews v. Bliss*, 22 Pick. 48; *Cooley on Torts* (2nd ed.), 587; *Shaw v. Gilbert*, 111 Wis. 165.

⁶² *Fishback v. Miller*, 15 Nev. 428.

not availing himself of other means of information and whether he exercised due caution in acting upon the representations, and this is generally for the jury.⁶³ If the facts are unknown to him and he has not equal means of knowing the truth there is no legal duty not to rely on the statements of the other party made as of his own knowledge.⁶⁴ Representations concerning the size of lots, the number of acres in a tract of land, the boundaries and title thereto may be relied upon; the party negotiating for the purchase of either need not consult the official records.⁶⁵ In Illinois it was held that where the land

⁶³ *Beach v. Beach*, 160 Iowa 346, 46 L.R.A. (N.S.) 98; *Thomson v. Pentecost*, 206 Mass. 505; *Peabody v. Whitcomb*, 195 Mass. 330; *Andrews v. Brace*, 154 Mich. 126; *Brown v. South Joplin L. & Z. M. Co.*, 194 Mo. 681; *Henn v. Douglass*, 147 App. Div. (N. Y.) 473; *Roberts v. Plaisted*, 63 Me. 335; *Savage v. Stevens*, 126 Mass. 207; *Greene v. Hallenback*, 24 Hun 116; *Handy v. Waldron*, 18 R. I. 618; *Brady v. Finn*, 162 Mass. 260.

⁶⁴ *Id.*; *Spreckels v. Gorrill*, 152 Cal. 383; *Neher v. Hansen*, 12 Cal. App. 370; *Water Com'rs v. Robbins*, 82 Conn. 623; *Holmes v. Rivers*, 145 Iowa 702; *Abmeyer v. First Nat. Bank*, 76 Kan. 877; *Garr v. Alden*, 139 Mich. 440; *Wooddy v. Benton W. Co.*, 54 Wash. 124, 132 Am. St. 1102; *Bonness v. Felsing*, 97 Minn. 227, 114 Am. St. 707; *Stearns v. Kennedy*, 94 Minn. 439; *Hines v. Royce*, 127 Mo. App. 718; *Helms v. Holton*, 152 N. C. 587; *Stickel v. Atwood*, 25 R. I. 456; *Lunscheon v. Wocknitz*, 21 S. D. 285; *Western Cottage P. & O. Co. v. Anderson*, 45 Tex. Civ. App. 513; *Wilson v. Clark*, 63 Wash. 136; *Simons v. Cissna*, 52 Wash. 115; *Godfrey v. Olson*, 68 Wash. 59; *Gray v. Reeves*, 69 Wash. 374 (the personal relations of the parties are a large factor in deter-

mining whether reliance is justifiable); *Baker v. Becker*, 153 Wis. 369; *Tyner v. Cotter*, 67 Wis. 482; *Johnson v. Gavitt*, 114 Iowa 183; *Speed v. Hollingsworth*, 54 Kan. 436; *Daiker v. Strelinger*, 28 App. Div. (N. Y.) 220; *Stewart v. Wyoming C. Co.*, 128 U. S. 383, 32 L. ed. 439; *Tacoma v. Tacoma L. & W. Co.*, 17 Wash. 458, 473; *Olcott v. Bolton*, 50 Neb. 779; *Norman v. Harrington*, 118 Mich. 623; *Krause v. Busacker*, 105 Wis. 350; *Van Velsor v. Seeberger*, 59 Ill. App. 322; *Rothmiller v. Stein*, 9 N. Y. Misc. 167; *Fargo G. & C. Co. v. Fargo G. & E. Co.*, 4 N. D. 219, 37 L.R.A. 593, citing many cases; *Roberts v. Holliday*, 10 S. D. 576; *Gunther v. Ullrich*, 82 Wis. 222, 33 Am. St. 32; *Chase v. Rusk*, 90 Mo. App. 25.

⁶⁵ *Morris v. Courtney*, 120 Cal. 63; *Miller v. Wissert*, 38 Okla. 808; *Eichelberger v. Mills L. & W. Co.*, 9 Cal. App. 628; *Boddy v. Henry*, 126 Iowa 31; *Judd v. Waiker*, 215 Mo. 312, disapproving *Mires v. Summerville*, 85 Mo. App. 183, 114 id. 128; *Sipola v. Winship*, 74 N. H. 240; *Curtley v. Security Sav. Soc.*, 46 Wash. 50; *Lawson v. Vernon*, 38 Wash. 422, 107 Am. St. 880; *Porter v. Fletcher*, 25 Minn. 493; *Hook*

relative to which the representations were made was only six miles away the plaintiff had a right to rely on them; ⁶⁶ and so in Massachusetts where the matters were peculiarly, though not exclusively, within the knowledge of the defendant. ⁶⁷ The purchaser of an interest in goods may rely on the seller's representations that he is their owner and is not negligent if he fails to test their correctness. ⁶⁸ The court say: "We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood." ⁶⁹ But this rule has no application if the means of knowledge are at hand. "Where means of knowledge are at hand and equally available to both parties, and the subject of the purchase is equally open to their inspection, if the purchaser does not avail himself of those means and opportunities he will not be heard to say, in impeachment of the contract of sale, that he was drawn into it by the vendor's misrepresentations." ⁷⁰ Making an unhampered investigation precludes the statement that reliance was made upon the representations; ⁷¹ but it is otherwise where there has

v. Bowman, 42 Neb. 80, 47 Am. St. 691.

Mere knowledge of the boundaries of a tract of land which was irregular in shape does not relieve the defendant from responsibility for his false and fraudulent representations in reference to its area if that could only be ascertained by actual survey. Cawston v. Sturgis, 29 Ore. 331; Ledbetter v. Davis, 121 Ind. 119.

⁶⁶ Nolte v. Reichelm, 96 Ill. 425.

⁶⁷ Nowlan v. Cain, 3 Allen 261.

See Brady v. Finn, 162 Mass. 260.

⁶⁸ Hale v. Philbrick, 42 Iowa 81.

⁶⁹ Bondurant v. Crawford, 22 Iowa 40; Van Epps v. Harrison, 5 Hill 63; Bank v. Hiatt, 58 Cal. 234; Cottrill v. Krum, 100 Mo. 397, 18 Am. St. 556; Speed v. Hollingsworth, 54 Kan. 436; Griffin v. Lumber Co., 140 N. C. 514, 6 L.R.A. Suth. Dam. Vol. IV.—46.

(N.S.) 463; Steen v. Weisten, 51 Ore. 473. See Eastern T. & B. Co. v. Cunningham, 103 Me. 455.

⁷⁰ Conta v. Corgiat, 74 Wash. 28; Woodson v. Winchester, 16 Cal. App. 472; Mabardy v. McHugh, 202 Mass. 148, 23 L.R.A.(N.S.) 487, 132 Am. St. 484; Pigott v. Graham, 48 Wash. 348, 14 L.R.A.(N.S.) 1176; Slaughter v. Gerson, 13 Wall. 383, 20 L. ed. 628; Farr v. Peterson, 91 Wis. 182; Mamlock v. Fairbanks, 46 Wis. 415, 32 Am. Rep. 716; Brown v. Leach, 107 Mass. 368. Compare Cottrill v. Krum, *supra*. See Muller v. Rosenblath, 157 App. Div. (N. Y.) 513.

⁷¹ Pittsburg L. & T. Co. v. Northern Cent. L. Ins. Co., 140 Fed. 888; Slaughter v. Gerson, 13 Wall. 379, 20 L. ed. 627; Southern D. Co. v. Silva, 125 U. S. 247, 31 L. ed. 678;

been activity in concealing the facts, thwarting investigation and inquiry and misrepresenting the significance of conditions open to observation.⁷² Constructive notice by the record of a mortgage will not deprive a purchaser of the right to rely on the vendor's positive statements, fraudulently made, that the property is unincumbered, nor will it prevent him from suing for the false representations.⁷³ These may be shown though the parties contracted in writing and concerning a matter within the statute of frauds, and the writing is silent on the subject of the representations.⁷⁴ The action will lie for false and fraudulent representations whether there is a warranty or not,⁷⁵ and though the vendor expressly refused to give a deed with covenants.⁷⁶ And damages for such fraud may be recovered whether the agreement is rescinded or not.⁷⁷ It is enough if the representations constitute a material, though they are not the sole, inducement to the action taken.⁷⁸

§ 1169. Same subject; defendant's belief in representations. To constitute a basis for damages the representations must not only be false, but fraudulent. If the person making the representations which are material and which he intends shall

Farrar v. Churchill, 135 U. S. 609, 34 L. ed. 246; *Smith v. Curran*, 138 Fed. 150, citing cases.

⁷² *Tooker v. Alston*, 16 L.R.A. (N.S.) 818, 86 C. C. A. 425, 159 Fed. 599.

⁷³ *Rollins v. Quimby*, 200 Mass. 162; *West v. Wright*, 98 Ind. 335; *Weber v. Weber*, 47 Mich. 569; *Carpenter v. Wright*, 52 Kan. 221; *David v. Park*, 103 Mass. 501; *Bristol v. Braidwood*, 28 Mich. 195; *Babcock v. Case*, 61 Pa. 247.

⁷⁴ *Nowlan v. Cain*, 3 Allen 261; *Lumin v. Port Deposit, etc. Ass'n*, 49 Md. 233, 33 Am. Rep. 246; *Dobbell v. Stevens*, 3 B. & C. 623.

⁷⁵ *Needham v. Halverson*, 22 N. D. 594; *Walton v. Jordan*, 23 Ga. 420; *Cravens v. Gant*, 4 T. B. Mon. 126, 2 id. 117. See *Van Vleet v. McLean*, 23 Hun 207.

⁷⁶ *Tyner v. Cotter*, 67 Wis. 482; *Haight v. Hayt*, 19 N. Y. 464.

⁷⁷ *Warren v. Cole*, 15 Mich. 265; *Mullen v. Old Colony R. Co.*, 127 Mass. 86, 34 Am. Rep. 349; *Dayton v. Monroe*, 47 Mich. 193; *Krumm v. Beach*, 25 Hun 293, 96 N. Y. 398; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Allaire v. Whitney*, 1 Hill 484; *Whitney v. Allaire*, 1 N. Y. 305; *Ely v. Mumford*, 47 Barb. 629; *Sollund v. Johnson*, 27 Minn. 455; *Miller v. Barber*, 66 N. Y. 558; *Merrill v. Nightingale*, 39 Wis. 237, 20 Am. Rep. 42; *Gustafson v. Rustemeyer*, 70 Conn. 125, 66 Am. St. 92, 39 L.R.A. 644; *Pryor v. Foster*, 130 N. Y. 171.

⁷⁸ *Darlington v. Gates L. Co.*, 151 Wis. 461.

influence another knows them to be false the case is clear.⁷⁹ Some question has been raised whether positive representations made without knowledge and believed to be true by the party making them will sustain an action in the nature of deceit for damages. But the doctrine which seems supported by the preponderance of authority is that if a person states as of his own knowledge material facts which are susceptible of verification to one who relies and acts upon them as true it is no defense to an action for deceit, if the representations are false, that the person making them believed them to be true.⁸⁰ The falsity and

⁷⁹ *Ginn v. Almy*, 212 Mass. 486, *Van Slochem v. Villard*, 207 N. Y. 587; *Rollins v. Quimby*, 200 Mass. 162; *Page v. Bent*, 2 Mete. (Mass.) 374; *Goring v. Fitzgerald*, 105 Iowa 507; *Bank v. Byers*, 139 Mo. 627.

⁸⁰ *Spreckels v. Gorrill*, 152 Cal. 383; *Water Com'rs v. Robbins*, 82 Conn. 623; *Crane v. Schaefer*, 140 Ill. App. 647; *Smith v. Packard*, 152 Iowa 1; *Eastern T. & B. Co. v. Cunningham*, 103 Me. 455; *Montgomery D. & S. Co. v. Atlantic L. Co.*, 206 Mass. 144; *Aldrich v. Scribner*, 154 Mich. 23; *Leach v. Bond*, 129 Mo. App. 315; *White v. Reitz*, 129 Mo. App. 307; *Bauer v. Taylor*, 4 Neb. (Unof.) 710; *Hitchcock v. Gothenburg W. P. & I. Co.*, 4 Neb. (Unof.) 620; *Robertson v. Halton*, 156 N. C. 215, 37 L.R.A.(N.S.) 298; *Barday v. Deyerle*, 53 Tex. Civ. App. 236; *Western Cottage P. & O. Co. v. Anderson*, 45 Tex. Civ. App. 513; *Oneal v. Weisman*, 39 Tex. Civ. App. 592; *West v. Carter*, 54 Wash. 236, citing the text; *Helberg v. Hosmer*, 143 Wis. 620; *Gibbens v. Bourland*, — Tex. Civ. App. —, 145 S. W. 274; *Godfrey v. Olson*, 68 Wash. 59; *Tuscaloosa County v. Foster*, 132 Ala. 392; *Chase v. Rusk*, 90 Mo. App. 25; *Live Stock R. Co. v. White*, id. 498; *West v. Wright*, 98 Ind. 335; *Hol-*

comb v. Noble, 69 Mich. 396; *Totten v. Burhans*, 91 Mich. 495; *Bird v. Kleiner*, 41 Wis. 134; *Cotzhause v. Simon*, 47 id. 103; *Bower v. Fenn*, 90 Pa. 359, 35 Am. Rep. 662; *Snyder v. Findley*, 1 N. J. L. 48; *Buford v. Caldwell*, 3 Mo. 477; *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *Hamilton v. Billingsley*, 37 Mich. 107; *Baughman v. Gould*, 45 id. 481; *Beebe v. Knapp*, 28 Mich. 53; *Bankhead v. Alloway*, 6 Cold. 56; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313; *Wheelden v. Lowell*, 50 Me. 499; *Thomas v. McCann*, 4 B. Mon. 601; *Boyd v. Browne*, 6 Pa. 310; *Lockridge v. Foster*, 5 Ill. 56; *Van Arsdale v. Howard*, 5 Ala. 596; *Munroe v. Pritchett*, 16 id. 785, 50 Am. Dec. 203; *Parham v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403; *Phillips v. Jones*, 12 Neb. 213; *Bank v. Hiatt*, 58 Cal. 234; *Taylor v. Leith*, 26 Ohio St. 428; *Duff v. Williams*, 85 Pa. 490; *Dunn v. White*, 63 Mo. 181; *Wharf v. Roberts*, 88 Ill. 426; *McCord-C. C. Co. v. Levi*, 21 Tex. Civ. App. 109; *Johnson v. Gulick*, 46 Neb. 817, 50 Am. St. 629; *Cawston v. Sturgis*, 29 Ore. 331; *Burke v. Milwaukee, etc. R. Co.*, 83 Wis. 410; *Krause v. Busacker*, 105 Wis. 350; *Lehigh Z. & I. Co. v. Bamford*, 150 U. S. 665, 37 L. ed. 1215;

fraud consist in representing that he knows the facts to be true of his own knowledge when he has not such knowledge.⁸¹ The rule has been applied to an action for deceit against a bank director for falsely stating the financial condition of the corporation.⁸² For false warranty an action in tort for damages will lie, and according to the general course of decision it is not necessary to allege or prove that the defendant knew the warranty to be false.⁸³ After full discussion and great conflict of judicial opinion the house of lords has established this rule for the English courts: A false statement made through carelessness and without reasonable ground for believing it to be true may be evidence of fraud, but does not necessarily amount to that. If made in the honest belief that it is true it is not fraudulent and does not support an action for deceit.⁸⁴ This case and other cases in England make it clear that mere ignorance, negligence or stupidity on the part of the person making the representations does not constitute fraud if he intends honestly to tell the truth, although his statements, understood

Browning v. National Capital Bank, 13 App. Cas. (D. C.) 1; *Gunther v. Ullrich*, 82 Wis. 222, 33 Am. St. 32; *McCready v. Phillips*, 56 Neb. 446.

⁸¹ *Vincent v. Corbett*, 94 Miss. 46, 21 L.R.A.(N.S.) 85; *Howe v. Martin*, 23 Okla. 561, 138 Am. St. 840; *Lawson v. Vernon*, 38 Wash. 422, 107 Am. St. 880, citing the text; *Steckbauer v. Leykom*, 130 Wis. 438; *Litchfield v. Hutchinson*, 117 Mass. 195; *Page v. Bent*, 2 Mete. (Mass.) 371; *Stone v. Denny*, 4 id. 151; *Milliken v. Thorndike*, 103 Mass. 382; *Fisher v. Mellen*, id. 503; *Scholfield G. & P. Co. v. Scholfield*, 71 Conn. 1, 19; *Chatham F. Co. v. Moffatt*, 147 Mass. 403, 9 Am. St. 727.

⁸² *Gerner v. Mosher*, 58 Neb. 135, 46 L.R.A. 244. Two judges dis-sented.

⁸³ *Williamson v. Allison*, 2 East 446; *Fowler v. Abrams*, 3 E. D. Smith 1; *Carter v. Glass*, 44 Mich.

154, 38 Am. Rep. 240; *Shippen v. Bowen*, 122 U. S. 575, 30 L. ed. 1172.

⁸⁴ *Derry v. Peek*, 14 App. Cas. 337, reversing *Peek v. Derry*, 37 Ch. Div. 541. The facts were that a statute incorporating a tramway company provided that the carriages which should be run on the tramway might be moved by animal power, and, with the consent of the board of trade, by steam power. The defendant issued a prospectus which stated that by the statute the company had the right to use steam power instead of animals. Plaintiff took shares in reliance upon that statement. Consent to the use of steam was refused, and the company was subsequently wound up. See *Angus v. Clifford*, [1891] 2 Ch. 449, 38 Am. & Eng. Corp. Cas. 79; *High v. Berret*, 148 Pa. 261; *White v. Sage*, 19 Ont. App. 135; *Donnelly v. Baltimore T. & G. Co.*, 102 Md. 1.

according to their seeming meaning, may be ever so misleading. In this particular there are American decisions of similar import.⁸⁵ A majority of the judges in Massachusetts have held that the language of a letter which is the basis of an action for deceit may be shown by the defendant not to mean what the plaintiff contends, and that the writer of it did not intend to state anything falsely.⁸⁶ In Iowa, though equity will relieve against false representations innocently made, the law will not afford relief on the ground of false and fraudulent representations unless it be shown that they were made with knowledge that they were false or under circumstances from which the existence of such knowledge will be inferred.⁸⁷ In New York the rule is that actionable deceit cannot be practiced without an actual intention to deceive. While there must be furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not and it is untrue, he is guilty of falsehood even if he believes it to be true, and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud.⁸⁸ In Illinois knowledge of the falsity of

⁸⁵ *Pittsburg L. & T. Co. v. Northern Cent. L. Ins. Co.*, 140 Fed. 886; *Nash v. Minnesota T. I. & T. Co.*, 163 Mass. 574, 47 Am. St. 489, 28 L.R.A. 753, citing *Tryon v. Whitmarsh*, 1 Metc. (Mass.) 1, 35 Am. Dec. 339; *Page v. Bent*, 2 Metc. (Mass.) 371; *Pearson v. Howe*, 1 Allen 207; *King v. Eagle Mills*, 10 Allen 548; *Hartford L. S. Ins. Co. v. Matthews*, 102 Mass. 221; *Fisher v. Mellen*, 103 Mass. 503; *Chatham F. Co. v. Moffatt*, 147 Mass. 403, 9 Am. St. 727; *Holst v. Stewart*, 154 Mass. 445. See cases cited *infra* and *Adams v. Collins*, 196 Mass. 422.

⁸⁶ *Nash v. Minnesota T. I. & T.*

Co., *supra*. Field, C. J., and Holmes, J., dissented.

⁸⁷ *Beach v. Beach*, 160 Iowa 346, 46 L.R.A.(N.S.) 98; *Hubbard v. Weare*, 79 Iowa 678; *Boddy v. Henry*, 113 Iowa 462, and cases cited; *Security Sav. Bank v. Smith*, 144 Iowa 203; *Snyder v. Stemmons*, 151 Mo. App. 156.

⁸⁸ *Hadcock v. Osmer*, 153 N. Y. 604, citing *Kountze v. Kennedy*, 147 N. Y. 124, 49 Am. St. 651, 29 L.R.A. 360; *Marsh v. Falker*, 40 N. Y. 562, 573; *Bennett v. Judson*, 21 id. 238. To the same effect, *Van Pub. Co. v. Westinghouse, etc. Co.*, 72 App. Div.

statements made is necessary to constitute fraud.⁸⁹ In some other states the representations must have been made with knowledge that they were false or made positively or recklessly without such knowledge.⁹⁰ The concealment of a material fact may amount to fraud regardless of the existence of the intent to deceive.⁹¹

§ 1170. **Same subject; representations need not be made to plaintiff.** It is not necessary that the false representations be made to deceive the plaintiff in particular, nor that the deceiving party obtain for himself the benefit he intended as the result of the deception.⁹² C. made a sale of what purported to be certificates of stock in an incorporated company organized for the manufacture of artificial stone. He was aided in making it by circulars, made by the defendants as the officers of the supposed company, falsely stating its incorporation, purposes and prospects. In an action brought by the purchaser against these officers for these misrepresentations, contributing to deceive the plaintiff and to induce him to make the purchase in the belief, contrary to the fact, that such company had a lawful existence, and for assuming to be and to act as the officers of a duly incorporated company and in issuing certificates of capital stock it was held that they were liable for the damages he thereby sustained though they had no intent to defraud him in particular. And it was held, also, that it was not necessary to show that they were interested in the sale.⁹³ Where a member of a firm made to a mercantile agency statements, known by him to be false, as to the capital invested in the firm business, with the intent that they should be communicated to persons inter-

(N. Y.) 121. See *Kramer v. Bjerum*, 19 App. Div. (N. Y.) 432.

⁸⁹ *Dickinson v. Atkins*, 100 Ill. App. 401.

⁹⁰ *Northwestern S. S. Co. v. Dexter Horton & Co.*, 29 Wash. 565; *Martin v. Eagle D. Co.*, 41 Ore. 448; *Mueller F. Co. v. Cascade F. Co.*, 76 C. C. A. 286, 145 Fed. 596; *Hartford L. Ins. Co. v. Hope*, 40 Ind. App. 354.

⁹¹ *Weikel v. Sterns*, 142 Ky. 513, 34 L.R.A.(N.S.) 1035.

⁹² *Hindman v. First Nat. Bank*, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931; *Keeler v. Seaman*, 47 N. Y. Misc. 292.

⁹³ *Fenn v. Curtis*, 23 Hun 384; *Hubbard v. Briggs*, 31 N. Y. 518; *Mead v. Mali*, 15 How. Pr. 347; *Cross v. Sackett*, 6 Abb. Pr. 247; *Scott v. Dixon*, 29 L. J. (Ex.) 62.

ested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits with and to defraud such persons, and such statements were communicated to one who, in reliance thereon, sold goods to the firm upon credit, it was held that an action for deceit could be maintained by such vendor against the partner who made such representations.⁹⁴ Chancellor Walworth said upon this point: "It is not necessary that the defendant should have had any particular individual in view as the person who was to be defrauded." And again: "Where a party plans a deliberate fraud and furnishes the means to another to carry that plan into effect upon some one of a particular class of persons, * * * it is idle to contend that he is not answerable for the consequences because he did not know upon what particular individual of the class the fraud would be perpetrated."⁹⁵ "A representation made to one person with the intention that it shall reach the ears of another and be acted upon by him to his injury gives the person so acting upon it the same right to relief or redress as if it had been made to him directly."⁹⁶

A corporation may sue for false representations made to its promoters in order to induce them to proceed to its organization with a view of making a contract with the person who made such representations.⁹⁷ Where the false and fraudulent misrepresentations consisted of published statements, reports and advertisements made by the directors of a bank, the court said that any person who saw and relied upon them and was damaged had a right of action against the directors.⁹⁸ But

⁹⁴ *Eaton, etc. Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389; *Bliss v. Sickles*, 142 N. Y. 647; *Tindle v. Birkett*, 171 N. Y. 520, 89 Am. St. 822; *Mashburn & Co. v. Dannenberg Co.*, 117 Ga. 567.

⁹⁵ *Kuelling v. Lean Mfg. Co.*, 183 N. Y. 78, 2 L.R.A.(N.S.) 303; *Benedict v. Guardian T. Co.*, 91 App. Div. (N. Y.) 103; *Mullen v. Eastern T. & B. Co.*, 108 Me. 498; *Addington v. Allen*, 11 Wend. 374; *Carvill v. Jacks*, 43 Ark. 454; *Haddock v. Os-*

mer, 153 N. Y. 604; *Parsons v. Johnson*, 28 App. Div. (N. Y.) 1; *Swift v. Winterbotham*, L. R. 8 Q. B. 253.

⁹⁶ *Painter v. Lebanon L. Co.*, 164 Mich. 260; *Ettlinger v. Weil*, 94 App. Div. (N. Y.) 291; *Puffer v. Welch*, 144 Wis. 506; *Henry v. Dennis*, 95 Me. 24, 85 Am. St. 365.

⁹⁷ *Scholfield G. & P. Co. v. Scholfield*, 71 Conn. 1.

⁹⁸ *Stuart v. Bank*, 57 Neb. 569, citing *Merchants' Nat. Bank v. Thoms*, 28 Weekly L. Bul. 164 (Cin-

this doctrine does not extend to a bank which discounts a note upon the security of shares in a bank the directors of which have published false and fraudulent statements concerning its condition, the discount being made on the faith of such statements, so as to make the bank they represented liable to the discounting bank. The reports made in this case, as in the cases of a somewhat similar nature cited elsewhere,⁹⁹ were made pursuant to the national bank statute. For that reason the court said the conclusion was irresistible that the statute in requiring such reports as were made, contemplated merely the persons who deal with the bank as a financial institution; that the reports are directed to them, and they only can recover. Dealers in the stock of the bank and holders of it as collateral are not privy to the reports, and, if deceived or misled by them, cannot recover against the bank.¹ Misrepresentations made to an officer concerning the deposits of an insurance company in the bank managed by the persons who made the misrepresentations, whereby such officer licenses such company to do business, does not make the bank liable to a third person who was induced to purchase shares in the company by reason of the license.²

§ 1171. **The measure of damages; general rule.** Following the principle that the recovery should be commensurate with the injury, if one is fraudulently induced to enter into a contract or pursue a course of action from which expenditures have naturally succeeded or in consequence of which he has

einnati Super. Ct.); *Prewitt v. Trimble*, 92 Ky. 176, 36 Am. St. 586; *Tate v. Bates*, 118 N. C. 287, 54 Am. St. 719; *Graves v. Lebanon Nat. Bank*, 10 Bush 23, 19 Am. Rep. 50; *Seale v. Baker*, 70 Tex. 283; *Westervelt v. Demarest*, 46 N. J. L. 37, 50 Am. Rep. 400. To the same effect is *Exchange Bank v. Gaitskill*, 18 Ky. L. Rep. 532.

⁹⁹ § 1165.

¹ *Merchants' Nat. Bank v. Armstrong*, 65 Fed. 932. See *Peek v. Gurney*, L. R. 13 Eq. 79, L. R. 6 H.

of L. 377; *Hunnewell v. Duxbury*, 154 Mass. 286, 13 L.R.A. 733; *First Nat. Bank v. Sowles*, 46 Fed. 731.

² *Hindman v. First Nat. Bank*, 86 Fed. 1013. See case on appeal, 39 C. C. A. 1; *Wells v. Cook*, 16 Ohio St. 67; *Ware v. Brown*, 2 Bond 268, Fed. Cas. No. 17,170; *Hunnewell v. Duxbury*, 154 Mass. 286, 13 L.R.A. 733. Compare *State v. Fox*, 79 Md. 514, 527, 47 Am. St. 424, 24 L.R.A. 679 (stated in § 1176), and cases therein cited.

been compelled to pay money or devote his time, the expenditures, with interest thereon, and the loss of time will be elements of damage.³ In so far as any advantage resulted to the plain-

³ *Barron Est. Co. v. Woodruff Co.*, 163 Cal. 566, 42 L.R.A.(N.S.) 125; *Kearney v. Davin*, 162 Ill. App. 37; *Timmerman v. Whiting*, 118 Minn. 398; *Hanly v. Street*, 169 Mo. App. 593; *Buckingham v. Thompson*, — Tex. Civ. App. —, 147 S. W. 290; *Morwick v. Walton*, 18 Manitoba 245; *Muller v. Rosenblath*, 157 App. Div. (N. Y.) 513; *Kell v. Trenchard*, 73 C. C. A. 202, 142 Fed. 16; *McRae v. Lonsby*, 64 C. C. A. 385, 130 Fed. 17; *Wilson v. New U. S. Cattle-R. Co.*, 20 C. C. A. 244, 73 Fed. 994; *Vanderbilt v. Bishop*, 188 Fed. 971; *Humburg v. Lotz*, 4 Cal. App. 438; *United States H. Co. v. O'Connor*, 48 Colo. 354; *Crane v. Schaefer*, 140 Ill. App. 647; *Kuechle v. Springer*, 145 id. 127; *Batman v. Cook*, 120 id. 203; *Hartford L. Ins. Co. v. Hope*, 40 Ind. App. 354, 1088; *Montgomery D. & S. Co. v. Atlantic L. Co.*, 206 Mass. 144; *McLain v. Parker*, 229 Mo. 68; *Brown v. Morrill*, 55 N. Y. Misc. 224; *Helms v. Holton*, 152 N. C. 587; *Sykes v. Life Ins. Co.*, 148 N. C. 13; *Caldwell v. Insurance Co.*, 140 N. C. 100; *Williams v. Detroit O. & C. Co.*, 103 Tex. 75, 52 Tex. Civ. App. 243 (denying a recovery for what the plaintiff would have received if the defendant had carried out his promise, it not appearing that the plaintiff would have obtained it but for the fraud); *Caplen v. Cox*, 42 Tex. Civ. App. 297; *Jankowsky v. Slade*, 60 Wash. 591; *Storseth v. Folsom*, 50 Wash. 456; *Lawson v. Vernon*, 38 Wash. 422, 107 Am. St. 880; *Jones v. Kinney*, 146 Wis. 130; *Wampole v. Simard*, 39 Can. Sup. Ct. 160; *Empire L. Ins. Co. v. Beaumont L.*

& B. Co. (Tex. Civ. App.), 146 S. W. 335; *Moore v. Fryman*, 154 Iowa 534; *Laubengayer v. Rohde*, 167 Mich. 605; *Charbonnell v. Seabury*, 23 R. I. 543; *Crater v. Binninger*, 33 N. J. L. 513; *Suydam v. Watts*, 4 MeLean 162; *Carvill v. Jacks*, 43 Ark. 439; *Sellar v. Clelland*, 2 Colo. 532; *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279; *Loeff v. Lawton*, 97 N. Y. 478; *Pryor v. Foster*, 130 id. 171; *Peak v. Frost*, 162 Mass. 298; *Struckmeyer v. Lamb*, 64 Minn. 57; *Gibbs v. Bank*, 4 New South Wales L. R. (law) 266; *Davis v. Davis*, 97 Mich. 419; *Nashua Sav. Bank v. Burlington E. L. Co.*, 100 Fed. 673. See § 1172.

Where the owner of lots represented to a builder who was about to contract with the purchaser of lots that they were the property of the purchaser and were not incumbered, whereas the deed had not been delivered, and when it was delivered the owner took a purchase-money mortgage, which enabled him to defeat the claim of the builder, the latter was entitled to recover the amount of his loss, and it was immaterial that such mortgage was for a less sum than the loss and that it could have been purchased by the builder. *Drenning v. Wesley*, 189 Pa. 160.

A contract of partnership was found to have been void in its inception because of the fraud of one of the partners. The award of damages included the repayment of all moneys put into the firm by the plaintiff as his portion of the capital stock and a reasonable compensation for the time he acted as a

tiff from his expenditures or efforts the liability of the defendant is mitigated.⁴ The party guilty of the fraud is to be charged with such damages as have naturally and proximately resulted therefrom.⁵ He is to make good his representations as though he had given a warranty to that effect. He is to make compensation for the difference between the real state of the case and what it was represented to be. Thus, in cases involving sales,

partner. He was also entitled to indemnity from all liability which might arise out of the business. *Richards v. Todd*, 127 Mass. 167.

One who buys the interest of his co-partner because of misrepresentations as to the indebtedness of the firm may recover the amount of it he was forced to pay in excess of the represented sum. *Pitman v. Self*, — Tex. Civ. App. —, 147 S. W. 907.

There cannot be a recovery of such expenditures as were made after the party defrauded obtained knowledge of the fraud. *Bowen v. Aetna Ins. Co.*, 160 Iowa 548.

No deduction from the expense incurred will be made because the plaintiff had the benefit of life insurance prior to bringing suit. *Briggs v. Life Ins. Co.*, 155 N. C. 73.

The liability for expenditures induced by fraud is not mitigated by a subsequent transaction between the defrauded party and a third person. *Timmerman v. Whiting*, 118 Minn. 398.

A stockholder who purposely deceives the directors of a corporation as to the surplus on hand and induces the payment of a larger dividend than would otherwise have been made must respond to the extent his dividend was increased thereby. *Salina M. Co. v. Stiefel*, 82 Kan. 7.

The expense of procuring the outstanding title to property which

was fraudulently represented to be unincumbered is the measure of the purchaser's recovery. *Van Gilder v. Bullen*, 159 N. C. 291.

The amount of an incumbrance on property represented to be unincumbered may be recovered if it is less than the value of the land. *Hahl v. Brooks*, 213 Ill. 134; *Russell v. Stoops*, 106 Md. 138; *Thomas v. Ellison*, 102 Tex. 354; *Taylor v. Hamberg*, 183 Ill. App. 241. But see *McDowell v. Volk*, 164 App. Div. (N. Y.) 311. See § 1177.

The liability of the master for the fraud of his servant is not less than that of the latter though the former made no profit out of the transaction. *Sheppard Pub. Co. v. Press Pub. Co.*, 10 Ont. L. R. 243.

There cannot be a recovery of money expended by the purchaser in improving the property before he became aware of his vendor's fraud. Having affirmed the sale by bringing his action for damages, the expenditures were made upon his own property. The fact that the vendor became the purchaser of it at a foreclosure sale does not affect his liability for such expenditure. *Krause v. Busacker*, 105 Wis. 350.

⁴ *Curtley v. Security Sav. Soc.*, 46 Wash. 50.

⁵ *Benton v. Pratt*, 2 Wend. 385; *American Nat. Bank v. Hammond*, 25 Colo. 367; *Stratton v. Meredith*, 45 Neb. 622.

leases or other like contracts, where it appears that there is a fraudulently false representation of quantity, quality, price or title the measure of damages is the difference in value between that which is actual and that which was represented to exist.⁶

⁶ *Lowe v. Hendrick*, 86 Conn. 481; *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, citing the text; *Taylor v. Hamberg*, 183 Ill. App. 241; *Burroughs v. Selleek*, 185 Ill. App. 446; *Thorp v. Hough*, 160 Iowa 694; *Stoke v. Converse*, 153 Iowa 274, 38 L.R.A.(N.S.) 465; *Ross v. Bolte*, 165 Iowa 499; *Disney v. Lang*, 90 Kan. 309; *Stroupe v. Hewitt*, 90 Kan. 200; *McDaniel v. Whalen*, 91 Kan. 488; *Epp v. Hinton*, 91 Kan. 513; *Ginn v. Almy*, 212 Mass. 486; *Emmons v. Alvord*, 177 Mass. 466; *Talbert v. Mason*, 136 Iowa 373, 14 L.R.A.(N.S.) 878; *Adams v. Burton*, 107 Me. 223; *Chapman v. Bible*, 171 Mich. 663; *Yanelli v. Littlejohn*, 172 Mich. 91; *Kaufman v. Davis*, 175 Mo. App. 470; *Smith v. Appleton*, 155 App. Div. (N. Y.) 520; *R. A. Elder & Co. v. Shoffstal*, 90 Ohio St. 265; *Patterson v. McMinn*, — Tex. Civ. App. —, 152 S. W. 223; *Smalley v. Vogt*, — Tex. Civ. App. —, 166 S. W. 1 (misrepresentation of quantity of land bought by the acre); *Hunt v. Allison*, 77 Wash. 58, citing the text; *Tooker v. Alston*, 16 L.R.A.(N.S.) 818, 86 C. C. A. 425, 159 Fed. 599; *Walker v. Walbridge*, 68 C. C. A. 569, 136 Fed. 19; *Kell v. Trenchard*, 73 C. C. A. 202, 142 Fed. 16; *Perry v. Ayers*, 159 Cal. 414; *Spreckels v. Gorrill*, 152 Cal. 383, citing the text; *McCrary v. Pritchard*, 119 Ga. 876, citing the text; *Schwitters v. Springer*, 236 Ill. 271; *Siltz v. Springer*, 236 Ill. 276; *Brier v. Mankey*, 47 Ind. App. 7; *Petrie v. Ludwig*, 41 Ind. App. 310; *Smith v. Packard*, 152 Iowa 1; *Long v.*

Davis, 136 Iowa 734; *Howerton v. Augustine*, 130 Iowa 389; *Thomson v. Pentecost*, 206 Mass. 505; *Lee v. Tarplin*, 183 Mass. 52; *Peters v. Birkett*, 153 Mich. 61; *Smith v. Werkheiser*, 152 Mich. 177, 125 Am. St. 406, 15 L.R.A.(N.S.) 1092; *Ryan v. Miller*, 236 Mo. 496; *Boyce v. Gingrich*, 154 Mo. App. 198; *Adams v. Barber*, 157 Mo. App. 370; *Lewis v. Muse*, 130 Mo. App. 194; *Benedict v. Guardian T. Co.*, 91 App. Div. (N. Y.) 103; *Robertson v. Halton*, 156 N. C. 215, 37 L.R.A.(N.S.) 298; *Page Farmers' E. Co. v. Thompson*, 20 N. D. 256; *Robertson v. Moses*, 15 N. D. 351; *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409; *Howe v. Martin*, 23 Okla. 561, 138 Am. St. 840; *Huckel v. Prettyman*, 18 Pa. Dist. 275; *Phillips v. Hebden*, 28 R. I. 1; *Pickens v. Major* (Tex. Civ. App.), 139 S. W. 1040; *Cockrell v. Ellison* (Tex. Civ. App.), 137 S. W. 150; *Linville v. Jones*, — Tex. Civ. App. —, 137 S. W. 415; *Reed v. Holway* (Tex. Civ. App.), 127 S. W. 1189; *Mills v. Knudson*, 54 Wash. 614; *Lazier v. Cady*, 44 Wash. 339; *Palmer v. Goldberg*, 128 Wis. 103; *Holmes v. Jones*, 4 Aust. Com. L. R. 1692; *Ettlinger v. Weil*, 94 App. Div. (N. Y.) 291 (misrepresentation as to rent paid for property in consequence of which it was leased); *Stoke v. Converse*, 153 Iowa 274, 38 L.R.A.(N.S.) 465, citing the text; *Wegner v. Herkimer*, 167 Mich. 587; *Gunderson v. Haran-C. M. Co.*, 22 N. D. 329, citing the text; *Mullen v. Eastern T. & B. Co.*, 108 Me. 498; *Duffy v. McKenna*, 82 N. J. L. 62; *Jones v. Holmes*, 7 New South

Nor is the obligation of the one guilty of fraud in these cases diminished, by the weight of authority, even if the other party

- Wales St. Rep. 821; Broome v. Speak (1903), 1 Ch. 586; Van de Wiele v. Garbade, 60 Ore. 585; Stone v. Pentecost, 210 Mass. 223; Matlock v. Reppy, 47 Ark. 148; Herfort v. Cramer, 7 Colo. 483; Williams v. McFadden, 23 Fla. 143, 11 Am. St. 345, quoting the text; Budlong v. Cunningham, 11 Ill. App. 28; Jackson v. Armstrong, 50 Mich. 65; Boddy v. Henry, 113 Iowa 462, 53 L.R.A. 769; Drake v. Holbrook, 23 Ky. L. Rep. 1941, quoting the text; Hindman v. First Nat. Bank, 50 C. C. A. 623, 112 Fed. 931, 57 L.R.A. 108; Shaw v. Gilbert, 111 Wis. 165, citing the text; Oehlhof v. Solomon, 73 App. Div. (N. Y.) 329; Anslyn v. Frank, 8 Mo. App. 242; Caldwell v. Henry, 76 Mo. 254; Shinnabarger v. Shelton, 41 Mo. App. 147; Krumm v. Beach, 96 N. Y. 398; Vail v. Reynolds, 118 id. 297; Lunn v. Shermer, 93 N. C. 164; Pierce v. Tiersch, 40 Ohio St. 168; Phinney v. Hubbard, 2 Wash. Terr. 369; Noyes v. Blodgett, 58 N. H. 502; Estell v. Myers, 56 Miss. 800; Gunther v. Ullrich, 82 Wis. 220; Morse v. Hutchins, 102 Mass. 459; Miller v. Barber, 66 N. Y. 558; Russell v. Clark, 7 Cranch 69, 3 L. ed. 271; Sibley v. Hulbert, 15 Gray 509; Neff v. Clute, 12 Barb. 466; Tackwell v. Lambert, 5 Cush. 23; Burpee v. Sparhawk, 97 Mass. 342; Bean v. Wells, 28 Barb. 465; Rheem v. Naugatuck W. Co., 33 Pa. 356, Platt v. Brown, 30 Conn. 336; Quimby v. Carter, 20 Me. 218; Kidney v. Stoddard, 7 Mete. (Mass.) 252; Briggs v. Brushaber, 43 Mich. 330, 38 Am. Rep. 187; Kendall v. Wilson, 41 Vt. 567; Ferris v. Comstock, 33 Conn. 513; Crosland v. Hall, 33 N. J. Eq. 111; White v. Smith, 54 Iowa 233; Mason v. Raplee, 65 Barb. 180; Clark v. Baird, 9 N. Y. 183; Clare v. Maynard, 7 C. & P. 743; Ives v. Carter, 24 Conn. 392; Campbell v. Hillman, 15 B. Mon. 508, 61 Am. Dec. 195; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172, 40 N. H. 47; Fisk v. Hicks, 31 id. 535; Carr v. Moore, 41 id. 131; Stiles v. White, 11 Mete. (Mass.) 356, 45 Am. Dec. 214; Sollund v. Johnson, 27 Minn. 455; Wright v. Roach, 57 Me. 600; Hiner v. Richter, 51 Ill. 299; Page v. Wells, 37 Mich. 415; Hamilton v. Billingsley, id. 107; Parker v. Walker, 12 Rich. 138; Foster v. Kennedy, 38 Ala. 359, 81 Am. Dec. 56; Gaulden v. Shehee, 24 Ga. 438; Warren v. Cole, 15 Mich. 265; Brown v. Woods, 3 Cold. 183; Ahrens v. Adler, 33 Cal. 608; Monell v. Colden, 13 Johns. 395, 7 Am. Dec. 390; Davis v. Elliott, 15 Gray 90; Gustafson v. Rustemeyer, 70 Conn. 125, 66 Am. St. 92, 39 L.R.A. 644, citing the text; Nysewander v. Lowman, 124 Ind. 584; Antle v. Sexton, 137 Ill. 410; Van Velsor v. Seeberger, 59 Ill. App. 322; Vivian v. Allen, 9 Colo. App. 147; Speed v. Hollingsworth, 54 Kan. 436; Exchange Bank v. Gaitskill, 18 Ky. L. Rep. 532; Hoock v. Bowman, 42 Neb. 80, 47 Am. St. 691; Parsons v. Johnson, 28 App. Div. (N. Y.) 1; King v. Mott, 37 App. Div. (N. Y.) 124; Fargo G. & C. Co. v. Fargo G. & E. Co., 4 N. D. 219, 37 L.R.A. 593, citing the text; Linerode v. Rasmussen, 63 Ohio St. 545; Martachowski v. Orawitz, 14 Pa. Super. Ct. 175; Beasley v. Swinton, 46 S. C. 426; McCord-C. C. Co. v. Levi, 21 Tex. Civ. App. 109 (compare Pruitt v. Jones, 14 Tex. Civ. App. 84; Hecht v. Metzler, 14 Utah 408,

by his own efforts, makes a profit out of the subject matter of the transaction. It is also held that interest on this difference may

60 Am. St. 906, quoting the text; *Tacoma v. Tacoma L. & W. Co.*, 17 Wash. 458, 482; *Kobiter v. Albrecht*, 82 Wis. 58; *Potter v. Neccadah L. Co.*, 105 Wis. 25; *May v. Dyer*, 57 Ark. 441; *Warner v. Benjamin*, 89 Wis. 290, citing the text; *Bank v. Byers*, 139 Mo. 627, 659; *Augur v. Smith*, 90 Tenn. 729; *Shanks v. Whitney*, 66 Vt. 405; *Nash v. Minnesota T. I. & T. Co.*, 163 Mass. 574, 47 Am. St. 489, 28 L.R.A. 753. See *Rice v. White*, 4 Leigh 474; *Hatton v. Cook*, 166 App. Div. (N. Y.) 257.

Actual and statutory damages are not both recoverable. *Galbraith v. Carmode*, 43 Wash. 456.

It is said in *Kendrick v. Ryus*, 225 Mo. 150: There is much soundness in the reasoning in *Morse v. Hutchins*, 102 Mass. 439. But for the fact that the purchaser thought he was getting a bargain he might not have made the contract at all. If by fraud and deceit he is induced to believe that he is contracting for a benefit or a bargain, and not merely swapping dollars, why shouldn't the benefits of the bargain be an element in the measure of damages in an action for fraud and deceit? Such benefit would be a matter fully contemplated by both parties. By the purchaser, because as a rule trades are not made for the purpose of merely exchanging dollars. By the seller, because he would not falsely represent the character of the property save and except to induce the purchaser to believe that he was procuring a benefit or bargain. Being, therefore, a matter fully contemplated by both parties, we are impressed with the reasonableness of the rule which allows the benefits

of the bargain as a proper element of damages in cases of fraud and deceit.

A person fraudulently induced to change his employment may recover the difference between the actual value of the new employment and what that value would have been if the representations made were true. *Thomson v. Pentecost*, 206 Mass. 505.

Where one is induced to purchase a hotel at an agreed price upon fraudulent representations as to the income, the number of rooms rented to permanent guests and the amount of rental received therefor the measure of damages is the difference between the contract price, which was the represented value, and its value at the time of the sale. *Bunck v. McAulay*, 84 Wash. 473.

One who purchases horses under a false representation as to soundness is entitled to recover the difference between the value of the horses as represented and their actual value, regardless of the fact that an advantageous disposition of the animals was subsequently made. *Stewart v. Riley & Johnson*, — Ala. —, 66 So. 488.

Where a second-hand locomotive engine was falsely represented to have been recently overhauled and repaired and to be as good as new, the purchaser may recover the reasonable cost of repairing the engine to the extent necessary to put it in the condition it was represented to be in at the time of the purchase, and the reasonable cost and expense of hiring another engine during the time of repairing, but not for the expense of altering the design of the firebox and boiler so as to comply with a law which

be added, in the discretion of the jury.⁷ No distinction is made in the application of this rule as between real and personal property.⁸ If the latter is the subject of the action its value is to be

became operative after the sale. *Kilby Locomotive & Machine Works v. D. B. Lacey & Son*, 12 Ala. App. 464.

Where houses are leased for a term under an agreement in which the landlord represents that the rents amount to a certain sum and agrees to make good any difference, if any, which exists the lessee may recover the difference between the rentals as represented and the rentals as they actually are. *Ermann v. Great Central Palace Co.* (Misc.), 151 N. Y. Supp. 481.

Where one agrees to sell an interest in a stock of merchandise at what it cost him and falsely represents the cost to the purchaser who has no reasonable means of ascertaining the falsity of the seller's statement, the measure of damages is the difference between the actual and the represented value, although the purchaser made profits from the conduct of the business and sold his interest at a profit. *Pickett v. Wren*, 187 Mo. App. 83.

A person fraudulently induced to sell his business for much less than its value by false representations as to the profits which might be made out of the business in which he invested the proceeds of that sold may recover the value of the business disposed of rather than the money paid the defendant. *Connally v. Saunders*, — Tex. Civ. App. —, 142 S. W. 975.

Where property is paid for partly in cash and partly in corporate stock falsely represented to be worth par and accepted as cash the seller may recover the difference between

its actual and its represented value. *Southern Ice Co. v. Morris*, 135 C. C. A. 319, 219 Fed. 551, aff'g 214 Fed. 168. See *Goodwin v. Dick*, 220 Mass. 556.

⁷ *Darlington v. L. Co.*, *Salzer v. Blessing*, *infra*; *Taylor v. Hamberg*, 183 Ill. App. 241; *Wright v. Roach*, 57 Me. 600; *Morse v. Hutchins*, 102 Mass. 439; *Budlong v. Cunningham*, 11 Ill. App. 28; *Snow v. Nowlin*, 43 Mich. 383; *Shaw v. Gilbert*, 111 Wis. 165, 195; *Morton v. Parker*, 17 Ohio C. C. 715. See § 354.

One who is fraudulently deprived of his money is entitled to interest from the time he was induced to part with it. *Atlantic Bank v. Harris*, 118 Mass. 147.

Interest is recoverable as a matter of law. *Steele v. Kellogg*, 163 Mich. 132.

If money is held to pay for property which the defendant unauthorizedly assumed to sell the interest recoverable cannot exceed the legal rate. *Place v. Dodge*, 54 Ill. 167.

Interest must not exceed the legal rate on the face value of the securities from the time the plaintiff obtained them. *Siltz v. Springer*, 236 Ill. 276.

The allowance of interest depends upon the equities of the case. If the vendee derives no advantage from the property while in his possession interest will be allowed almost as a matter of course. *Gray v. Reeves*, 69 Wash. 374.

⁸ *Salzer v. Blessing*, 151 Ky. 459; *Boyd v. Wahl*, 175 Mo. App. 181; *Carnahan v. Moore*, 70 Wash. 623; *Darlington v. Gates L. Co.*, 151 Wis. 461; *McDonough v. Williams*, 77

ascertained as of the time and place of the transaction; ⁹ though in Massachusetts the time favored is when the deed was delivered in pursuance of the contract.¹⁰ In New Jersey the time when the fraud ceased to be operative has been taken as the date for ascertaining the value.¹¹ In other cases it has been considered that proof of the market value of real estate need not be confined to the day on which it was transferred; proof of value within a reasonable time before and after that event may be received.¹² In some cases the price agreed to be paid for the

Ark. 261, 8 L.R.A.(N.S.) 452, citing the text; *Bridges v. Padford*, 6 Ga. App. 689; *Haldeman v. Schuh*, 109 Ill. App. 259; *Durward v. Hubbell*, 149 Iowa 722; *Holmes v. Rivers*, 145 Iowa 702; *Page v. Johnston*, 205 Mass. 274; *Painter v. Lebanon L. Co.*, 164 Mich. 260; *Knight v. Leighton*, 110 Minn. 254; *Lang v. Merbach*, 96 Minn. 431; *Stearns v. Kennedy*, 94 Minn. 439; *Hawman v. McLean*, 139 Mo. App. 429; *Dresher v. Becker*, 88 Neb. 619; *Odell v. Story*, 81 Neb. 437; *Ettliner v. Weil*, 184 N. Y. 179; *Spotten v. DeFreest*, 140 App. Div. (N. Y.) 792; *Davidge v. Guardian T. Co.*, 136 App. Div. (N. Y.) 78; *Storms v. Mundy*, 46 Tex. Civ. App. 88; *West v. Carter*, 54 Wash. 236; *Gustafson v. Rustemeyer*, 70 Conn. 125, 136, 66 Am. St. 92, 39 L.R.A. 644, citing the text; *Antle v. Sexton*, 137 Ill. 410.

An exchange of land by one who wrongfully opened a telegram making a cash offer for it, thereby securing it for less than was offered, is attended with liability for the difference between the value of the properties, and not by the difference in the value of the defendant's property and the offer made for the other in the message, there being a probability the plaintiff could have obtained full value for it. *Deighton*

v. Hover, 58 Wash. 12, 137 Am. St. 1035.

⁹ *Gaulden v. Shehee*, 24 Ga. 438; *Garstang v. Skinner*, 165 Cal. 721, citing the text; *McDonough v. Williams*, 77 Ark. 261, 8 L.R.A.(N.S.) 452; *McConnel v. Wright*, [1903] 1 Ch. 546; *Wynn v. Longley*, 31 Ill. App. 516; *Connor v. Levinson*, 115 Mich. 297.

A plea in an action to recover damages for fraud in the sale of land which alleges that the land was worthless when the plea was filed is not good. The damages must be fixed as of the date of the contract. *Tyson v. Williamson*, 96 Va. 636.

It is presumed that real estate was as represented, and the price paid is evidence of its value as it would have been if it had corresponded to the representations. *Long v. Davis*, 136 Iowa 734.

¹⁰ *Page v. Johnston*, 205 Mass. 274.

¹¹ *Smith v. Duffy*, 57 N. J. L. 679; *Duffy v. McKenna*, 82 N. J. L. 62.

¹² *Storms v. Mundy*, 46 Tex. Civ. App. 88; *Constant v. Lehman*, 52 Kan. 227.

There cannot be, in addition to the recovery stated, a further sum for losses incurred in running the business purchased, nor for time lost in leaving a former employment and

land is the basis upon which the damages will be computed.¹³ If the sale was at a certain price per acre the recovery will be proportioned to the number of acres which were not conveyed,¹⁴ based on the agreed price unless the improvements upon a particular part of it are of unusual extent and value.¹⁵ If the contract price per acre is not ascertainable the average value by the acre of the tract sold will be the basis for awarding compensation.¹⁶ But this seems to depend upon the measure of recovery for the breach of the contract. "To make the price paid, or agreed to be paid the unbending test of the value upon the supposition of the truth of the representation, would deprive the purchaser of the benefit of his bargain; while it is well established that the parties to a contract free from fraud or other objection are entitled to all the advantages they may respectively obtain by it."¹⁷ Where the title of land taken in exchange was decreed to be in a third person the plaintiff's damages were based on its reasonable market value on the day such decree was made.¹⁸ In ascertaining the value a tract of land would have had if the representation had been true it is proper to determine the average value per acre of the tract and multiply that by the number of acres which are lacking.¹⁹ If the misrepresentation is not as to the quantity of all the land sold, but as to the quantity in a particular parcel of it, the average value of the latter may be multiplied by the number of acres lacking.²⁰ In the absence of other evidence the purchaser will be entitled to a proportionate abatement of the purchase price based on the deficiency in the quantity of land conveyed.²¹ The value of the land acquired is not always regarded; the recovery is measured by the price paid for the deficient quantity. "This

entering upon such business. *Thomson v. Pentecost*, 206 Mass. 505.

¹³ *Howes v. Axtell*, 74 Iowa 400; *Morris v. Courtney*, 120 Cal. 63.

¹⁴ *Hallam v. Todhunter*, 24 Iowa 166.

¹⁵ *Lenoch v. Yoss*, 157 Iowa 314.

¹⁶ *Anderson v. Snyder*, 21 W. Va. 632.

¹⁷ *Thompson v. Bell*, 37 Ala. See

the chapter on Vendor and Purchaser.

¹⁸ *Stewart v. Jack*, 78 Iowa 154.

¹⁹ *Kelly v. Allen*, 34 Ala. 663; *Thompson v. Bell*, 37 id. 438.

²⁰ *Thompson v. Bell*, *supra*.

²¹ *Drake v. Enbanks*, 61 Ark. 120. See § 590; *Smith v. Kirkpatrick*,

79 Ga. 410.

rule enables a vendee who, relying upon the false and fraudulent representation of his vendor as to the quantity of land purchased, pays for land he does not receive, to recover the money paid on account of such fraud. It works substantial justice, and is amply supported by authority.”²²

One who has been fraudulently induced to sell goods to an insolvent may recover their fair value, including an ordinary measure of trade profit. Neither accounts for goods so sold nor notes given upon settlements thereof are material prior to the time when the vendor could demand payment. If the vendee is a corporation the vendor's claim against it upon its settlement of its affairs under an assignment for the benefit of creditors should be regarded in fixing the damages, as should the liability of responsible stockholders to whom stock has been issued without consideration, including interest on the face value of such stock.²³ A promoter who fraudulently sells property to a corporation prior to the existence of a fiduciary relation between them is liable for the secret profits made, which are to be ascertained by the difference between its market value and the value of the stock received for it. But if such a relation existed between them the rule would be the difference between the market value of the shares received and what the property cost him.²⁴ In equity the value of stock is to be ascertained as of the time it was transferred, and is not to be extended to the time when the plaintiff became entitled to its return, whether that be as of the date suit was begun or of the entry of a decree, at least where the disability to return was not the result of the defendant's act after the institution of suit.²⁵ The foregoing rule as to the rights of a vendor against a corporation and the considerations upon which damages are to be based applies in case of a recovery for fraud in selling securities that have been assigned

²² *Cawston v. Sturgis*, 29 Ore. 331, citing *Estes v. Odom*, 91 Ga. 600; *Smith v. Kirkpatrick*, 79 Ga. 410; *Tyler v. Anderson*, 106 Ind. 185; *Parker v. Walker*, 12 Rich. L. 138; *Flint v. Lewis*, 61 Ill. 299; *Hallam v. Todhunter*, 24 Iowa 166; *Sears v. Stinson*, 3 Wash. 615.

Suth. Dam. Vol. IV.—47.

²³ *Shaw v. Gilbert*, 111 Wis. 165; *McConnel v. Wright*, [1903] 1 Ch. 546, 555.

²⁴ *Old Dominion C. M. & S. Co. v. Bigelow*, 203 Mass. 159, 40 L.R.A. (N.S.) 314.

²⁵ *Stewart v. Joyce*, 205 Mass. 371.

to a third person.²⁶ If the defrauded purchaser has paid part of the consideration he is entitled to a deduction equal thereto; if he has given his note in part payment and it is not shown that it has been paid it will be presumed to have been accepted as payment.²⁷ Appreciation or depreciation in the value of the property is not an element of damage under this rule because the claim therefor rests upon the assumption that the party asking compensation would have sold when he could have realized the highest price.²⁸ A joint purchaser of property who pays more than the purchase price for his interest is entitled to the benefit of his bargain, and it is immaterial to his right to recover the excess of the price he paid over what he should have paid that the property was worth more than the represented price.²⁹ In Arkansas the defrauded party may elect to recover the difference between the actual value of the property and the price paid for it, or the value placed upon it in the transaction.³⁰ The solvent maker of a note fraudulently transferred to an innocent holder may bring suit upon the rendition of judgment against him, though it is not paid, and recover at least the amount for which judgment was rendered.³¹ The existence of a confidential relation between the parties to a fraudulent transaction may affect the measure of damages. Where one of two equal partners secured the consent of the other to the sale of the business of the firm and misrepresented the price received

²⁶ *Miller v. Zeimer*, 12 Daly 126.

²⁷ *Siltz v. Springer*, 236 Ill. 276; *Johnson v. Culver*, 116 Ind. 278. See *West Florida L. Co. v. Studebaker*, 37 Fla. 28.

An action to recover the damages resulting from fraud in obtaining goods by false representations may be brought before the maturity of a note received in payment of the goods, and the value of the latter may be recovered if it is shown the note has not been paid and its return is proffered. The decision is rested upon the theory that a cause of action for at least nominal damages arose immediately upon the

perpetration of the fraud, which was not affected by accepting the note; but the fraud abrogated the credit evidenced thereby. *Thomas v. Dickinson*, 67 Hun 350.

²⁸ *Marvin v. Prentice*, 94 N. Y. 295; *Brisbane v. Pomeroy*, 13 Daly 358; *Shaw v. Gilbert*, 111 Wis. 165, 191, citing the text; *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279; *McConnel v. Wright*, [1903] 1 Ch. 546, 554.

²⁹ *Lowe v. Hendrick*, 86 Conn. 481.

³⁰ *Matlock v. Reppy*, 47 Ark. 148, 166.

³¹ *Kitchens v. Ryner*, 8 Ga. App. 587. See § 1175.

for it the value of the property was not the determining factor in fixing the defendant's liability; the plaintiff was entitled to one-half the sum received.³² The sale of property for less than a stipulated price, contrary to a contract between the parties, involves liability for the difference between the price received and its value.³³ The difference between the rent due on property leased for a term and its rental value may be recovered by the purchaser who bought with the assurance that it was occupied by a tenant at will.³⁴

Fraud practiced on the exchange of properties must be compensated for by payment of the difference between the value of that received and that transferred.³⁵ Where a chattel was exchanged for land upon the false representation that one of the defendants was ready and anxious and financially able to purchase the land for a certain sum in cash equal to the value of the chattel the measure of damages was the difference between the value of the land and the sum for which it was to be taken off his hands.³⁶ Where a double exchange is made in pursuance of the original contract the defrauded party is not entitled to damages for each transaction, the deceit in the first exchange having been made good in the second; his recovery is measured by the difference in the value of the property ultimately and that originally received.³⁷ In some cases it has been laid down that if the parties in making an exchange have fixed the value of that transferred by the plaintiff, in the absence of any claim of fraud or mistake in doing so, such value will be accepted as the actual value of it.³⁸ This is not to be taken as precluding

³² *Finn v. Young*, 50 Wash. 543.

³³ *Cerny v. Paxton*, 78 Neb. 134, 10 L.R.A.(N.S.) 640.

³⁴ *Bridges v. Pafford*, 6 Ga. App. 689.

³⁵ *Donlon v. Evans*, 40 Minn. 501; *George v. Hessee*, 100 Tex. 44, 8 L.R.A.(N.S.) 804, 53 Tex. Civ. App. 344; *Ritko v. Grove*, 102 Minn. 312.

³⁶ *Hinchey v. Starrett*, 92 Kan. 661.

³⁷ *Robertson v. Halton*, 156 N. C. 215, 37 L.R.A.(N.S.) 298.

³⁸ *Holmes v. Rivers*, 145 Iowa 702; *Boyce v. Gingrich*, 154 Mo. App. 198; *Parsons v. Johnson*, 28 App. Div. (N. Y.) 1.

Statements as to value made by the defendant during the negotiations and the consideration expressed in the deed to the plaintiff, which the defendant witnessed and delivered, are evidence of value. *Donlon v. Evans*, *supra*.

The representations as to value made by the parties during the

an inquiry into the value,³⁹ as where the contract of exchange merely recites the agreed price.⁴⁰

The cases in which defrauded vendors have sought compensation for their wrongs are, as was said by Marshall, J., few in number. That able judge reached the conclusion, in which he was sustained by the distinguished court of which he is a member, that the same rule of damages applies in such case as where the vendee seeks redress by way of damages: the difference between the real value of the subject of the sale and what the value would have been had the representations been true, with interest in a proper case.⁴¹ In vindication of that rule the judge said: The rule of difference between the value as represented and the actual value is not universal. In many jurisdictions a less rigorous rule prevails. It can only be defended on the theory that both values are determinable to a reasonable certainty and that the difference between them is attributable to the natural and proximate result of the fraud. When we try to determine the actual value of property, taking as the standard to measure from some fictitious value, it would seem that we at once begin to wander beyond the realms of natural and proximate result and to establish a new rule difficult of application and not necessary or practical in the administration of justice. A purchaser for less than value who has given a note for the property will not be credited with its face value if he discounted it, but only with the sum paid.⁴²

For fraudulently inducing a person to purchase the note of an insolvent as good he is entitled to recover the full amount payable by its terms.⁴³ The decrease in the value of stock is the

negotiations are competent to show the estimated values placed upon the properties. *Hallam v. Todhunter*, 24 Iowa 166.

³⁹ *Knight v. Leighton*, 110 Minn. 254.

⁴⁰ *Robbins v. Selby*, 144 Iowa 407.

⁴¹ *Potter v. Necedah L. Co.*, 105 Wis. 25, citing *Burns v. Mahannah*, 39 Kan. 87; *Bench v. Sheldon*, 14 Barb. 66. To the same effect: *McMillan v. Reaume*, 137 Mich. 1, 109

Am. St. 666; *Gasser v. Wall*, 111 Minn. 6; *Ranch v. Lynch*, 4 Boyce (Del.) 446 (interest not mentioned). But see *Mountain v. Day*, 91 Minn. 249.

In such a case the damages are liquidated and interest is recoverable. *Rutherford v. Irby*, 1 Ga. App. 499.

⁴² *Eighmy v. Brock*, 126 Iowa 535.

⁴³ *Wells v. Western U. Tel. Co.*, 144 Iowa 605, 24 L.R.A. (N.S.) 1045,

measure of recovery against one who fraudulently prevents the sale of shares.⁴⁴ One who fraudulently places in circulation the negotiable instrument of another, whether made by him or by his apparent authority, and thereby renders him liable to pay the same, in the absence of special circumstances diminishing its value, is presumptively liable to the injured party for the full value thereof;⁴⁵ and for the expense incurred in the defense of an action thereon and the interest due.⁴⁶ A party who has secured the payment of a judgment by falsely representing that he owns it must refund though the judgment remains unpaid. "If the judgment creditor saw fit not to enforce his claim it would not afford any ground for defendant keeping what he had wrongfully obtained."⁴⁷ An unsatisfied judgment in *assumpsit* for money loaned does not bar an action on the case for deceit in procuring the loan; but the value of such judgment should be considered in assessing the damages in the tort action.⁴⁸ One who is induced to buy a mortgage by fraudulent representations as to the value of the property covered by it and the responsibility of the indorsers of the notes thereby secured may recover the difference between the actual value of the securities and their value as represented. But in such a case more definite and specific instructions might be given: "The rule would mean a sum equal to that portion of the mortgage debt which the securities, when properly applied thereto, will fail to pay, on the hypothesis that, if they had been as repre-

138 Am. St. 317; *Freeman v. Harbaugh*, 114 Minn. 283; *Luetzke v. Roberts*, 130 Wis. 97; *Sibley v. Hulbert*, 15 Gray 509; *Neff v. Clute*, 12 Barb. 466; *Slingerland v. Bennett*, 65 N. Y. 611. See *Clayton v. O'Connor*, 35 Ga. 193.

The recovery against the directors of an insolvent bank for false representations which induced the plaintiff to deposit money therein which he lost is measured by the amount deposited with interest thereon, less the value of his claim

after the bank's failure. *Baker v. Ashe*, 80 Tex. 356.

⁴⁴ *Fottler v. Moseley*, 185 Mass. 563.

⁴⁵ *Metropolitan E. R. Co. v. Kneeland*, 120 N. Y. 134, 8 L.R.A. 253, 47 Am. St. 619; *Jones v. Crawford*, 107 Ga. 318.

⁴⁶ *Rectenbaugh v. Northwestern Port Huron Co.*, 22 S. D. 410.

⁴⁷ *Goring v. Fitzgerald*, 105 Iowa 507.

⁴⁸ *Whittier v. Collins*, 15 R. I. 90, 2 Am. St. 879; *Merchants' Nat. Bank v. Taylor*, 66 Vt. 574.

sented, they were adequate to pay the whole debt. If the securities had been already foreclosed and applied, evidence of that fact would be pertinent and cogent to establish the actual amount of damage.”⁴⁹ The vendor of a leasehold interest who induces the landlord to take possession of land on the representation that it was included in the lease is liable for its rental value for the unexpired term.⁵⁰ One who is fraudulently induced to buy land he did not purpose to buy may recover the difference in the value of that he thought he was buying and that to which he in fact secured title.⁵¹

In an action for damages for false representations it appeared that the defendant had sold the plaintiff a lot, knowing that he intended to build a dwelling-house upon it, and had falsely represented that there was a street upon the north side of the lot; that the latter, after purchasing, erected on it a valuable house for a residence, relying upon such representations. It was held that the plaintiff was entitled to recover as special damages, in addition to the difference in the value of the lot, the difference in the market value of the house as a residence with a street as represented and without such street, it appearing that the public records did not show the condition of the property with respect to streets.⁵² A purchase was made of land lying near the city of Albany for the declared purpose of laying it out into building lots, and the vendor fraudulently represented it to be even and require no grading. The property was not adapted by location for the purpose the vendee bought it, but not having rescinded the contract of purchase on the ground of fraud he was entitled to recoup damages.⁵³

⁴⁹ *Beetle v. Anderson*, 98 Wis. 5, citing *Foster v. Taggart*, 54 Wis. 391. See *May v. Dyer*, 57 Ark. 441.

⁵⁰ *Lewis v. Richardson*, 2 Ind. Ty. 341.

⁵¹ *Smith v. Michigan R. & C. Co.*, 175 Mich. 600.

⁵² *White v. Smith*, 54 Iowa 233.

⁵³ *Van Epps v. Harrison*, 5 Hill 63. On the question of damages the court say: “The cause must, as far as practicable, be tried just as it

would have been tried the day after the contract was made if the question had arisen at that time. The jury must assume, what the parties then believed, that the land was valuable as the site of a town, and then inquire how much less the land was worth for building purposes, taking the surface as it actually existed, than it would have been worth for those purposes had the plaintiff’s representations concerning the sur-

Expenses which may be incurred in removing a house from land to which the purchaser obtained no title may be recovered though its removal may never be required.⁵⁴ Where worthless stock belonging to a stockholder is delivered, instead of treasury preferred stock which was subscribed for, as a result of the fraud of officers of a corporation, the corporation and its directors are liable for the amount paid and interest.⁵⁵

Where one, with intent to cheat and defraud another, induces him by fraudulent means and representations to purchase for value stock which he knows to be worthless he is liable for the damages sustained, whether the purchase is made from him or from another. The measure is the difference between the value of the stock in accordance with the actual condition of the company issuing it and what it would be if its condition had been as the purchaser was fraudulently induced to believe.⁵⁶ In estimating that value the good will of the corporation is a factor.⁵⁷ The market price of the stock about the time of or soon after the purchase is strong evidence of its value,⁵⁸ and in the absence of other proof will control.⁵⁹ But where the real pecuniary condition of the company is shown and it appears that the stock was worthless such market price is entitled to no weight upon the question of value. The purchaser after discovery of its worthlessness is not bound to mitigate the loss by himself cheating some other ignorant purchaser.⁶⁰ Where that measure of redress is obtained the plaintiff cannot also recover assessments

face been true. One mode of arriving at the correct result, and perhaps the only one, would be to inquire into the probable expense of reducing and conforming the surface of the ground to a condition corresponding with the plaintiff's representation. This would, I think, give the correct rule of damages." *Dinwiddie v. Stone*, 21 Ky. L. Rep. 584.

⁵⁴ *Dupree v. Savage*, — Tex. Civ. App. —, 154 S. W. 701.

⁵⁵ *Chatfield v. Sintz-Wallin Co.*, 182 Mich. 689.

⁵⁶ *Neher v. Hansen*, 12 Cal. App.

370, citing the text; *Hazelton v. Carolus*, 132 Ill. App. 512; *Drake v. Holbrook*, 23 Ky. L. Rep. 1941, quoting the text.

⁵⁷ *Von Au v. Magenheimer*, 115 App. Div. (N. Y.) 84.

⁵⁸ *Warner v. Benjamin*, 89 Wis. 290, citing the text.

⁵⁹ *Hazelton v. Carolus*, 133 Ill. App. 512, quoting the text.

⁶⁰ *Hubbell v. Meigs*, 50 N. Y. 480; *Hindman v. First Nat. Bank*, 50 C. C. A. 623, 112 Fed. 931, 57 L.R.A. 108; *McConnel v. Wright*, [1903] 1 Ch. 546. See *Redding v. Godwin*, 44 Minn. 355.

paid on the stock, except so far as they were made necessary in consequence of the particular representation or representations which made the defendant liable.⁶¹ If the misrepresentation consists of a statement that the corporation whose stock was sold had acquired a valuable property the fact that it obtained it soon afterward does not defeat the action for damages unless it be shown that at the date of the sale there was but slight risk that the property would not be secured.⁶² A joint-stock company which issues certificates of shares under a forged transfer is liable to their owner to the extent of their value at the time it first refuses to recognize him as a shareholder, with interest from that time.⁶³ The same rule applies where a corporate officer unauthorizedly issues stock.⁶⁴ In an action by a corporation against the person to whom it had issued a new certificate of stock in reliance upon a forged power of attorney authorizing the transfer of it to him, the damages included the costs and expenses (except counsel fees) of a suit against the plaintiff in this action by the rightful owner of the certificate to compel the issue of new stock to replace that so transferred, the defendant in this action having failed to defend that, as he was requested to do; the amount paid by the plaintiff for stock bought in good faith to replace that transferred, including the advance in price over that prevailing when the forgery was perpetrated, also the dividends upon the stock which were necessarily paid to its rightful owner.⁶⁵ Where a stockholder was offered a cash price for his shares and another price contingent upon the year's dividends amounting to a stated sum and took the latter in reliance upon the statements of the company's officers as to its financial condition, such officers were liable for the loss sustained by the plaintiff in accepting

⁶¹ *Bowman v. Parker*, 40 Vt. 410.

⁶² *McConnel v. Wright*, *supra*.

⁶³ *In re Bahia & San Francisco R. Co.*, L. R. 3 Q. B. 583.

⁶⁴ *Allen v. South Boston R. Co.*, 150 Mass. 200, 15 Am. St. 185, 5 L.R.A. 716; *New York, etc. R. Co. v. Schuyler*, 34 N. Y. 30; *Fifth*

Ave. Bank v. Forty-second St., etc. F. R. Co., 137 N. Y. 231, 19 L.R.A. 331, 33 Am. St. 712; *Archer v. Dunham*, 89 Hun 387, *eo nomine* *Murphy v. Braker*.

⁶⁵ *Boston & A. R. Co. v. Richardson*, 135 Mass. 473.

the contingent offer, the corporation being insolvent at the time the officers made the false representations.⁶⁶

One who has accepted bonds because of false representations as to the title of real estate upon which the bonds were issued is not prevented from recovering damages according to the general rule, i. e. on the basis of the difference between the real state of the case and what it was represented to be, because the defendant has procured an assignment of the mortgage on the real estate and tendered a discharge of it to the plaintiff. The court observed: The defendant may hold and use its mortgage in any lawful way, but the plaintiffs ought not to be compelled to receive the discharge of it in mitigation of their damages after the expiration of so long a time. If the mortgage were discharged it would not, as matter of law, limit the recovery to nominal damages. If there had been no incumbrance he might long ago have sold the bonds on better terms than can be obtained now. Moreover, the commission of the fraud, if fraud is proved, was a wilful wrong, and the case is analogous to a wilful conversion of property, and an offer to return it in mitigation of damages after its condition has changed and its value has depreciated.⁶⁷ The general rule of damages is not to be varied because of the purpose for which the buyer desired the property concerning which false representations were made.⁶⁸ The damages for which a parent is liable for fraudulently representing to the woman who subsequently marries her son that he owned specific land are not measurable in favor of the wife by one-third of its present value; her inchoate right of dower may never have become consummate, and her homestead right would have ceased with her life. "Doubtless the value of the land might be considered as bearing upon the support which she

⁶⁶ Rothmiller v. Stein, 9 N. Y. Misc. 167, 143 N. Y. 581, 26 L.R.A. 148.

⁶⁷ Nash v. Minnesota T. I. & T. Co., 163 Mass. 574, 47 Am. St. 489, 28 L.R.A. 753.

As between a corporation and one of its officers who conspires to do work for it at a price in excess of

the cost thereof, the difference to be divided between the conspirators, there may be a recovery of the contract price in excess of the cost of the work. St. Paul D. Co. v. Pratt, 45 Minn. 215.

⁶⁸ Littlejohn v. Sample, 173 Mich. 419,

might reasonably have expected during life, and the society in which she might have moved, and the station in life which she might have occupied." The damages are to be found by a jury, having regard to these considerations. The trial court should indicate what might be considered as a present loss to the plaintiff by reason of the fact that her husband did not own the land, and such as the evidence shows she was reasonably certain to lose in the future, depending somewhat upon their expectancies of life, and leave it to the jury to find what will make her loss, present and prospective, good.⁶⁹ The real value of property which is sold by means of false representations as to the price paid for it is not material in an action to recover damages for the fraud. The purchaser may recover the difference between the price the vendor claimed to have paid and the price he actually paid; in other words, the purchaser had the right to the profits of his bargain.⁷⁰ A party who has been induced by fraud to execute a deed rather than a mortgage may recover his estate in the property and the rents thereof during the time he was deprived of possession, together with such other damages as were sustained; he was not also entitled to recover the value of the equity of redemption.⁷¹ The damages recoverable for fraud in a contract for the sale of property which is not rescinded by the purchaser are the difference between the actual value of the property and its value, if as represented, the depreciation in the value of the improvements, and legitimate expenditures, less the unpaid portion of the purchase price.⁷² One who is induced to release a claim for personal injuries as a result of fraudulent representations by an officer of a corporation as to his authority to contract to employ such person for life by way of settlements of his claim may recover for the loss occasioned by failure to obtain a valid contract.⁷³ Where a college falsely represents that it has authority to confer a certain degree the measure of damages is what it will cost the

⁶⁹ *Beach v. Beach*, 160 Iowa 346,
46 L.R.A. (N.S.) 98.

⁷⁰ *Pendergast v. Reed*, 29 Md. 398,
96 Am. Dec. 539; *Mason v. Thorn-*
ton, 74 Ark. 46; *Stewart v. Salis-*

bury R. & I. Co., 159 N. C. 230.

⁷¹ *Culbreth v. Hall*, 159 N. C. 588.

⁷² *Hines v. Brode*, 168 Cal. 507.

⁷³ *Pierson v. Holdridge*, 92 Kan.
365.

student in time and money to obtain such a degree, and not what he has paid out in getting the education without the degree.⁷⁴ Where a borrower of money falsely represented to the lender that he had an option to purchase a certain amount of stock in a corporation which was to be deposited as collateral when in fact he had an option for only half such amount and obtained money for the alleged purpose of completing the purchase in excess of the value of the stock the measure of damages is the difference between the value of the stock at the time of its deposit as collateral and the amount loaned with interest upon the difference from the date of the writ.⁷⁵

§ 1172. **Same subject; another rule.** Some courts, including the supreme court of the United States and the house of lords of England, hold that the damages between a defrauded purchaser and the defrauding vendor is the difference between the real value and the amount which the former was induced to pay.⁷⁶

⁷⁴ Kerr v. Shurtleff, 218 Mass. 167.

⁷⁵ McKinley v. Warren, 218 Mass. 310.

⁷⁶ Tedder v. Riggis, 65 Fla. 153; Nelson v. Gjestrum, 118 Minn. 284; International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89; Zobrist v. Estes, 65 Ore. 573; Weeks v. Stevens, — Tex. Civ. App. —, 155 S. W. 667; Sanders v. Dunn, — Tex. Civ. App. —, 158 S. W. 1041; Rosen v. Lindsay, 17 Manitoba 251; Steele v. Pritchard, id. 226; Tooker v. Alston, 16 L.R.A.(N.S.) 818, 86 C. C. A. 425, 159 Fed. 599; George v. Hesse, 100 Tex. 44, 8 L.R.A.(N.S.) 804, 123 Am. St. 772; Pickens v. Mayor, — Tex. Civ. App. —, 139 S. W. 1040; Stratton's Independence v. Dines, 68 C. C. A. 161, 135 Fed. 449; Brown v. Morrill, 55 N. Y. Misc. 224; Tompkins v. Perry (Tex. Civ. App.), 128 S. W. 1164; Syndicat Lyonnais du Klondyke v. Barrett, 36 Can. Sup. Ct. 279; Lamont v. Wenger, 22 Ont. L. R. 642;

Mountain v. Day, 91 Minn. 249; Redding v. Godwin, 44 Minn. 355; Selover v. Freeman, 111 Minn. 318; Markel v. Moudy, 11 Neb. 213; Greenwood v. Pierce, 58 Tex. 130; Atwater v. Whiteman, 41 Fed. 427; Glaspell v. Northern Pac. R. Co., 43 id. 900 (applying the rule to the Dakota code which declares that the measure of damages for the breach of an obligation not arising from contract, except where otherwise provided, is the amount which will compensate for all the detriment proximately caused thereby); Arkwright v. Newbold, 17 Ch. Div. 301; Davidson v. Tulloch, 3 Macq. 783; Twycross v. Grant, 2 C. P. Div. 469, 544; Clayton v. O'Connor, 35 Ga. 193; Hallam v. Todhunter, 24 Iowa 166; Hiner v. Richter, 51 Ill. 299; Pryor v. Foster, 130 N. Y. 171; Constant v. Lehman, 52 Kan. 227; Wallace v. Hollowell, 56 Minn. 501; Cawston v. Sturgis, 29 Ore. 331; Roberts v. Holliday, 10 S. D. 576.

Thus, in a late case in the federal supreme court, the action being in the nature of one on the case to recover damages suffered by reason of the purchase of stock in reliance on the defendant's false and fraudulent representations, the recovery was limited to the loss sustained, such as the money paid, interest thereon, and other outlays resulting from the wrong.⁷⁷ In the noted case of *Peek v. Derry*,⁷⁸ which, though reversed as to the question of fraud,⁷⁹ is apparently unaffected by such reversal as to the rule of damages, it was held that the value of shares of stock purchased under fraudulent representations should be ascertained immediately after they were procured.⁸⁰ If the company which issued them was a good one at that time and the stock had an intrinsic value, no fact subsequently occurring, otherwise than from intrinsic defects in the company, should increase the liability of its directors. But subsequent events,

⁷⁷ *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, approved in *Sigafus v. Porter*, 179 U. S. 116, 45 L. ed. 113. The same doctrine has been applied in various federal courts. *The Normannia*, 62 Fed. 469, 481; *Wilson v. New United States C. R. Co.*, 73 id. 994; *Rockefeller v. Merritt*, 76 id. 909, 22 C. C. A. 608, 35 L.R.A. 633; *Nashua Sav. Bank v. Burlington E. L. Co.*, 100 Fed. 673; *Chandler v. Andrews*, 192 id. 543; *Pittsburg L. & T. Co. v. Northern Cent. L. Ins. Co.*, 140 id. 888; *Trenchard v. Kell*, 127 id. 596, and federal case cited in preceding note. And in England, *McConnel v. Wright*, [1903] 1 Ch. 546.

Harlan, J., said in *Sigafus v. Porter*, *supra*: Substantially the same rule announced in *Smith v. Bolles* has been applied in the following cases in state courts: *Reynolds v. Franklin*, 44 Minn. 30, 20 Am. St. 540; *Redding v. Godwin*, *Wallace v. Hollowell*, *Greenwood v. Pierce*, *supra*; *Woolenslagle v. Runals*, 76 Mich. 545, 553; *Buschman v. Codd*, 52 Md. 202, 209; *Howes v. Axtell*,

74 Iowa 400; *High v. Berret*, 148 Pa. 261. See *Connors v. Chingren*, 111 Iowa 451; *Wallace v. Hollowell*, 56 Minn. 501.

In *Walker v. Walbridge*, 68 C. C. A. 569, 136 Fed. 19, a majority of the judges distinguished *Smith v. Bolles* and *Sigafus v. Porter*, *supra*, from the case in hand, in which there was a recovery of the value of land to which the defendant had no title, on the ground that, in those cases, the recovery of speculative profits was sought.

The rule has been favored where stock without market value was sold at a nominal price because the rule of the difference between its actual and its represented value would allow the recovery of speculative damages. *Findlater v. Dorland*, 152 Mich. 301.

⁷⁸ 37 Ch. Div. 541. *Johnstone v. Hall*, 10 Manitoba 161, is to the same effect.

⁷⁹ *Derry v. Peek*, 14 App. Cas. 337.

⁸⁰ *Davidson v. Tulloch*, 3 Macq. 790; *McConnel v. Wright*, *supra*.

if they show that the company was worthless, may be considered in determining the value of the stock immediately after the shares were sold. In other words, the real, and not the market, value controls in fixing the recovery. If the fraud does not extend to the whole property sold the complaining vendee whose title to a portion of it has failed may recover accordingly.⁸¹ Where the fraud is practiced by the promoters of a corporation the value of the stock sold is not uniformly fixed as of the time of the sale, especially if the purchase was made as an investment. The fraud, in such a case, has been considered operative until the purchaser learned of it; that is regarded as the time when his cause of action arose.⁸² A subsequent lienholder who has been deprived of his right to collect his debt by redemption on account of the interposition of the liens of fraudulent and simulated securities may recover the amount of his debt and expenses necessarily incurred. "The court will not consider the speculative or extra value of the land beyond this, or allow him the benefit of his bargain in addition to the recovery of his debt."⁸³

The general rule above stated is based on the assumption that the amount paid is the measure of the value as fixed by the parties; but a purchaser does not buy to sell again at the same price; and to compel him arbitrarily to accept compensation by that standard is to deprive him of such benefit of his purchase as the state of the market would have enabled him to realize if there had been no fraud.⁸⁴ As said by Mr. Justice Gray,⁸⁵ "to allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the wrong-doer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the

⁸¹ Reynolds v. Franklin, *supra*.

⁸² Goodwin v. Wilbur, 104 Ill. App. 45; Smith v. Duffy, 57 N. J. L. 679.

⁸³ Parker v. St. Martin, 53 Minn. 1.

⁸⁴ Reggio v. Braggiotti, 7 Cush. 166, 169.

⁸⁵ Morse v. Hutchins, 102 Mass. 440.

party who was ready to abide by, the terms of the contract.”⁸⁶ The amount paid is evidence of the value, but on principle and according to the general course of decision is not conclusive of the value as it was represented to be.⁸⁷ Where the subject of sale is a disputed claim worth less than its face the solvency of the debtor, the probability of its collection and the probable extent and expense of the litigation necessary to realize upon it are relevant matters.⁸⁸ The value of the property involved is to be considered in its entirety, regardless of the several elements which influenced the parties in their negotiations.⁸⁹ Proof as to the value of property sold and bought at the same time as that concerning which misrepresentations were made is not required if no misrepresentations were made respecting the former.⁹⁰

Where there is a failure of title on an exchange of property the damages are measured by the actual value of that conveyed by the defrauded party.⁹¹ One who accepts property with

⁸⁶ *Kendrick v. Ryus*, 225 Mo. 150, 135 Am. St. 585, quoting the text; *Herfort v. Cramer*, 7 Colo. 483, 491; *Krumm v. Beach*, 96 N. Y. 398; *Brisbane v. Pomeroy*, 13 Daly 358; *Gustafson v. Rustemeyer*, 70 Conn. 125, 137, 66 Am. St. 92, 39 L.R.A. 644, citing the text; *Hicks v. Deemer*, 187 Ill. 164; *King v. Mott*, 37 App. Div. (N. Y.) 124; *Fargo G. & C. Co. v. Fargo G. & E. Co.*, 4 N. D. 219, 37 L.R.A. 593; *Martachowski v. Orawitz*, 14 Pa. Super. Ct. 175, 186.

⁸⁷ *McCrary v. Pritchard*, 119 Ga. 876, quoting the preceding part of the paragraph; *Syndicat Lyonnais du Klondyke v. Barrett*, 36 Can. Super Ct. 279; *Lunn v. Sherman*, 93 N. C. 164; *Stiles v. White*, 11 Mete. (Mass.) 356, 45 Am. Dec. 214; *Cary v. Gruman*, 4 Hill 625; *Fisk v. Hicks*, 31 N. H. 535; *Carr v. Moore*, 41 id. 131; *Page v. Parker*, 40 id. 47, 363; *Tuttle v. Brown*, 4 Gray 457, 64 Am. Dec. 80; *Woodward v. Thatcher*, 21 Vt. 580, 52 Am. Dec.

73; *Sherwood v. Sutton*, 5 Mason 1; *Muller v. Eno*, 14 N. Y. 597; *Drew v. Beall*, 62 Ill. 164; *Loder v. Kekule*, 3 C. B. (N.S.) 128; *Dingle v. Hare*, 7 id. 145; *Jones v. Clarke*, 3 Q. B. 194; *Gustafson v. Rustemeyer*, *supra*, citing the text. See *Thompson v. Sheplar*, 72 Pa. 160; *Rockefeller v. Merritt*, 22 C. C. A. 608, 76 Fed. 909, 35 L.R.A. 633.

⁸⁸ *Westerfield v. New York L. Ins. Co.*, 157 Cal. 339, approving *Gould v. Cayuga Nat. Bank*, 99 N. Y. 333.

⁸⁹ *Pittsburg L. & T. Co. v. Northern Cent. L. Ins. Co.*, 140 Fed. 888.

⁹⁰ *Syndicat Lyonnais du Klondyke v. Barrett*, 36 Can. Super Ct. 279.

⁹¹ *Simmons v. Clark* (Tex. Civ. App.), 130 S. W. 619; *Barbour v. Flick*, 126 Cal. 628; *Woolenslagle v. Runals*, 76 Mich. 545; *Reynolds v. Franklin*, 44 Minn. 30, 20 Am. St. 540; *Shimabarger v. Shelton*, 41 Mo. App. 147. See *Cheney v. Gleason*, 125 Mass. 166.

knowledge that his vendor has made false statements concerning its quality cannot recover the same damages as he might recover if he had not obtained such knowledge because he does not act on the false representation. His recovery is measured by the difference between the contract price of the property and its value in the market at the time regardless of its value to him.⁹² If incumbered personalty is sold as unincumbered the defrauded party may recover the value of the property not delivered or which he lost thereafter because of the mortgage.⁹³ One who conveys his interest in land under the belief, caused by the defendant's fraud, that he owned only a life estate therein may recover the difference between the value of the title conveyed and the value of that which he intended to convey.⁹⁴ If the plaintiff has sold property on credit in consequence of the defendant's false representations concerning the purchaser's financial ability he may recover its value at the time of sale, less any payment made and the value of any security given.⁹⁵ A trustee who fraudulently exchanges land to which he has title is bound to respond for its value or for the value of that received at the option of the party defrauded.⁹⁶ The foregoing general rule has been held inapplicable to the purchaser of bank stock who relied on false statements of the condition of the bank made by the directors by falsely including in the assets a large amount of worthless paper. The recovery in such a case is ascertainable by the difference between the fair market value of the stock purchased if all such paper had been rightfully reported as assets and that sum which would have been such value if it had not been so reported, with interest from the date of the purchase. It is not reason for denying the latter that the stock has increased in value since it was purchased.⁹⁷ In addition to the damages recoverable under the rule of this section there may be a recovery of

⁹² *McHose v. Earnshaw*, 5 C. C. A. 210, 55 Fed. 584, 35 L.R.A. 633.

⁹³ *Brennecke v. Heald*, 107 Iowa 376.

⁹⁴ *Hicks v. Deemer*, 187 Ill. 164.

⁹⁵ *American Nat. Bank v. Hammond*, 25 Colo. 367.

⁹⁶ *Dybdal v. Fagerberg*, 102 Minn. 130.

⁹⁷ *Chesbrough v. Woodworth*, 195 Fed. 875.

expenditures legitimately attributable to or resulting from the fraud, as money expended by the purchaser of stock in payment of the debts of the corporation.⁹⁸

1173. Same subject; other elements of damage. The general rules stated do not embrace all the damages which a defrauded vendee may suffer. In *Slingerland v. Bennett*⁹⁹ the defendant induced the plaintiff to purchase as good a note against an irresponsible party. The purchaser brought suit on the note and obtained judgment, but was unable to collect it. In an action for the fraud it was held that the costs of obtaining this judgment were not proper elements of damage; they were not its proximate result or natural consequence. The correctness of this conclusion may well be doubted.¹ If these costs were incurred judiciously and in good faith to enforce the demand as being such as it was represented to be, certainly they were the natural and probable effect of the sale of a note as good against a debtor unable to pay. A warranty of title justifies a suit or a defense to maintain it, and if the title fails the costs and expenses are proper items of damage in an action upon the warranty.² So where a person falsely pretends to be the agent of the owner of property and makes a contract for the sale of it the purchaser may recover the costs of an unsuccessful suit to enforce the contract against the supposed principal.³ False representations concerning the price at which property is held if they lead the purchaser to mortgage his property to raise money to buy it are attended with liability for the expense of defending a suit to foreclose the mortgage and for the loss of the property notwithstanding he had a good defense to the suit if the proper steps had been taken.⁴ One who has been fraudulently induced to buy animals falsely represented or warranted to be sound, but having disease, may recover as damages not only for their loss or depreciation by reason of

⁹⁸ *Beckwith v. Powers*, — Tex. Civ. App. —, 157 S. W. 177.

⁹⁹ 66 N. Y. 611.

¹ See note 43 to § 1171.

² §§ 84, 85, 669; *Curtley v. Security Sav. Soc.*, 46 Wash. 50.

Expenses incurred in obtaining

evidence concerning the fraudulent breach of a contract have been recovered. *Wampole v. Simard*, 39 Can. Super. Ct. 160.

³ § 84.

⁴ *Hughes v. Lockington*, 221 Ill. 571.

the disease, but compensation for the trouble and expense of attempting their cure; and if in reliance upon the warranty or representation such animals have been associated with and communicated the disease to others the loss or depreciation of the latter may also be recovered.⁵ Where a bull was sold with knowledge that the buyer wanted to put him with his cows and the fact that he could not propagate was concealed, this rule was expressed: When the vendor makes a sale for a particular purpose and is guilty of defrauding the vendee in respect to the fitness of the thing for that purpose he is liable to the vendee for all the damages which result directly from using the commodity for the contemplated purpose. Where the fraud is in regard to the fitness of the commodity for a special purpose it is the direct cause of all the damages which result in prudently using it for that purpose.⁶ Where a stallion is falsely represented to be pedigreed and is retained by the purchaser after knowledge of the fraud and used as a grade stallion the rule is the difference between the actual value and the price paid and such special damages as resulted proximately from the fraud and occurred prior to the discovery of the fraud.⁷ A purchaser of land who is forced to leave it and whose property is destroyed because of the recurrence of a periodical overflow of a stream of water on the border of the land may recover of his vendor for his loss; the representation that the land did not overflow was the cause of placing the property where it was, and the purchaser was justified in relying upon the representation made.⁸ The recovery may include compensation for personal injuries and incidental expenses where they result from the ordinary use of warranted property and the warranty proves false.⁹ A carrier may be liable for a passenger's loss of time

⁵ *Sherrod v. Langdon*, 21 Iowa 518; *Marsh v. Webber*, 16 Minn. 418; *Wintz v. Morrison*, 17 Tex. 372; *Johnson v. Wallower*, 18 Minn. 288; *Brown v. Wood*, 3 Cold. 182; *Rose v. Wallace*, 11 Ind. 112; *Pinney v. Andrus*, 41 Vt. 631.

⁶ *Maynard v. Maynard*, 49 Vt. 297
Suth. Dam. Vol. IV.—48.

⁷ *Magnuson v. Burgess*, 124 Minn. 374.

⁸ *Oakes v. Miller*, 11 Colo. App. 374.

⁹ *Sharon v. Mosher*, 17 Barb. 518; *George v. Skivington*, L. R. 5 Ex. 1; *Thomas v. Winchester*, 6 N. Y. 397; *Pryor v. Foster*, 130 id. 171. See

and suffering resulting from misrepresentations as to the character of the passengers to be carried on a vessel.¹⁰

Where false representations were made as to the safety of a road over which the plaintiffs made a contract to draw freight the following instruction was sustained: "If the plaintiff's cattle sickened and died and their sickness and death are attributable to the former presence of Texas cattle upon the same trail you may allow to the plaintiffs the reasonable value of such cattle at the time of the loss. If plaintiffs were, from the same cause, delayed and hindered in their journey and so were put to expense in employing and boarding their servants, which they would otherwise not have incurred, you may allow them for this. If, also, they expended money or transferred and exchanged other property for cattle in the Indian nation with which to continue their journey, and owing to the sparsity of settlements there or the absence of a market, the plaintiffs were under the necessity to pay for the cattle so bought more than the same were worth, and if a man of ordinary prudence would have acted as plaintiffs did, if placed in the like circumstances, then you may allow the plaintiffs for the difference between the amount so necessarily expended in the purchase of cattle and the reasonable value of such cattle at the time of the purchase thereof."¹¹ If property for future delivery is purchased because of false representations made by the vendor as to the quantity he will put upon the market in a given time the diminution in the price caused by putting a much larger quantity upon the market measures the damages. The price prevailing at the time delivery is made to the purchaser is to be regarded.¹²

Where the plaintiff was induced by deceit to sell stock to a person who had secured the majority of the stock of the corporation which issued it and who was willing to buy all the remaining stock outstanding, and who did in fact buy all such stock at prices higher than the plaintiff, by reason of the deceit-

State v. Fox, 79 Md. 514, 527, 47 Am. St. 424, 24 L.R.A. 679, stated in § 1176.

¹⁰ Tho Normannia, 62 Fed. 469, 482.

¹¹ Sellar v. Clelland, 2 Colo. 532, 550.

¹² Cooper v. Schlesinger, 111 U. S. 148, 28 L. ed. 382.

ful representations of the defendant, was induced to sell for, the damages were measurable by the value of the chance to sell the stock; such damages were proximate in the sense that they were such as the wrong-doer must have contemplated as the probable consequence of his misconduct, and certain in the sense that they were not problematical.¹³ If no misrepresentations are made as to the character or probable productive value of the thing sold, but the purchaser is led by fraud to give more than the vendor would have been willing to accept, rather than lose the sale, the recovery is measurable by the sum the purchaser was led to pay above that for which he could and would otherwise have got the property.¹⁴ In an action of deceit for the breach of an express contract of warranty the damages are measured by the cost of putting all property injured by the warranted article, including such article, in as good condition as it was in before the injury. There cannot, in addition, be a recovery of incidental damages, such as loss of profits and the like. These must be regarded as compensated for by the recovery of interest on the money expended.¹⁵ Neither can there be a recovery of the money earned under a contract and, in addition thereto, of the expenses incurred in preparation for its performance; this would be a double recovery.¹⁶ The buyer at public auction of unmerchandiseable goods may recover the expense incurred in removing them from the place of sale.¹⁷ A *bona fide* holder of warehouse receipts taken as security for a loan and issued in fraud under circumstances which estop the company on whose behalf they were issued from denying their validity can recover only to the extent of his loan, with interest.¹⁸ The purchaser of a horse which proves to be worthless may not keep it an indefinite time after discovering the fraud practiced on him and recover the expense. He is bound to act with reasonable promptness and can only recover such damages as he sustains when he so acts.¹⁹ One who performs

¹³ Weaver v. Cone, 12 Pa. Super. Ct. 143, 156.

¹⁴ Kilgore v. Bruce, 166 Mass. 136.

¹⁵ Eagle City I. Works v. Barber, 102 Pa. 156.

¹⁶ Simons v. Cissna, 52 Wash. 115.

¹⁷ Ruben v. Lewis, 20 N. Y. Misc. 583.

¹⁸ Corn Exch. Bank v. American D. & T. Co., 163 N. Y. 332.

¹⁹ Dawson v. Vickery, 150 Ill. 398.

labor for another cannot, in an action based on the defendant's false and fraudulent representations, recover on an implied contract, the tort being waived. Hence the recovery will be limited to the amount which the defendant has been enriched by his wrong; the plaintiff cannot recover the profits he would have made on performance of the contract had there been no fraud.²⁰ A person who is induced by deceit to enter into a contract to perform labor for a gross sum on the representation that the number of logs to be driven is about one-third the real number is not barred of the right to recover what the work was reasonably worth because he completed his contract after discovering the fraud, the work then being in such condition that it could not be discontinued and compensation on that basis being immediately demanded after the drive was finished.²¹

§ 1174. *Same subject.* In New York one who has been induced by fraudulent representations to become the purchaser of property may elect either of three remedies. He may rescind the contract absolutely and sue at law for the consideration paid, if he has restored or offered to restore to the other party whatever he has received from him by virtue of the contract.²² He may bring an action in equity to rescind the contract and obtain full relief therein.²³ "Such an action is not founded upon a rescission, but is maintained for a rescission, and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial."²⁴ Or he may retain what he has received and bring an action at law to recover the damages sustained. In such an action an offer to restore the property received does not affect the damages.²⁵ A later case lays down the general rule that when fraud has been practiced in the sale of real estate the vendor may proceed in equity to rescind the contract by restor-

²⁰ *Huganir v. Cotter*, 102 Wis. 322.

²¹ *Sell v. Mississippi River L. Co.*, 88 Wis. 581.

²² *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Vail v. Reynolds*, 118 id. 297; *Pryor v. Foster*, 130 N. Y. 171. The rescission must

be made promptly on discovering the fraud. *Strong v. Strong*, 102 N. Y. 69, distinguished in *Pryor v. Foster*, *supra*.

²³ *Allerton v. Allerton*, 50 N. Y. 670.

²⁴ *Vail v. Reynolds*, *supra*.

²⁵ *Id.*

ing or tendering to the vendee what he has paid, when he will be entitled to a decree for the reconveyance of the land, or he may proceed in affirmance of the sale and recover damages at law for the deceit. Both remedies cannot be availed of, nor can they be blended and the contract be affirmed in part and rescinded in part.²⁶ Generally there are at least two courses open to the injured party: he may on discovery of the fraud restore what he has received, rescind the contract and recover what he has paid or sue for damages.²⁷ If he affirms the contract and sues for the fraud he is not necessarily entitled to recover for all he has done or paid on it, for he may have derived some benefit therefrom.²⁸ But when the contract is repudiated on account of the fraud the defrauded party is entitled to be put in *statu quo*, and where this cannot be literally accomplished it may be done by damages. Thus, a defendant represented the water power connected with his tannery to be sufficient to work it continuously throughout the year, and the plaintiff, having no knowledge of the premises and relying upon his representation, was thereby induced to purchase; thereupon, after taking a bond for it and giving his note for the price, he entered into possession and under the advice of the defendant expended large sums in repairs. The water failing, he abandoned the property and notified the defendant that he considered the contract of purchase rescinded. The defendant resumed possession and had the benefit of the repairs. And it was held that *assumpsit* would lie to recover for such repairs; that the law would under such circumstances imply a promise to pay for them.²⁹ Where the plaintiff was fraudulently induced to take

²⁶ Yeomans v. Bell, 151 N. Y. 230.

²⁷ Warren v. Cole, 15 Mich. 265; Atlanta, etc. R. Co. v. Hodnett, 29 Ga. 461; Hawk v. Brownell, 120 Ill. 161; Potter v. Taggart, 59 Wis. 1; Supreme Council v. Apman, 39 Ind. App. 670.

²⁸ Yeomans v. Bell, *supra*; § 1171.

²⁹ Farris v. Ware, 60 Me. 482.

One who obtains title by fraud cannot, on a rescission of the contract, recover for repairs or im-

provements made or for incumbrances removed while he was in possession. Railroad Co. v. Soutter, 13 Wall. 517, 20 L. ed. 543; Mosely v. Miller, 13 Bush 408. On the contrary, he is chargeable for rents during that time. Mosely v. Miller, *supra*.

In Texas there cannot be a recovery for improvements made by one who purchases property, there being fraudulent misrepresentations

an endowment policy of insurance and pay the premium thereon he was entitled to recover in an action brought before the second premium became due the amount paid, the defendant having been notified of the purpose to cancel the policy. This rule of damages was not inapplicable because the company was solvent, the policy a valid one and the rate of premium fair. The rule contended for by the defendant was the difference in the money value between what the plaintiff got and what he would have got had the representations been true. But this was inapplicable because the contract was executory and was rescinded. The contention that the cancellation of the policy was the cause of the loss of the premium was considered a refinement which would lead to unjust results.³⁰ The plaintiff may recover, in

as to the title, unless it is shown that the purpose to improve was known to the vendor at the time of the sale. A claim for attorney's fees in prosecuting the suit to recover damages was also denied and the recovery was limited to the consideration paid and interest thereon. *Haddock v. Taylor*, 74 Tex. 216, 15 Am. St. 827.

But in some states a purchaser who relies upon fraudulent representations made by his vendor as to the state of the title may, upon eviction by the holder of the superior title, recover the purchase-money and interest and for improvements made. He is not bound to resort to the vendor's warranty, nor restricted to the measure of recovery which an action thereon would afford. *Carvill v. Jacks*, 43 Ark. 439, 454; *Lawson v. Vernon*, 38 Wash. 422, 107 Am. St. 880. See *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229.

From the value of the improvements is to be deducted the value of the rents and profits while the plaintiff had possession of the land. *Bryant v. Boothe*, 30 Ala. 311, 68

Am. Dec. 117. This is the measure of relief where the cancellation of a deed is sought because of fraud in obtaining the title. *Chaney v. Coleman*, 77 Tex. 100.

Where false representations were made concerning what the land would produce the purchaser recovered the payments made with interest thereon from the time of his eviction for the non-payment of the balance of the purchase-price and a reasonable allowance for improvements made prior to knowledge of the fraud; interest was not recoverable for the time possession of the land was enjoyed. *Buckingham v. Thompson* (Tex. Civ. App.), 135 S. W. 652.

³⁰ *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25. See *Nash v. Minnesota T. I. & T. Co.*, 163 Mass. 574, 582, 47 Am. St. 489, 28 L.R.A. 753.

One who is induced by fraudulent representations to take a membership in a mutual benevolent society can only recover such sum as he has expended by reason thereof; not the amount he would have received if the representations were

such a case, the premiums paid, less the value, if any, of the insurance received; what that was, the jury should find.³¹ The measure of damages in an action by the beneficiary of an insurance certificate for fraud in procuring a settlement of a disputed claim is the difference between the amount received in settlement and the actual value of the thing surrendered.³² The court stated that the actual value of the thing surrendered was not necessarily equivalent to the face value of the policy, and that while the face value should be considered in determining the actual value the questions of whether, aside from the fraud, there was in fact a dispute respecting the validity of the thing surrendered and whether the compromise was entirely induced by fraud, or whether the fraud was merely effective in reducing the amount paid should be considered. An action to recover for fraud in leading to the settlement and discharge of a liability upon a contract is a ratification of the release, and the recovery is fixed by the difference between the sum paid and the value of the contract, and not by the difference between the sum accepted and that specified in the contract.³³

The right to recover the purchase-money and interest on the failure of title is not affected by the fact that the purchaser has cut timber from the land and sold it, he being liable to account to the owner of the land for it; neither is the defendant liable for the expense of such cutting so long as the plaintiff has not been compelled to respond to the owner.³⁴ The defrauded purchaser is not bound to purchase the outstanding title and thus mitigate the liability of his vendor.³⁵ For the fraud of falsely representing a third person to be worthy of credit, whereby the person deceived has been induced to sell goods to such person, he being insolvent, the vendor may recover the value of the goods sold.³⁶ If a debtor fraudulently settles

true. *May v. New York, etc. Soc.*, 14 Daly 389.

³¹ *McKindley v. Drew*, 69 Vt. 210, 71 Vt. 138.

³² *Sovereign Camp Woodmen of World v. Latham*, — Ind. App. —, 107 N. E. 749.

³³ *Supreme Council v. Apman*, 39

Ind. App. 670, following *Gould v Cayuga Nat. Bank*, 99 N. Y. 333.

³⁴ *Tyner v. Cotter*, 67 Wis. 482.

³⁵ *Id.*

³⁶ *Viele v. Goss*, 49 Barb. 96; *Bean v. Wells*, 28 *id.* 466; *Rheem v. Naugatuck W. Co.*, 33 Pa. 356.

with his creditor for fifty per cent. of the latter's claim, the creditor being induced thereto by fraudulent representations that other creditors had made such settlements, a suit by him in *assumpsit*, while retaining the amount, is in affirmation of the contract and the balance cannot be recovered.³⁷ But in an action for the fraud such amount may be recovered as would have been received if no fraud had been committed.³⁸ One who sells his land for his own price, the only fraud practiced being the vendee's intention not to pay for it, is not entitled to recover the difference between the value of the land and the money received; but the price agreed upon, less the sum paid and less any sum due the defendant because of the transaction and accruing under the contract, measures the recovery.³⁹ One who has sold goods and accepted in payment thereof the purchaser's check, payment of which he stopped, is not entitled to recover, in addition to their value, interest thereon, damages for their detention, and such damage as the jury may reasonably think he deserved.⁴⁰ The damages for conspiring to defraud by purchasing goods and disposing of them without paying therefor are measured by the value of the goods where and when they were obtained, with interest from the time they were obtained.⁴¹ Where the grantee of land conveyed in trust by a deed absolute conveyed the same to *bona fide* purchasers the recovery was measured by the value of the land on the day of the trial less the debt secured and interest, or the money realized by the defendant on his sale, with interest, less the amount of the debt secured, including the costs of the foreclosure proceedings.⁴² In suits for fraudulently conveying land in defiance of the rights of the equitable owner or mortgagee the time for fixing the value of it will be governed by the circumstances of the case. In an Iowa case where the title of a grantee who failed to prop-

³⁷ *Jewett v. Petit*, 4 Mich. 514; *Walsh v. Sisson*, 49 id. 423; *Grabenhaimer v. Blum*, 63 Tex. 369.

³⁸ *Id.*; *Page v. Wells*, 37 Mich. 421; *Bowman v. Parker*, 40 Vt. 413; *Foster v. Kennedy*, 38 Ala. 359, 81 Am. Dec. 56; *Moberly v. Alexander*, 19 Iowa 164; *Reynolds v. Cox*,

11 Ind. 266. See *Erde v. Fenster* (App. Div.), 141 N. Y. Supp. 943.

³⁹ *McCready v. Phillips*, 56 Neb. 446.

⁴⁰ *Cole v. High*, 173 Pa. 590.

⁴¹ *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 20, 65 Am. St. 22.

⁴² *Boothe v. Fiest*, 80 Tex. 141;

erly record his deed was defeated by a subsequent conveyance by the grantor to an innocent purchaser the first grantee's measure of damages was held to be the highest value of the land at any time between his purchase and the commencement of his suit.⁴³ In Kansas a grantor who executed a deed which was intended as a mortgage may recover from the grantee, who conveyed to a *bona fide* purchaser, the value of the land at the time of making a tender of payment and demanding its reconveyance, less the amount of the debt secured by the deed, rather than its value when it was sold by the grantee.⁴⁴ Where a part of the lands mortgaged was fraudulently conveyed at the commencement of the suit, without thereby affecting the value of the other part, the defendant was liable for the value of those sold and the plaintiff entitled to recover those unsold upon discharging his obligation therefor; as to sales made while the suit was pending, the plaintiff was not bound to proceed against the purchasers, but could recover the value of the lands from the trustee, or, at his election, proceed against the purchasers.⁴⁵ Where land was purchased that was not conveyed and there was a failure to convey as much as was purchased, there was cause for the recovery, in addition to the usual damages, the loss resulting from erecting improvements before the fraud was discovered if they would not be adapted to the tract conveyed and would not be as valuable with it as with the whole; and so expenses connected with removal to the land if they would not have been incurred but for the fraud.⁴⁶ In other words "the measure of the equitable damages which a *cestui que trust* is entitled to recover against his trustee as compensation for a breach of trust is, at the option of the *cestui que trust*, (1) the amount the *cestui que trust* has actually lost by the breach, or (2) the amount, if anything which the trustee has gained

Mixon v. Miles, 92 Tex. 318; Silliman v. Gano, 90 Tex. 637.

⁴³ Burdick v. Seymour, 39 Iowa 452.

⁴⁴ Clark v. Morris, 88 Kan. 752. See Gibbs v. Champion, 3 Ohio 335; May v. Le Claire, 11 Wall. 217, 20 L. ed. 50; Meehan v. Forrester, 52

N. Y. 277; Gibbs v. Meserve, 12 Ill. App. 613; Linnell v. Lyford, 72 Me. 280; Johnson v. McMullin, 3 Wyo. 237, 4 L.R.A. 670.

⁴⁵ Silliman v. Gano, *supra*.

⁴⁶ Smith v. Kirkpatrick, 79 Ga. 410.

thereby.”⁴⁷ A court of equity will require a trustee who unauthorizedly sells land at foreclosure to account for its fair market value when sold, but in an action for an accounting damages for injury to the business, reputation and credit of the mortgagor are not recoverable; these matters are not related to the subject-matter of the bill.⁴⁸ The statutory rule of damages in California—the replacement of the land fraudulently conveyed with its fruits, or the proceeds of the sale, with interest—applies whether the trust was voluntary or involuntary, and is not inapplicable because of an allegation that the proceeds of the sale were converted to his own use by the trustee. The value of the land is to be fixed as of the time it was conveyed.⁴⁹ In Massachusetts the rule of damages in equity is the same as at law, and in a suit to rescind the sale of stock procured by fraud, the defendant, before suit, having parted with the shares, the damages were based on the difference in their value when the sale was made and the amount paid by the plaintiff to the defendant for them, with interest from the time of the sale to the date of the decree.⁵⁰

A creditor who fraudulently colludes with his insolvent debtor and receives property from him in excess of the debt is liable to other creditors for the value of such property at the time it was transferred to him, and not for the sum realized from a subsequent sale of it.⁵¹ Where there was a continued series of acts of bad faith by a trustee it was said by Chancellor Kent to be requisite to justice and for example’s sake that the injured party should be completely indemnified, and that the trustee should answer for all the consequential damages caused by the fraud. Liability was measured by the value of the land conveyed as it was at the commencement of the suit.⁵² Where a

⁴⁷ *General Proprietors of Eastern New Jersey v. Force*, 72 N. J. Eq. 56, 127.

⁴⁸ *Manville C. Co. v. Babcock*, 28 R. I. 496, 14 L.R.A.(N.S.) 900.

⁴⁹ *Clapp v. Vatcher*, 9 Cal. App. 462.

⁵⁰ *Stewart v. Joyce*, 205 Mass. 371.

⁵¹ *Oppenheimer v. Halff*, 68 Tex.

409; *Johnson v. Saum*, 137 Iowa 138.

⁵² *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 116; *Bell v. Bell*, 20 Ga. 250; *Mixon v. Miles* (Tex. Civ. App.), 46 S. W. 105; 92 Tex. 318.

In *Norman v. Cunningham*, 5 Gratt. 63, the court was equally divided as to whether the liability

transfer of property was set aside as against the creditors of the transferrer because it was fraudulent and it appeared that prior to the transfer the property was pledged to secure a valid debt due a party not connected with the fraud, and that the fraudulent transferee received only the surplus avails of the property after deducting the amount of the debt, the recovery by the creditors was limited to the value of the property, less the amount of the debt. The property, having been sold for less than its value, the creditors were not limited to the recovery of the price received, less the lien. Because the transferee acquired the title wrongfully and sold the property for less than its value the loss was his.⁵³ One who fraudulently procures the sale of land pursuant to a judgment must answer for its value regardless of whether he has received the purchase-money,⁵⁴ and for interest on the value at the date of the sale, not merely what the land was sold for.⁵⁵ An unauthorized sale of trust property subjects the trustee to liability for its value at the time of the trial; the *cestui que trust* not being required to engage in litigation with the purchasers of it. Any gains made by the trustee out of the trust fund belong to the *cestui que trust*; and the trustee must bear any losses caused by his misconduct.⁵⁶ One who fraudulently induces a person who has contracted to furnish material at a given price to abandon his contract and furnish the material at a less price must compensate the contractor for his loss.⁵⁷ The cost of putting work not done in accordance with the contract in the condition required thereby may be recovered by a city where there has been collusive fraud on the part of its representative and the contractor.⁵⁸ The measure of damages sustained by one driven out of business as

of a trustee who made an unauthorized conveyance was measurable by the value of the land at the time of the sale or its value at the death of the trustee, excluding permanent improvements when the bill was filed.

⁵³ *Hamilton Nat. Bank v. Halsted*, 134 N. Y. 520, 30 Am. St. 693.

⁵⁴ *Cox v. Armstrong*, 14 Ky. L. Rep. 350.

⁵⁵ *Maynard v. May*, 16 Ky. L. Rep. 690.

⁵⁶ *Sullivan v. Ramsey* (Tex. Civ. App.), 155 S. W. 580.

⁵⁷ *Mix v. Boland Co.*, 153 App. Div. (N. Y.) 435.

⁵⁸ *West Homestead v. Erbeck*, 239 Pa. 192.

a result of a conspiracy in restraint of trade is the loss suffered in the business and consequent diminished value of the use of his property rather than the loss sustained by being forced to sell his tools and implements of trade at less than their value.⁵⁹ Where one ordering an automobile of a standard make and having a standard market value procures cancellation of the order by misrepresentations as to his inability to pay therefor and the automobile is sold to another at the contract price the measure of damages is the difference between the market price and the contract price so as to entitle the seller to merely nominal damages.⁶⁰ Where one acting as agent for another induces him to exchange his property for other property, including an option contract on land, under fraudulent representations as to its value the agent is liable only for the actual damages sustained, regardless of the valuations placed upon the respective properties by the parties.⁶¹

§ 1175. **Remote, conjectural and contingent damages.** Only such damages are recoverable as are shown with reasonable certainty to have been sustained. Remote, contingent and conjectural losses will not be considered.⁶² A vendor who seeks to set aside a contract for the sale of property because of fraud cannot recover for anxiety, worry and embarrassment, nor for expenses incurred in caring for the property sold.⁶³ But trouble, vexation and annoyance, in connection with the expense attending a fraud which tied up real estate for a considerable time,

⁵⁹ *Bratt v. Swift*, 99 Wis. 579.

⁶⁰ *Chalmers Motor Co. v. Maibaum*, 186 Ill. App. 147.

⁶¹ *Scribner v. Palmer*, 81 Wash. 470.

⁶² *Myers v. Turner* (Tenn. Ch. App.), 52 S. W. 332; *Kuechle v. Springer*, 145 Ill. App. 127; *Gunderson v. Havana-C. M. Co.*, 22 N. D. 329. See *The Normannia*, 62 Fed. 469; *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279; *Sigafus v. Porter*, 179 U. S. 116, 45 L. ed. 113; *Jamison v. Ellsworth*, 115 Iowa 90; § 1176.

This is one of the grounds upon

which some courts fix the damages for the wrongful sale of property at its value when the sale was made. *Stewart v. Joyce*, 205 Mass. 371.

The failure to secure the incidental advantage resulting from the increase of population in a town in consequence of fraudulent representations as to the financial strength of a manufacturing firm which settled there, is too uncertain and speculative to be a basis for the recovery of damages. *Fitzsimmons v. Chapman*, 37 Mich. 139.

⁶³ *Newman v. Smith*, 77 Cal. 22.

have been held to be elements of damages.⁶⁴ A vendee may not recover for his humiliation and mental suffering because of the ill repute of a house purchased.⁶⁵ Deceit concerning leased premises is not a basis upon which to award the tenant compensation for the loss of profits.⁶⁶ A trustee who colludes with the remainder-man and with the tenants of the *cestui que trust*, the latter holding a life estate, and causes his ejection and loss of rents is not responsible for losses resulting from the subsequent insolvency of the tenants.⁶⁷ One who is fraudulently led to purchase the interest of retiring partners in a firm and to execute a note in the name of the new firm for a sum in excess of the invoice price of the property received cannot recover more than such excess, although he is obliged to pay the whole amount of such note because of the subsequent insolvency of his partners.⁶⁸ For fraud inducing the payee of a note secured by mortgage to indorse it in blank, by means whereof it got into the hands of a *bona fide* holder, there can be no recovery until such indorser has actually paid the note; until then he will suffer no injury. The mortgage debt may be made out of the security or the maker of the note.⁶⁹ But all such liability to loss from fraud as a ground of damage is not rejected as conjectural and contingent. It has been held in New York⁷⁰ that if a vendor fraudulently represents goods sold to be his own, when he knows them to belong to a stranger, an action on the case lies to recover damages therefor, though the real owner has not recovered the property nor the vendee suffered any actual damage. A recovery was had on the basis of an unsatisfied liability in *Kenyon v. Woodruff*,⁷¹ and upon very safe principles. The defendants by fraud induced the plaintiff innocently to take and remove and thereby convert the property of a third person for their benefit. They

⁶⁴ *Schusler v. Clark*, 50 Pa. Super. Ct. 459.

⁶⁵ *Walsh v. Meyer*, 40 Wash. 650.

⁶⁶ *Brown v. Morrill*, 55 N. Y. Misc. 224.

⁶⁷ *Kaye v. Powel*, 1 Ves. Jr. 403; *Fox v. Mackreth*, 2 Cox 320; *Franklin v. Greene*, 2 Allen 579; *Squier v. Plunkett*, 11 Gray 11.

⁶⁸ *Schwabacker v. Riddle*, 84 Ill. 517.

⁶⁹ *Freeman v. Venner*, 120 Mass. 424; *Alden v. Wright*, 47 Minn. 225.

⁷⁰ *Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605.

⁷¹ 33 Mich. 310.

took upon themselves the defense of an action of trover brought against him by the owner, and judgment therein was recovered, which he had abundant property to satisfy. They were held liable to him for the amount of that judgment and interest upon it, though it had not been collected or paid. The court thought that there was no analogy between the relations of these parties and those which exist between principal and surety. Graves, J., said: "The relation of principal and surety grows out of the consent of all the parties, and the principles which belong to it in regard to the right of recovery over can have no necessary application to a case where the relation does not arise by consent, but is caused by a positive wrong committed by one against another. It would be very unreasonable to hold that where one is drawn by the fraud of another to perform an act which gives a third party a right of action against him, and which has eventuated in a judgment which is indisputably collectible of him, the wrong-doer may still insist that his responsibility to the party he has by his fraud caused to be accountable to the third party is required to be governed by those rules which naturally and justly apply where one by choice assumes a relation of accountability on behalf of one to another."⁷² It has recently been ruled in New York, after a full examination of the adjudications there, that the directors of a corporation who fraudulently issue in its name and transfer to *bona fide* holders for value, notes which purport to be its valid obligations are liable to the corporation as soon as its liability attaches by their transfer of the paper. Neither the right to sue the directors nor the measure of their liability is affected by the fact that the notes remain unpaid. In the absence of evidence of circumstances diminishing its value the face of the paper measures the liability of the wrong-doer.⁷³ The plaintiff may show the loss of employment in consequence of the fraud practiced on him.⁷⁴

§ 1176. **Same subject.** In an Iowa case⁷⁵ the defendants sold and assigned to the plaintiff for a money consideration a

⁷² *Kitchens v. Ryner*, 8 Ga. App. 587.

⁷⁴ *Ward v. Cook*, 158 Mich. 283.

⁷³ *Metropolitan E. R. Co. v. Kneeland*, 120 N. Y. 134, 17 Am. St. 619, 8 L.R.A. 253.

⁷⁵ *Kimmans v. Chandler*, 13 Iowa 327.

bond of the school fund commissioner for a deed to a tract of school land. It appeared that the interest for one year had not been paid by them, although they so represented when they assigned the bond. The trial court found that the plaintiff had not paid that year's interest, but paid the defendants that amount more than was due according to their agreement and that the county held their note, which contained their obligation to pay the interest. It was ruled that the plaintiff was not entitled to recover for that interest because he had not paid it; he had not yet suffered any damages by means of the defendants' representations. The court say: "He has not yet paid the money due the school fund, nor is it alleged that the defendants are insolvent or unable to pay the same. Their note is with the proper officer and the defendants are liable to an action thereon at any time. The plaintiff's recovery in this case would not prevent the school fund from suing and recovering at any time for the same interest. The defendants should not be made twice liable for the same debt." It may be observed in respect to this case that the defendants could have protected themselves from this double liability by paying the interest in question to the school fund, even after this action was brought, and therefore they were not, except by their own fraud and negligence, placed in peril of a double recovery. They having received from the plaintiff an amount equal to that interest, on their false representation that they had paid it, it would seem just that he should recover damages to an equal amount, since the defendants, on the action being brought, persisted in the wrong by defending instead of making their representation good by immediate payment to the school fund.⁷⁶

In *Bradley v. Fuller*,⁷⁷ the court held that a false and fraudulent representation by which a creditor was induced to abandon an intention to sue out an attachment against his debtor, followed by the loss of his debt in consequence of other creditors attaching all his property, is not actionable; that he, on that state of facts, had suffered no legal damage; that it must neces-

⁷⁶ See *Dunne v. Thorpe*, B. D. & O. 128; *Barmon v. Lithauer*, 4 Keyes 317.

⁷⁷ 118 Mass. 239.

sarily be uncertain whether he would have attached the property and applied it to the debt if the alleged representation had not been made.⁷⁸ It is not easy to perceive why the execution of such an intention might not be proved with sufficient certainty. It might almost be presumed under the circumstances stated because of the interest of the creditor to secure his debt. Readiness to perform a contract is sufficient to evince the intention of a party to fulfill it, so that if the other by any act or omission prevent its performance the former may recover damages estimated on the assumption that he would have proceeded. In *Remington Sewing Machine Co. v. Kezertee*,⁷⁹ where a surety was drawn into the execution of a contract by false representations or suppression of the truth, it was held that the testimony of the surety was admissible that he would not have become such if he had known the facts concealed. In a Georgia case the holder of a deed tainted with usury stated at a sheriff's sale of the land that he held an equitable mortgage on the premises for \$1,500, and the purchaser would buy subject to that incumbrance. He bid in the land himself, knowing that \$500 of the \$1,500 secured by his deed was for one year's interest on the remaining \$1,000. On evidence that another would have given \$500 more for the land at the sale had the truth been told the mortgagor, recovered that sum from the buyer.⁸⁰ In *Benton v. Pratt*⁸¹ it was held that where a contract would have been fulfilled but for the false and fraudulent representations of a third person an action would lie against such person for the fraud, although the contract could not have been enforced by action.⁸² A creditor at large who has taken no proceedings against his debtor to acquire a lien upon his property cannot maintain an action against a person who takes possession or converts the debtor's property under a conveyance or transfer which is made to hinder, delay and defraud his creditors.⁸³ But it is otherwise if the creditor has a lien and

⁷⁸ See § 30, note, and § 965.

⁷⁹ 49 Wis. 409.

⁸⁰ *Denham v. Kirkpatrick*, 64 Ga. 71.

⁸¹ 2 Wend. 385.

⁸² See *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589.

⁸³ *Adler v. Fenton*, 24 How. 407, 16 L. ed. 696; *Moran v. Dawes*,

it is reduced in value by the fraudulent conduct of another,⁸⁴ or if its release is procured by fraud.⁸⁵ So a creditor may compel the fraudulent grantee of his debtor to account for the property after such creditor has obtained a judgment and under it a right to resort to the equitable assets of his debtor.⁸⁶

If the purpose of the contract of purchase and sale was to give the purchaser a privilege not obtainable elsewhere and the loss of profits or advantages which must have resulted from the fulfillment of the contract must be presumed to have been stipulated for and to have been within the contemplation of the parties when the contract was made, such loss is an element of the damage and may be considered in fixing the difference between the value of the rights which were represented to pass under the contract and the value of the rights which did pass under it.⁸⁷ The purchaser of a business enterprise cannot recover the profits he would have made by transferring it to a corporation to be organized for the purpose of taking it;⁸⁸ nor the losses sustained in the operation of the properties purchased.⁸⁹ Damages resulting to a purchaser of property through his being unable to borrow money upon as favorable terms as he would have been able to do if there had been no misrepresentation in his contract of purchase are too remote.⁹⁰ One who has purchased a lease, barroom fixtures and a liquor license, the last of which the vendor did not own, and who sold liquor thereunder, cannot recover for the consequences of his conviction and imprisonment. No damages are recoverable, it was said, when the claim therefor rests on the plaintiff's violation of a

Hopk. Ch. 365; *Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 145; *Austin v. Barrows*, 41 Conn. 287.

⁸⁴ *Yates v. Joyce*, 11 Johns. 136.

⁸⁵ *Marshall v. Buchanan*, 35 Cal. 264, 95 Am. Dec. 95.

⁸⁶ *Robinson v. Boyd*, 17 Mich. 128.

⁸⁷ *Martachowski v. Orawitz*, 14 Pa. Super. Ct. 175, 186.

Liability for lost profits has been enforced where there was a fraudulent breach of a contract to make an article according to a secret formula for the sole benefit of the plaintiff. *Wampole v. Simard*, 39 Can. Sup. Ct. 160.

⁸⁸ *Loewer v. Harris*, 6 C. C. A. 394, 57 Fed. 368.

⁸⁹ *Lamont v. Wenger*, 22 Ont. L. R. 642.

⁹⁰ *Wilkinson v. Detmold*, 16 Vict. L. R. 439. See § 1129.

penal statute.⁹¹ A case in the Indiana Court of Appeals proceeds on a different and preferable theory. The defendant fraudulently and in violation of law sold intoxicating liquors to the plaintiff, who was not licensed to sell them; he sold them as "soft drinks" without knowing that they were not such. After a conviction of a violation of the excise law he recovered compensatory damages from the vendor.⁹² One who has been induced to purchase stock by misrepresentations cannot recover for damage to his feelings and for his disgrace in the community.⁹³ The existence of a lien on land purchased as free from incumbrance does not make the vendor liable for the purchaser's loss of rents which might have been received had the land been improved, though the existence of the lien deterred the making of the improvements; nor could the purchaser recover the fee paid an attorney for assisting in procuring the release of the lien, which the vendor willingly executed as soon as it could be done and which was prepared by his own attorney.⁹⁴ A vendor who misrepresents the fact concerning the payment of interest on a mortgage is not liable to his vendee for the consequence of his inability to meet the interest.⁹⁵ But a mortgagor who is induced to delay the payment of interest, in consequence of which the mortgage is foreclosed, may recover the costs and, it seems, the money paid his attorney.⁹⁶

In a Maryland case decided in 1894 the defendant sold, by means of false representations, a horse affected with glanders, the purchaser being ignorant and the vendor knowing of the existence of the disease and of its dangerous character to human beings. The person put in charge of the horse by the purchaser contracted the disease and died therefrom. The court held that the vendor might, under proper pleading and proof, be responsible for the death of such person.⁹⁷ Where fraud was practiced in the sale of glandered horses, which were warranted sound,

⁹¹ *Martachowski v. Orawitz*, 14 Pa. Super. Ct. 175. See § 5.

⁹² *Anderson v. Evansville B. Ass'n*, 49 Ind. App. 403.

⁹³ *Cable v. Bowlus*, 21 Ohio C. C. 53.

⁹⁴ *Sherrick v. Wyland*, 14 Tex. Civ. App. 299.

⁹⁵ *Russell v. Stoops*, 106 Md. 138.

⁹⁶ *Nearing v. Hathaway*, 128 App. Div. (N. Y.) 745.

⁹⁷ *State v. Fox*, 79 Md. 514, 527, 47 Am. St. 424, 24 L.R.A. 679.

the damages included, besides the price paid for them, money expended for their treatment and the value of the stable in which the purchaser kept them, which was destroyed.⁹⁸ In a late case in one of the Texas courts of civil appeals, in which a writ of error was denied by the supreme court, an undertaker who fraudulently supplied a pine box in which to place the remains of a son of the plaintiff, who had bought and paid for a coffin and robe in which to bury the deceased, which box was used though it was too small to contain the remains, was held liable for mental anguish sustained by the decedent's mother, sister and brothers.⁹⁹ A party who has fraudulently misrepresented his professional skill and knowledge and led his employer to expend a large sum of money in excess of that he estimated to be the cost of a building and in excess of that upon which a fair rental may be obtained must respond for the commissions paid him and for the excess of the cost of the building over the estimate. In completing the building after discovering the fraud, rather than in abandoning it, the plaintiff acted within his rights.¹

§ 1177. **Expenses of litigation.** It is settled in Connecticut that in actions for fraud the successful plaintiff may, in the discretion of the jury, recover, in addition to the actual damages directly resulting, such sum as will reimburse him for the expenses necessarily incurred in obtaining redress.² In Kansas attorneys' fees and expenses incurred in good faith by a bank in saving itself from loss occasioned by the fraud of a party who obtained from it a draft and then caused the same to be cashed may be recovered as compensatory damages.³ In Ohio the court has said the better opinion seems to be that in cases where the act complained of is tainted by fraud or involves an ingredient of malice or insult the jury may award proper and reasonable counsel fees in their estimate of damages.⁴ One

⁹⁸ *Merguire v. O'Donnell*, 103 Cal. 50.

⁹⁹ *J. E. Dunn & Co. v. Smith* (Tex. Civ. App.), 74 S. W. 576.

¹ *Barron Est. Co. v. Woodruff Co.*, 163 Cal. 561, 42 L.R.A.(N.S.) 125.

² *Bennett v. Gibbons*, 55 Conn. 450.

³ *First Nat. Bank v. Williams*, 62 Kan. 431. See § 58.

⁴ *Roberts v. Mason*, 10 Ohio St. 277; *Peckham I. Co. v. Harper*, 41 id. 100.

who has fraudulently induced his debtor to leave the state of his domicile and go into another state with intent to cause his arrest and compel him to pay for his release is liable for the money paid for that purpose; and if the plaintiff paid money to settle two other suits brought by others who profited by his arrest through the contrivance of the defendant the latter is liable therefor.⁵ The perpetrator of a fraud is not liable for the expense of an injudicious defense made against the *bona fide* holder of a note given by the defrauded party.⁶ In New York a vendor who accepts the note of a third person in payment for property may not recover the costs of a suit against its maker because he was not obliged to sue on it as a condition precedent to his recovery against the vendee who made misrepresentations as to the maker's solvency.⁷ The expense of investigating and detecting an attempted fraud cannot be recovered. By acting upon his own judgment, instead of relying upon the representations made, a party acts at his own risk.⁸ A vendor who mistakenly conveys land to which he has no title is not liable for the traveling expenses of the purchaser incurred in efforts to adjust the matter.⁹

§ 1178. **Exemplary damages.** There is not entire agreement on the question whether exemplary damages may be allowed in actions for deceit; nor are the cases numerous in which the point has been considered. On the principle upon which such damages are allowed where the doctrine of punitive damages prevails it is not easy to see how they are to be excluded as matter of law in cases of wilful and deliberate fraud followed by actual damage.¹⁰ Punitive damages, in addition to

⁵ Sweet v. Kimball, 166 Mass. 332, 55 Am. St. 406.

⁶ Morwick v. Walton, 18 Manitoba 245.

⁷ Slingerland v. Bennett, 66 N. Y. 611.

⁸ Enfield v. Colburn, 63 N. H. 218.

⁹ Doom v. Curran, 52 Kan. 360.

¹⁰ Ch. 9; Nye v. Merriam, 35 Vt. 438; Byram v. McGuire, 3 Head 530; Oliver v. Chapman, 15 Tex. 400; Peckham I. Co. v. Harper, 41

Ohio St. 100; Platt v. Brown, 30 Conn. 336; Ives v. Carter, 24 id. 392; Kelly v. Valentine, 17 Ill. App. 87; Tate v. Watts, 42 id. 103; Kujek v. Goldman, 150 N. Y. 176, 179, 34 L.R.A. 156, 55 Am. St. 670; Batman v. Cook, 120 Ill. App. 203; Crane v. Schaefer, 140 id. 647 (though the perpetrator may be indicted); Western Cottage P. & O. Co. v. Anderson, 45 Tex. Civ. App. 513; Kearney v. Davin, 162 Ill.

compensatory damages, may be assessed where there is no actual intent to deceive, but there is such a disregard of facts ascertainable by the use of due care as to constitute a fraudulent intent in law.¹¹ Interest on the value of the property converted in consequence of the fraud has been allowed as punishment.¹² Punitive damages are not recoverable in some states if the fraud was an offense under the criminal law.¹³

§ 1179. **Parties.** Plaintiffs who are jointly interested in the damages sought to be recovered may join in the action.¹⁴ Two purchasers of land which the vendor fraudulently misrepresented as to quantity and location properly joined though they afterwards made partition.¹⁵ A petition which joins several parties as defendants, if it states a joint act relating to a tort which may from its nature be joint or may be committed by persons in combination, is not subject to a demurrer on the

App. 37; *Harmening v. Howland*, 25 N. D. 38; *Schusler v. Clark*, 50 Pa. Super. Ct. 459; *Robinson v. Van Hooser*, 196 Fed. 620. See § 392 and note; *Lane v. Wilcox*, 55 Barb. 615, followed in *Oehlhof v. Solomon*, 73 App. Div. (N. Y.) 329.

It is said in *Cable v. Bowlus*, 21 Ohio C. C. 53, 59, that the case must be such that it was either gross or malicious fraud, or something showing a very corrupt condition of affairs, to justify the recovery of exemplary damages. "I have never heard of a bare case of fraud where it was claimed that for fraud alone the party was entitled to punitive damages."

Actual damages must be proven or exemplary damages cannot be recovered. *Dickinson v. Atkins*, 100 Ill. App. 401.

It is said in *Hoffman v. Gill*, 102 Mo. App. 320, that such damages are not recoverable except where malice, violence or passion and wanton recklessness is shown. And in *Williams v. Detroit O. & C. Co.*, 52 Tex. Civ. App. 243: There seems to be no

well defined rule for determining when exemplary damages should be permitted in suits of this character. We are inclined to the opinion that this should not be done except in those cases where the misrepresentation has been attended by malicious or oppressive conduct, or the abuse of the relation of trust or confidence, followed by special damages apart from the mere loss of money or property forming the subject matter of the fraud.

¹¹ *Wheatacraft v. Myers*, 57 Ind. App. 371 (purchase of hogs infected with cholera).

¹² *Gibbens v. Bourland*, — Tex. Civ. App. —, 145 S. W. 274.

¹³ *Hartford L. Ins. Co. v. Hope*, 40 Ind. App. 354. See § 402.

¹⁴ *Medley v. Watson*, 6 Mete. (Mass.) 257-8; *Stiles v. White*, 11 Mete. (Mass.) 356, 45 Am. Dec. 214; *J. E. Dunn & Co. v. Smith* (Tex. Civ. App.), 74 S. W. 576; *Larsen v. Groeschel*, 98 Ind. 160.

¹⁵ *Porter v. Fletcher*, 25 Minn. 493. See *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141.

ground of misjoinder of parties.¹⁶ The liability of joint conspirators is not dependent upon the receipt of their share of the proceeds of the fraud.¹⁷ A principal and agent who jointly perpetrate and share in the profits of a fraudulent act are jointly liable.¹⁸ The liability to make good a loss resulting from a breach of trust participated in by more than one trustee is both joint and several, and each is liable for the whole loss.¹⁹

§ 1180. Pleading. Where fraud is the ground of action the plaintiff must allege all circumstances necessary for the support of the action with such certainty that the defendant may know what he is called on to answer.²⁰ Evidence is admissible only of the false statements alleged in the declaration.²¹ A general averment of fraud in an answer is sufficient in New Jersey,²² but not in New York.²³ A special allegation of such consequences as are the natural, but not the necessary, result of the wrong is essential.²⁴ In the absence of a claim for special damages the complaint need not particularize the claim for compensatory and exemplary damages.²⁵

¹⁶ *Stuart v. Bank*, 57 Neb. 569, and cases cited. See *Gurney v. Tenney*, 197 Mass. 457.

¹⁷ *Light v. Jacobs*, 183 Mass. 206.

¹⁸ *Dresher v. Becker*, 88 Neb. 619.

¹⁹ *General Proprietors of Eastern Division of New Jersey v. Force*, 72 N. J. Eq. 56, 128.

²⁰ *Duffy v. Byrne*, 7 Mo. App. 417; *First Nat. Bank v. Grosshans*, 61 Neb. 575; *Tolbert v. Caledonian Ins. Co.*, 101 Ga. 741; *Johnston v. Spencer*, 51 Neb. 198; *New Bank v. Klei-*

ner, 112 Wis. 287; *Schoellhamer v. Rometsch*, 26 Ore. 394.

²¹ *Jackson v. Collins*, 39 Mich. 557.

²² *Fivey v. Pennsylvania R. Co.*, 66 N. J. L. 23.

²³ *Eccardt v. Eisenhower*, 74 App. Div. (N. Y.) 35.

²⁴ *Isman v. Loring*, 130 App. Div. (N. Y.) 845.

²⁵ *Patterson v. Corn Exchange*, 197 Fed. 686.

CHAPTER XXXI.

INFRINGEMENT OF PATENT-RIGHTS.

§ 1181. Statutory remedies.

1182. Same subject; judicial summary.

1183, 1184. Damage recoverable at law; license fees.

1185. Same subject; profits as damages.

1186. Same subject; other measures of damage; who liable; assignments.

1187. Interest on damages in actions at law.

1188. Exemplary damages.

1189. Compensation in equity; theory on which allowed.

1190, 1191. Same subject; computation of profits.

1192. Same subject; computation, to what time made.

1193. Rule when whole article not patented.

1194. Same subject; mitigation of liability.

1195. Same subject; ascertainment of profits.

1196. Profits recoverable though no license fee established.

1197. Interest in equity.

§ 1181. Statutory remedies. Pecuniary redress for infringement of patent-rights may be obtained, pursuant to the legislation of congress, by actions at law and by suits in equity. In the former, damages may be recovered in an action on the case in the name of the party interested, either as patentee, assignee¹ or grantee. And whenever in any such action a verdict is rendered for the plaintiff the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount found, together with the costs.² The legal remedy has been substantially

¹ An assignee cannot sue in his own name for an infringement which occurred before the assignment was made to him, although his assignment covers all claims and demands accruing from infringements pre-

vious to its date. *Armstrong, Whitworth & Co. v. Norton*, 15 App. Cas. (D. C.) 223. But see § 1186.

² Act of July 8, 1870, § 4919, R. S. of U. S.

the same since the passage of the act of July 4, 1836.³ The equitable remedy was enlarged by the act of 1870. It provides that upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction, and shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case.⁴ By amendment, made in 1897, the recovery of profits or damages is limited to six years before the commencement of suit or action. The authority to treble the damages may be exercised by a court of equity and includes authority to multiply or increase them to any amount less than treble the sum awarded.⁵

Under section 4900 of the revised statutes the patentee or his assignee, if he makes or sells the articles patented, cannot recover damages against infringers of the patent unless he has given notice of his right either to the whole public by marking his article "patented" or to the particular defendant by informing him of his patent and of the infringement of it. The failure to give such notice also bars the recovery of the penalty imposed by the act of February 4, 1887, ch. 105,⁶ upon any person who, during the term of a patent for a design, and without the license of the owner, applies the design secured by the patent, "or any colorable imitation thereof," to any article of manufacture for the purpose of sale, or sells or exposes for sale any article of manufacture to which "such design or colorable imitation" has been applied, knowing that the same has been so applied.⁷ If an infringed article is covered by two patents, and is marked "patented" by only one of them, though both were infringed, the accounting of damages must be had

³ 5 Stats. at Large, 123, sec. 14.

⁶ 24 Stats. at Large, 387.

⁴ § 4921, R. S. of U. S.; *Fox v. Knickerbocker E. Co.*, 140 Fed. 714.

⁷ *Dunlap v. Schofield*, 152 U. S.

⁵ *National Folding-Box & P. Co. v. Elsas*, 81 Fed. 197. See § 1188.

244, 38 L. ed. 426; *Monroe v. Anderson*, 7 C. C. A. 272, 58 Fed. 398.

solely under the patent so marked.⁸ In the absence of marking or notice neither damages nor profits can be recovered.⁹ Sufficient notice is given by bringing suit as to profits accruing thereafter.¹⁰

The act of February 4, 1887, has enlarged the remedy for the infringement of a design patent by giving the entire net profits made on the article to which the infringing design is applied, thereby changing the rule¹¹ which required an apportionment of the profits attributable merely to the design. Such act applied to pending suits so far as infringements occurred after it took effect.¹²

§ 1182. **Same subject; judicial summary.** Mr. Justice Clifford¹³ thus summarized the legal and equitable remedies for this wrong: "Prior to the passage of the act of the 8th of July, 1870, two remedies were open to the owner of a patent whose rights had been infringed, and he had his election between the two; he might proceed in equity and recover the gain and profits which the infringer had made by the unlawful use of his invention, the infringer in such a suit being regarded as the trustee of the owner of the patent as respects such gains and profits; or the owner of the patent might sue at law, in which case he would be entitled to recover as damages compensation for the pecuniary injury he suffered by the infringement, without regard to the question whether the defendant had gained or lost by his unlawful acts,—the measure of damages in such case being not what the defendant had gained, but what the plaintiff had lost."¹⁴ Where the suit is at law, the measure of damages remains unchanged to the present time, the rule still

⁸ *Blount Mfg. Co. v. Bardsley*, 66 Fed. 761.

⁹ *American C. Co. v. Mills*, 89 C. A. 171, 162 Fed. 147; *Westinghouse E. & Mfg. Co. v. Condit E. Mfg. Co.*, 159 Fed. 154; *Allen v. Deacon*, 21 Fed. 122; *National Co. v. Belcher*, 68 Fed. 665. In *B. B. Hill Mfg. Co. v. Stewart*, 116 id. 927, the court seemed to favor the recovery of nominal damages under such circumstances.

¹⁰ *Eastern D. Co. v. Keystone P. Mfg. Co.*, 164 Fed. 47.

¹¹ *Dobson v. Hartford C. Co.*, 114 U. S. 439, 29 L. ed. 177.

¹² *Untermeyer v. Freund*, 7 C. C. A. 183, 58 Fed. 205.

¹³ *Birdsall v. Coolidge*, 93 U. S. 68, 23 L. ed. 804.

¹⁴ *Curtis on Pat.* (4th ed.) 461; 5 Stats. 123.

being that the verdict of the jury must be for the *actual* damages sustained by the plaintiff, subject to the right of the court to enter judgment thereon for any sum above the verdict, not exceeding three times that amount, together with costs.¹⁵ Damages of a compensatory character may also be allowed to the complainant suing in equity in certain cases where the gains and profits made by the respondent are clearly not sufficient to compensate the complainant for the injury sustained by the unlawful violation of the exclusive right secured to him by the patent. Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event the provision is that the complainant 'shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby.' Cases occurred under the prior patent act where manifest injustice was done to the complainant in equity suits by withholding from him a just compensation for the injury he sustained by the unlawful invasion of his exclusive rights, even when the final decree gave him all that the law allowed. Examples of the kind may be mentioned where the business of the infringer was so improvidently conducted that it did not yield any substantial profits, and cases where the products of the patented improvements were sold greatly below their just and market value in order to compel the owner of the patent, his assignees and licensees, to abandon the manufacture of the patented product. Courts could not, under that act, augment the allowance made by the final decree, as in the case of a verdict of a jury; but the present patent act provides that the court shall have the same powers to increase the decree, in its discretion, that are given by the act to increase the damages found by verdicts in actions at law. Such difficulties could never arise in an action at law, nor can they now, as both the prior and present patent acts authorize the court to enter judgment on the verdict of the jury for any sum above the

¹⁵ 16 Stats. 207. See *Coupe v. Royer*, 155 U. S. 565, 582, 39 L. ed. 263, 269.

verdict, not exceeding three times the amount. No discretion is vested in the jury, but they are required to find the *actual damages* under proper instructions from the court.”¹⁶

§ 1183. *Damage recoverable at law; license fees.* Where the plaintiff has sought his profit in the form of a royalty paid by his licensees and there are no peculiar circumstances in the case the amount to be recovered will be regulated by that standard,¹⁷ when a sufficient number of licenses or sales have been made to establish a market value.¹⁸ Whenever an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvements he has himself fixed the average of his actual damage when his invention has been used without his license. If he claims anything above that amount he is bound to substantiate his claim by clear and distinct evidence.¹⁹ He is, however, entitled to interest on the amount due him from the time payment should have been made.²⁰ The rule that the damages are measured by the royalty applies regardless of whether the patent infringed upon is a foundation patent or not.²¹ If an infringement is deliberately made the defendant may be charged with the full amount of the established license fee although his use of the article wrongfully made may have continued for but a small portion of the time covered by the life of the patent. The effect of the payment will be to vest the right in the infringer to use the article during the life of the patent or until the article made

¹⁶ *Day v. Woodworth*, 13 How. 372, 14 L. ed. 185; *Seymour v. McCormick*, 16 How. 488, 14 L. ed. 1027.

¹⁷ *Philp v. Nock*, 17 Wall. 460, 21 L. ed. 679; *Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764; *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024; *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. ed. 802; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. ed. 664.

¹⁸ *Diamond Stone-S. Mach. Co. v. Brown*, 92 C. C. A. 224, 166 Fed. 306; *Locomotive Safety T. Co. v. Pennsylvania R. Co.*, 14 Phila. 432; *Packet Co. v. Sickles*, 19 Wall. 611,

22 L. ed. 203; *Sickles v. Borden*, 4 Blatch. 14; *Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. ed. 76; *Livingston v. Jones*, 3 Wall. Jr. 330; *Houston, etc. R. Co. v. Stern*, 20 C. C. A. 568, 74 Fed. 636. See *Bussey v. Excelsior Co.*, 1 McCrary 161.

¹⁹ *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024, 1028. See *Singer Mfg. Co. v. Cramer*, 48 C. C. A. 588, 109 Fed. 652; *Wood v. United States*, 36 Ct. of Cls. 418, 426; *International T. C. Co. v. Hanks D. Ass'n*, *infra*.

²⁰ *Tilghman v. Proctor*, *supra*.

²¹ *Timken v. Olin*, 41 Fed. 169.

by him is worn out.²² "In order," says Mr. Justice Field, "that a royalty may be accepted as a measure of damages against an infringer who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of; it must be paid by such a number of persons, as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention, and it must be uniform at the places where the licenses are issued."²³ A variation in the fees paid at different times and the continuation of the infringement under the different fees will justify a variation of the liability accordingly.²⁴ Retroactive effect will not be given the establishment of a fee though the profits made by the infringer cannot be proved.²⁵

The payment of a sum in settlement of a claim for an alleged infringement cannot be taken as a standard to measure the value of the improvements in determining the damages in other cases of infringements.²⁶ Agreements made to secure the introduction of an invention are not such licenses as establish a measure of damages against an infringer.²⁷ If two prices are agreed upon as a royalty, the lesser depending upon prompt payment, a third party's liability will be measured by it.²⁸ The general rule is not applicable where the invention infringed upon contains patents which are not appropriated by the infringer. In such a case the nature of the part used must be shown,²⁹ and the portion of the license fee paid there-

²² *Stutz v. Armstrong*, 25 Fed. 147, and cases cited.

²³ *Rude v. Westcott*, 130 U. S. 152, 32 L. ed. 888; *Houston, etc. R. Co. v. Stern*, 20 C. C. A. 568, 74 Fed. 636; *American S. P. Co. v. De Grasse P. Co.*, 190 Fed. 39; *Diamond Stone-S. Mach. Co. v. Brown*, 155 Fed. 753, 166 id. 306, 92 C. C. A. 224.

It seems that, in the absence of collusion, license fees agreed upon pending the suit for infringement may be shown if the infringement is continued. *Mast v. Superior D. Co.*, 83 C. C. A. 157, 154 Fed. 45.

²⁴ *Fox v. Knickerbocker E. Co.*, 158 Fed. 422.

²⁵ *Diamond Stone-S. Mach. Co. v. Brown*, *supra*.

²⁶ *Rude v. Westcott*, *supra*; *Cornely v. Marekwald*, 131 U. S. 159, 33 L. ed. 117; 32 Fed. 292; *International T. C. Co. v. Hanks D. Ass'n*, 111 Fed. 916.

²⁷ *Graham v. Geneva, etc. Mfg. Co.*, 24 Fed. 642.

²⁸ *Id.*

²⁹ *Wooster v. Simonson*, 16 Fed. 680. See *McDonald v. Whitney*, 39 id. 466.

for.³⁰ And so that rule is inapplicable where the only royalty established is for the right to use the patented article, and damages are sought for its wrongful sale; a payment made for the whole monopoly of selling and manufacturing is not sufficient evidence of the value of the right to make occasional sales in particular territory; and so a royalty paid for a license to manufacture and sell under a covenant not to sue purchasers from the licensee is not the standard by which to measure the value of an ordinary selling right.³¹ In the absence of evidence of the relative utility or value of two devices named in a patent, proof of the license fee paid for two improvements in an article is not competent to show the damage sustained by an infringement of one of the improvements.³² But if there is evidence tending to show that the royalty which the patentee had received was for the second claim of his patent alone and that the improvement covered by the first claim was a detriment to his apparatus the jury may apportion the whole damages to the second claim.³³

§ 1184. **Same subject.** The foregoing rule is deemed subordinate to the measure fixed by the statute—the actual damages,—and therefore it will be departed from whenever the court can see that it will give less or more than such damages.³⁴ There is no rule that will apply equally to all cases. The mode of ascertaining actual damages must necessarily depend on the nature of the monopoly granted,³⁵ and the character of the infringement. Thus, it was held by Judge Story that if the use of a machine is proven the value of the use would establish the measure of damages; but if the infringement consisted merely

³⁰ *Porter N. Co. v. National N. Co.*, 22 Fed. 829. See *American S. P. Co. v. De Grasse P. Co.*, 190 Fed. 39.

³¹ *Colgate v. Western E. Mfg. Co.*, 28 Fed. 146; *La Baw v. Hawkins*, 2 Bann. & Ard. 561.

³² *Hunt F. P. Co. v. Cassidy*, 3 C. C. A. 525, 53 Fed. 257, citing *Philp v. Nock*, 17 Wall. 460, 21 L. ed. 679; and *Seymour v. McCormick*, *infra*.

³³ *S. C.*, 12 C. C. A. 316, 64 Fed.

585. See *Willimantic T. Co. v. Clark T. Co.*, 27 Fed. 865.

³⁴ *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024; *Birdsall v. Coolidge*, 93 U. S. 68, 23 L. ed. 804; *Bates v. St. Johnsbury, etc. R. Co.*, 32 Fed. 628; *Keller v. Stolzenbaugh*, 43 Ill. 378. See *Sanders v. Logan*, 2 Fish. Pat. Cas. 168; *Washington, etc. S. P. Co. v. Sickles*, 19 Wall. 611, 22 L. ed. 203.

³⁵ *Id.*

in making a machine and no actual damages were shown to have resulted only a nominal sum should be awarded.³⁶ Where it was shown what sum the plaintiff would have obtained from the defendant for a patented machine and that a sale would have been made to him if he had not used the infringing machine the recovery was regulated by such amount.³⁷ In England the principle is recognized that the plaintiff may have the damages assessed at such sum as the defendant would have had to pay for permission to do that which he wrongfully did.³⁸

In cases where there is no established patent or license fee general evidence may be resorted to in order to get at the measure of damages; then, evidence of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results is competent and appropriate.³⁹ In some cases this advantage, or the value of the use of the plaintiff's invention, is adopted as the measure of the actual damages.⁴⁰ A man who invents or discovers a new com-

³⁶ *Whittemore v. Cutter*, 1 Gall. 478. See *Reis v. Rosenfeld*, 204 Fed. 282.

³⁷ *Blake v. Greenwood Cemetery*, 21 Blatch. 222; *Bemis C. B. Co. v. Brill Co.*, 200 Fed. 749. In *Blake v. Robertson*, 94 U. S. 728, 24 L. ed. 245, that measure of damages was denied because other patents than that owned by the plaintiff were involved and their value was not proven.

³⁸ *British Motor Syndicate v. Taylor*, [1900] 1 Ch. 577, [1901] 1 Ch. 122; *Pneumatic T. Co. v. Puncture Proof P. T. Co.*, 16 Rep. of Pat. Cas. 209.

³⁹ *Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. ed. 76; *Philp v. Nock*, 17 id. 460, 21 L. ed. 679; *McCune v. Baltimore & O. R. Co.*, 83 C. C. A. 175, 154 Fed. 63.

The amount paid by the defendant for a license to use another patented invention, which he used after he ceased to infringe upon

the plaintiff's patent and as a substitute therefor, was held to be the proper measure of the value of the plaintiff's invention to him. *Sargent v. Yale Lock Mfg. Co.*, 17 Blatch. 249.

If there is no established license fee and the plaintiff has produced all the evidence of the value of the article he can and the defendant has offered no evidence, the manufacturer's price of the article, the percentage on such price which ordinarily constitutes a fair royalty, the judgment of an expert and the price paid by an individual for two licenses under the patent will be considered in assessing damages. *McKeever v. United States*, 14 Ct. of Cls. 396; *Wood v. Same*, 36 id. 418, 426.

⁴⁰ *Brodie v. Ophir S. M. Co.*, 5 Sawyer 608; *Carter v. Baker*, 1 id. 527.

This measure applies in an action of *assumpsit* for the use of a pat-

bination of matter, such as vulcanized India rubber or a valuable medicine, may find his profit to consist in a close monopoly, forbidding any one to compete with him in the market, he being himself able to supply the whole demand at his own price. If he should grant licenses to all who should desire to manufacture his composition mutual competition might destroy the value of each license. This may be the case, also, where the patentee is the inventor of an entirely new machine. If any person could use the invention or discovery by paying what a jury might suppose to be the fair value of a license it is plain that competition would destroy the whole value of the monopoly. In such case the profit of the infringer may be the only criterion of the actual damage to the patentee. It is, however, only when, from the peculiar circumstances of the case, no other rule can be found that the defendant's profits become the criterion of the plaintiff's loss.⁴¹ It is observed in a late

ented invention if there is no established royalty. *Deane v. Hodge*, 35 Minn. 146.

⁴¹*Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024; *Cowing v. Rumsey*, 8 Blatch. 36.

In *Packet Co. v. Sickles*, 19 Wall. 611, 22 L. ed. 203, Miller, J., said: "The rule in suits in equity of ascertaining by a reference to a master the profits which the defendant has made by the use of the plaintiff's invention stands on a different principle. It is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the adjustment of those profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury. With these corrective powers in the hands of the chancellor, the rule of assuming profits as the groundwork for estimating the compensation due from the infring-

er to the patentee has produced results calculated to suggest distrust of its universal application even in courts of equity. Certainly any unnecessary relaxation of the rule we have laid down in courts of law, where the patentee has been in the habit of selling his invention, or licenses to use it, so that a fair deduction can be made as to the value which he and those using it have established for it, does not commend itself to our judgment, nor is it encouraged by our experience. The reason of this rule is still stronger when the use of the patented invention has been with the consent of the patentee, express or implied, without any rate of compensation fixed by the parties."

In *Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764, the same judge said: "Profits are not the primary or true criterion of damages for infringement in actions at law. That rule applies eminently and

case that this topic is one upon which there has been some confusion and perhaps some variance in the cases, and the rule is declared to be that at law the plaintiff is entitled to recover, as damages, compensation for the pecuniary loss he has suffered from the infringement without regard to the question whether the defendant has gained or lost by his unlawful acts—the measure of recovery in such cases being, not what the defendant has gained, but what the plaintiff has lost.⁴² It has been held by at least one of the circuit courts of appeals that in the absence of an established royalty, and of proof of lost sales or injury by competition, the only measure of damages is such sum as, under all the circumstances, would have been a reasonable royalty for the defendant to have paid, which amount the jury may determine, and this they may do in the absence of testimony showing with mathematical certainty what would have been such royalty.⁴³ But this doctrine has been overthrown by the supreme court and the rule established that, in the absence of proof of a license fee, market price, or other use of the invention than by the defendant, the recovery cannot exceed a nominal sum.⁴⁴ “Where the patentee sues to recover

mainly in cases in equity, and is based upon the idea that the infringer shall be converted into a trustee as to these profits for the owner of the patent which he infringes,—a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine the defendant's books and papers, and examine him on oath, as well as all his clerks and employees. On the other hand, as we have repeatedly held, sales of licenses of machines or of a royalty established constitute the primary and true criterion of damages in an action at law. No doubt, in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on

which the damages or the compensation may be ascertained; but it cannot be admitted * * * that in an action at law the profits which the other party might have made is the primary or controlling measure of damages.”

If the proof of profits is difficult a court of equity will accept the established license fee as a proper basis for awarding damages. *Emigh v. B. & O. R. Co.*, 4 *Hughes* 271.

⁴² *Coupe v. Royer*, 155 U. S. 565, 582, 39 L. ed. 263, 269.

⁴³ *Hunt F. P. Co. v. Cassiday*, 12 C. C. A. 316, 64 Fed. 585.

⁴⁴ *Coupe v. Royer*, *supra*; *Scattle v. McNamara*, 26 C. C. A. 652, 81 Fed. 863; *Houston, etc. R. Co. v. Stern*, 20 C. C. A. 568, 74 Fed. 636.

for the use of his appliance from a licensee the measure of recovery is not the worth or value of the appliance to the defendant, but its worth or value generally. * * * Where the defendant is a wrong-doer and is infringing upon the rights of the patentee then he may be required to pay the full value of the article to himself."⁴⁵

§ 1185. Same subject; profits as damages. The conclusions reached by the supreme court of the United States on the various aspects of this branch of the subject have been thus stated: It is competent for a complainant, who has established the validity of his patent and proved an infringement, to demand, in equity, an account of the profits actually realized by the defendant from his use of the patented device; that the burden of proof is on the plaintiff; that where the infringed device was a portion only of the defendant's machine, which embraced inventions covered by patents other than that for the infringement of which the suit was brought, in the absence of proof to show how much of that profit was due to such other patents and how much was a manufacturer's profit, the complainant is entitled to nominal damages only.⁴⁶ In cases in which profits are the proper measure of damages it is the profits which the infringer makes or ought to have made which govern, and not those which the plaintiff shows he might have made.⁴⁷ The profits the patentee might have made on sales of the infringer's articles by an agent bound to buy from him may be recovered because it is fair to assume the agent would have bought the

⁴⁵ *Ft. Wayne, etc. R. Co. v. Haberkorn*, 15 Ind. App. 479, 488.

⁴⁶ *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 147, 38 L. ed. 103, 105, 14 Sup. Ct. 295.

⁴⁷ *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024; *Cowing v. Rumsey*, 8 Blatch. 36; *Packet Co. v. Sickles*, 19 Wall. 611, 22 L. ed. 203; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. ed. 664; *Keystone Mfg. Manuf. Co. v. Adams*, *supra*; *Busch v. Jones*, 16 App. Cas. (D. C.) 23, 43; *Coupe v. Royer*, 155 U. S.

565, 583, 39 L. ed. 263, 270; *Piaget N. Co. v. Headley*, 123 Fed. 897; *Brennan v. Dowagiac Mfg. Co.*, 89 C. C. A. 392, 162 Fed. 472.

"An infringer cannot be heard to say that his superior skill and intelligence enabled him to realize profits by his infringement which a person of less skill might not have realized. He is liable for all profits he has made by the illegal appropriation of another's invention." *Lawther v. Hamilton*, 64 Fed. Rep. 221, 224.

quantity sold from his principal if there had been no infringement.⁴⁸ If there is no established license fee the jury are not to estimate damages for the whole life of the patent, but only for the period of the infringement. In such case a recovery does not vest the infringer with the right to continue the use of the patented machine or article.⁴⁹ It is otherwise at the election of the complainant if such a fee has been established,⁵⁰ and where it has not if the patentee does not use the invention himself, but manufactures and sells it at fixed prices, if he recovers the full amount of profits he would have obtained had he made and sold the article in question. It is said that by such claim and recovery he adopts the sale made by the defendant, and the right to use the specific article sold by the latter vests in his vendee.⁵¹ But the recovery of merely nominal damages does not work this result because the payment thereof is not a satisfaction.⁵² The patentee may sue at law for the damages which he has sustained, and these he may recover whether the defendant has made any profits or not. In such an action it is precisely what is lost to the plaintiff, and not what the defendant has gained, which is the measure of the compensation to be awarded.⁵³

Where the defendant's profits are sought to be made the measure of the plaintiff's recovery it is a practical question, the solution of which will determine that claim or the extent to which it may be maintained, whether the defendant has by the infringement diverted the patronage of the plaintiff or diminished his profits from his invention. It was at one time ruled at the circuit that the law would presume the plaintiff's profits were diminished in proportion to those made by the infringer;⁵⁴ but this was held erroneous in *Seymour v.*

⁴⁸ *National Metal W. S. Co. v. Bredin*, 186 Fed. 490.

⁴⁹ *Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. ed. 76; *Spaulding v. Page*, 4 Fish. Pat. Cas. 641, 1 Sawyer 702.

⁵⁰ *Stutz v. Armstrong*, 25 Fed. 147; *Sickels v. Borden*, 3 Blatch. 535, 545; *Perrigo v. Spaulding*, 13 id. 389; *Spaulding v. Page*, *supra*.

⁵¹ *Spaulding v. Page*, *supra*. See

Steam S. C. Co. v. Sheldons, 15 Fed. 608.

⁵² *Blake v. Greenwood Cemetery*, 21 Blatch. 222.

⁵³ *Cowing v. Rumsey*, 8 Blatch. 36.

⁵⁴ *Wilbur v. Beecher*, 2 Blatch. 132; *Buck v. Hermance*, 1 id. 398; *Hall v. Wiles*, 2 id. 194. See *Holmes v. Truman*, 14 C. C. A. 517, 67 Fed. 542.

McCormick.⁵⁵ It is now settled that there is no such legal inference or presumption. Actual damages must be proved; they cannot be found unless the plaintiff furnishes the jury some *data* for the computation.⁵⁶ He must show his damages by evidence; they must not be left to conjecture; they must be proved, and not guessed.⁵⁷ But the general principle stated in another place⁵⁸ is not lost sight of in this class of actions where the infringement was wanton, or the evidence which will show more exactly the loss resulting therefrom is peculiarly within the defendant's possession or control. Under such circumstances the defendant ought to be held to the most rigid accountability and no intendment made in his favor, founded on the alleged inconclusiveness of the plaintiff's proof of loss. Such proof ought to be considered and interpreted most liberally in his favor within the limit of an approximately accurate ascertainment of his damages.⁵⁹ On the trial of an action for infringement of a patent for a writing fluid no proof was given of the cost of the manufacture of the fluid or of the sale price; but it was shown that sales were highly profitable and that the defendant had made and sold very large quantities. He gave no evidence of the amount of the manufactures or sales, or of the cost of the article. The jury found a verdict for \$2,000

⁵⁵ 16 How. 480, 14 L. ed. 1024. See *Alexander v. Henry*, 12 Rep. of Pat. Cas. 360; *American B. W. Co. v. Thompson*, 7 id. 152.

⁵⁶ *Mayor v. Ransom*, 23 How. 487, 16 L. ed. 515; *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024; *Blake v. Robertson*, 94 U. S. 728, 24 L. ed. 245; *Cowing v. Rumsey*, 8 Blatch. 36; *Philp v. Nock*, 17 Wall. 460, 21 L. ed. 679; *Ingersoll v. Musgrove*, 14 Blatch. 541; *Cornely v. Marekwald*, 131 U. S. 159, 33 L. ed. 117; *Bell v. United States S. Co.*, 32 Fed. 549; *Royer v. Shultz B. Co.*, 45 id. 51. See *Bemis C. B. Co. v. Brill Co.*, 200 Fed. 749.

⁵⁷ *Paxton v. Brinton*, 126 Fed. 541; *Mast v. Superior D. Co.*, 83

C. C. A. 157, 154 Fed. 45; *Philp v. Nock*, 17 Wall. 460, 21 L. ed. 679; *Hohorst v. Hamburg-Am. P. Co.*, 34 C. C. A. 39, 91 Fed. 655.

⁵⁸ § 439.

⁵⁹ *Bemis C. B. Co. v. Brill Co.*, 200 Fed. 749, and cases cited: *Brennan v. Dowagiac Mfg. Co.*, 89 C. C. A. 392, 162 Fed. 472; *Dowagiac Mfg. Co. v. Superior D. Co.*, 89 C. C. A. 399, 162 Fed. 479; *Bigelow C. Co. v. Dobson*, 10 Fed. 385 (reversed as to the measure of damages in *Dobson v. Hartford C. Co.*, 114 U. S. 439, 29 L. ed. 177); *Creamer v. Bowers*, 35 Fed. 206; *Regina M. B. Co. v. Otto*, 114 id. 505; *Rose v. Hirsh*, 94 id. 177, 36 C. C. A. 132, 51 L.R.A. 81.

for the plaintiff, and it was held that it must stand, not being one of palpable extravagance; that in such cases the plaintiff is not held to the most exact proof of the amount of his damages and the jury are warranted in exercising a liberal discretion. If the defendant prefers to leave the damages to general inference and the estimate of the jury when he might make the amount reasonably certain by evidence on his part the verdict will not be interfered with except in a case of plain extravagance.⁶⁰ But this doctrine, if it is in harmony with the later cases, does not justify the estimate of profits upon the basis of those made by establishments similar to that of the defendant's. The plaintiff has the burden of proof, notwithstanding the defendant has failed to disclose the condition of its business.⁶¹ The damages will be computed on what the jury find from evidence is the loss the plaintiff has in some way sustained in consequence of the infringement. The profits of the defendant, to the extent the jury find that they represent a loss of profits or gains which the plaintiff, but for the infringement, would have realized, may be accepted as the measure of his loss, but no further.⁶² In the absence of proof of a license fee the jury may consider, in estimating the damages, the utility and advantage to the defendant of the use of the patented device as compared with other means of obtaining similar results the use of which was open to it and may compare the cost of using the one to the cost and saving in the use of the other,⁶³ and also take into account the profits resulting from the infringement.⁶⁴

One who has obtained judgment for lost profits cannot, so long as it is unreversed, prosecute an action at law for other damages caused by the same acts of infringement which were

⁶⁰ *Stephens v. Felt*, 2 Blatch. 37.

⁶¹ *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 148, 38 L. ed. 103, 105.

⁶² *Stephens v. Felt*, *supra*; *Pitts v. Hall*, 2 Blatch. 229; *Ingersoll v. Musgrove*, 14 id. 541; *Carter v. Baker*, 1 Sawyer, 527; *English &*

Am. Mach. Co. v. Union B. & S. Mach. Co., 13 Rep. of Pat. Cas. 64. Compare *Brennan v. Dowagiac Mfg. Co.*, 89 C. C. A. 392, 162 Fed. 472.

⁶³ *Brickill v. Mayor, etc.*, 8 C. C. A. 500, 60 Fed. 98; *Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. ed. 76.

⁶⁴ *Cassidy v. Hunt*, 75 Fed. 1012.

recovered for in the equity suit.⁶⁵ After the satisfaction of a decree for the profits of sales there cannot be a recovery against the vendee of the patent of the profits derived by him from its use.⁶⁶ The recovery of profits must be limited to such as accrue to the complainants in the right in which they sue—there cannot be a recovery as a licensee by one who sues as a joint owner.⁶⁷ Joint owners of a patent may not recover profits made anterior to their ownership, though one of them was previously the sole owner of it.⁶⁸ A decree may not be rendered against the officers of a corporation jointly sued with it for profits realized alone by the corporation.⁶⁹

§ 1186. Same subject; other measures of damage; who liable; assignments. Where the infringement is confined to a part of the thing used or sold by the infringer the recovery will be limited accordingly. It cannot be as if the entire thing were covered by the patent, or, where that is the case, as if the infringement were as large as the monopoly.⁷⁰ The plaintiff is entitled to recover in respect of any loss by reduction of the price of the article containing his invention in consequence of the infringement.⁷¹ But it was held in *Ingersoll v. Musgrove*⁷² that where the patentee claims damages for a reduction of his price caused by the defendant infringing the patent he must establish by satisfactory evidence not only that the reduction was caused by the infringement, but how much such reduction was; the extent to which it was occasioned by the acts of the defendant and that it was made because the infringing article contained the invention. Such evidence must not be estimate, conjecture and opinion, but must afford a sound and safe basis of calculation.⁷³

The only persons who can be held for damages for the

⁶⁵ *Child v. Boston & F. I. Works, Mfg. Co.*, 89 C. C. A. 26, 160 Fed. 19 Fed. 258. 948.

⁶⁶ *Steam Stone-C. Co. v. Sheldons*, 70 Philp v. Noek, 17 Wall. 460, 21 21 Fed. 875. L. ed. 679.

⁶⁷ *National Metal W. S. Co. v. Bredin*, 186 Fed. 490. ⁷¹ *Carter v. Baker*, 1 Sawyer, 527.

⁶⁸ *Canda v. Michigan M. I. Co.*, 72 14 Blatch. 541. ⁷³ See *Buerk v. Imhaeuser*, 14 81 C. C. A. 420, 152 Fed. 178.

⁶⁹ *McSherry Mfg. Co. v. Dowagiac* Blatch. 19.

infringement of a patent are those who own, or have some interest in, the business of making, using or selling the thing which is an infringement. An action at law cannot be maintained against the directors, shareholders or workmen of a corporation which infringes a patented improvement.⁷⁴ All who participate in and profit by the infringing acts are joint wrong-doers.⁷⁵

Demands for damages and for profits for past infringements are assignable, and an assignee may recover for infringements which occurred when he was not the owner of the patent.⁷⁶ The vendor of a machine which is known to be the invention of another person is not liable for sales made before the inventor applied for a patent.⁷⁷

§ 1187. **Interest on damages in actions at law.** The damages in these cases being unliquidated, interest is not generally allowed.⁷⁸ In one case the jury were permitted to add interest from the commencement of the action,⁷⁹ and in another to add it in their discretion, without restriction, to the time of commencing the action.⁸⁰ If, however, the amount of the royalty charged by the patentee is fixed by him before the infringement occurs the damages are so far liquidated that interest follows as compensation for delay in making payment.⁸¹

§ 1188. **Exemplary damages.** The jury are required to find the actual damages and have and can be allowed no discretion to go beyond that measure,⁸² nor to allow counsel fees as part

⁷⁴ *United N. Co. v. Worthington*, 13 Fed. 392.

⁷⁵ *Harrington v. Atlantic & P. Tel. Co.*, 143 Fed. 329.

⁷⁶ *Consolidated Oil Well P. Co. v. Eaton*, 12 Fed. 865; *Diddle v. Augur*, 7 Blatch. 86; *Gordon v. Anthony*, 16 id. 234.

⁷⁷ *Lyon v. Donaldson*, 34 Fed. 789.

⁷⁸ *Parks v. Booth*, 102 U. S. 96, 26 L. ed. 54; *Silshy v. Foote*, 20 How. 378, 15 L. ed. 953; *Littlefield v. Perry*, 21 Wall. 205, 229, 22 L.

ed. 577, 581; *Mowry v. Whitney*, 14 id. 620, 20 L. ed. 860.

⁷⁹ *Pitts v. Hall*, 2 Blatch. 229.

⁸⁰ *Tatham v. Le Roy*, 2 Blatch. 478.

⁸¹ *Tilghman v. Proctor*, 125 U. S. 136, 143, 31 L. ed. 664, 666; *Locomotive Safety T. Co. v. Pennsylvania R. Co.*, 14 Phila. 432.

⁸² *Day v. Woodworth*, 13 How. 372, 14 L. ed. 185; *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. ed. 802; *Scymour v. McCormick*, 16 How. 480, 489, 14 L. ed. 1024, 1028; *Buck v. Hermance*, 1 Blatch. 398.

of such damages.⁸³ The power to inflict exemplary damages is committed to the discretion and judgment of the court within the limit of trebling the actual damages found by the jury.⁸⁴ It is only exercised where special reasons are shown, such as malice, insufficiency of the verdict, or the like.⁸⁵ It is a power to be used in view of the circumstances of the case. It may be exercised to remunerate parties who have been driven to litigation to sustain their patents by wanton and persistent infringement,⁸⁶ and where efforts have been made to render a recovery ineffectual.⁸⁷ It will not be exercised in favor of the mere assignee of a right of action,⁸⁸ nor where the defense, though active and annoying, has not been legally wanton or unjustifiable.⁸⁹ The statute which authorizes courts of equity to treble the damages does not empower them to allow an increase in the recovery of profits.⁹⁰ Doubt concerning the validity of the patent is ground for not trebling the damages.⁹¹

§ 1189. Compensation in equity; theory on which allowed.

As has been stated, the present patent law gives to the successful plaintiff in an equity suit for an infringement the damages he has sustained in addition to the profits to be accounted for by the defendant. As interpreted, this statute does not, in every case, entitle the plaintiff to such damages, but only when they are necessary to give him adequate compensation. If it appears that the injuries which he sustained are greater than the gains and profits realized by the defendant the plaintiff is entitled to recover compensation in the form of damages for the excess of the injuries sustained beyond the gains and profits received

⁸³ Philip v. Nock, 17 Wall. 460, 21 L. ed. 679; Day v. Woodworth, *supra*.

⁸⁴ *Id.*

⁸⁵ Schwarzel v. Holenshade, 2 Bond 29, 3 Fish. Pat. Cas. 116; Lyon v. Donaldson, 34 Fed. 789; Morss v. Union F. Co., 39 *id.* 468.

⁸⁶ Fox v. Knickerbocker E. Co., 158 Fed. 422; National F. B. & P. Co. v. Robertson's Est., 125 Fed. 524; Brodie v. Ophir S. M. Co., 5 Sawyer 608; National Folding-Box

P. Co. v. Elsas, 86 Fed. 917, 30 C. A. 487, 81 Fed. 197.

⁸⁷ Weston E. I. Co. v. Empire E. I. Co., 155 Fed. 301.

⁸⁸ Schwarzel v. Holenshade, 2 Bond 29, 3 Fish. Pat. Cas. 116.

⁸⁹ Welling v. La Bau, 35 Fed. 302.

⁹⁰ Campbell v. James, 5 Fed. 807; Covert v. Sargent, 42 *id.* 298; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 89 C. C. A. 26, 160 Fed. 948.

⁹¹ Toledo C. S. Co. v. Moneyweight S. Co., 178 Fed. 557; Brown

by the defendant.⁹² The amount of profits the complainant would have realized, rather than the amount made by the defendant, may be recovered where the former was so situated that he could have supplied the demand for the infringed article.⁹³ In an accounting for damages where the infringement was wilful and the defendant made no profits, the relief granted the plaintiff will not be limited merely to nominal damages because of difficulty of proving loss of actual sales by plaintiff, where the sales by the defendant were so large as to render the existence of substantial damages as beyond doubt.⁹⁴ Where the infringement is not wilful it is only compensation for actual loss that can be recovered in any event or form.⁹⁵ Where a patentee contracts to furnish machines to another at a stipulated price and fails to deliver the machines as fast as desired, the purchaser, acting in good faith and under legal advice as to the expiration of the patent, builds a certain number of machines before receiving notice as to the existence of the patent the purchaser should not be compelled to account for profits for the use of the machines and should not be held liable for treble damages but should simply be required to pay whatever profit the patentee would have made in the machines if he had built them himself.⁹⁶ If the patentee has not acted in good faith toward the infringer and has been guilty of laches he can recover only such damages as he clearly proves.⁹⁷ There was nothing in the statutes relating to patents before the act of 1870 providing expressly for the recovery of the gains and profits of an infringement of a patent by suit in equity. The right must have been derived from the application of the general principles of justice as administered in

Bag F. Mach. Co. v. Drohen, 175 id. 576, 99 C. C. A. 192.

⁹² Buerk v. Imhaeuser, 14 Blatch. 19; Carew v. Boston E. F. Co., 3 Cliff. 356, 370; Birdsall v. Coolidge, 93 U. S. 64, 23 L. ed. 802; Conpe v. Royer, 155 U. S. 565, 39 L. ed. 263.

⁹³ Westinghouse v. New York A. B. Co., 131 Fed. 607.

⁹⁴ United States Frumentum Co.

v. Lauhoff, 132 C. C. A. 614, 216 Fed. 610.

⁹⁵ Buerk v. Imhaeuser, 14 Blatch. 19.

⁹⁶ Wright's Automatic T. P. Mach. Co. v. American T. Co., 220 Fed. 163.

⁹⁷ Jennings v. Rogers S. P. Co., 118 Fed. 339.

courts of equity to the relations between the owners of patents and infringers created by the patent laws. The patentee owns the monopoly of the patented invention. When an infringer converts any part of the monopoly into money or anything else the owner has the right to follow his property in its new form. The person in whose hands it is becomes his trustee; not because he was ever a trustee of the invention or monopoly or had any right whatever to dispose of it for the owner, but because he had the money or other thing in his hands which the owner of the invention had the right to claim because the invention brought it. It is what is received for the invention that belongs to the owner of the patent, and when that is not mixed with what is received for anything else there can be no difficulty about how much the owner of the patent is entitled to; when it is, the difficulty is wholly in making the separation.⁹⁸ "The general rule," said Gray, J., "has been sometimes said to be based upon the theory that the infringer is converted into a trustee for the owner of the patent, as regards the profits made by the use of his invention. But, as has been recently declared by this court, upon an elaborate review of the cases in this country and in England, it is more strictly accurate to say that a court of equity which has acquired, upon some equitable ground, jurisdiction of a suit for the infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief by awarding as an equivalent or substitute for legal damages a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage."⁹⁹ It is held in the same case that the liability of an infringer for the profits made is not limited as

⁹⁸ *Steam Stone-C. Co. v. Windsor Mfg. Co.*, 17 Blatch. 24, 36, 18 id. 47; *Littlefield v. Perry*, 21 Wall. 205, 22 L. ed. 577; *Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764; *Packet Co. v. Sickles*, 19 Wall. 611, 22 L. ed. 203; *Livingston v. Woodworth*, 15 How. 546, 14 L. ed. 809; *Williams v. Rome*, etc. R. Co., 18

Blatch. 181; *Regina M. B. Co. v. Otto*, 114 Fed. 505; *Rose v. Hirsh*, 94 id. 177, 36 C. C. A. 132, 51 L.R.A. 801. See *Head v. Porter*, 70 Fed. 498.

⁹⁹ *Tilghman v. Proctor*, 125 U. S. 136, 148, 31 L. ed. 664, 668, referring to *Root v. Railway Co.*, 105 U. S. 189, 214, 26 L. ed. 975, 984.

to time because during a portion of the period he was doing the patentee a wrong an erroneous decision as to the scope of the patent was made in favor of another infringer in no way connected with the defendant.¹ In equity if the patent covers only a particular feature of the article sold by the infringer he must show that the profits received were not attributable solely to the patent feature; it is only where this is done that the patentee is required to apportion the profits between that feature and the other parts of the article.²

§ 1190. **Same subject; computation of profits.** The profits made in violation of a patent-right are to be computed and ascertained by finding the difference between cost and yield. In estimating the cost the elements of price of materials, interest, expenses of manufacture and sale and other necessary expenditures, if there be any, and bad debts are to be taken into account, but usually nothing else.³ The calculation is to be made as a manufacturer calculates the profits of his business. Profit is the gain made upon any business or investment when both the receipts and payments are taken into account. The rule is founded in reason and justice. It compensates one party

¹ *Tilghman v. Proctor*, *supra*.

² *Canda v. Michigan M. I. Co.*, 81 C. C. A. 420, 152 Fed. 178; *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 89 C. C. A. 26, 160 Fed. 948. But see *Kansas City H. P. Co. v. Devo*, 127 Fed. 363.

³ *Piaget Novelty Co. v. Headley*, 123 Fed. 897, disallowing a claim for insurance and for legal services or expenses in successfully defending a prior suit.

Where both the parties did a large similar business at the same place the cost of producing the infringed article by one of them was taken as representing the cost of making it by the other, he not producing any evidence to the contrary. The cost of making the machine with the patented device was arrived at by comparing it with one

most nearly like it. *Mast v. Superior D. Co.*, 83 C. C. A. 157, 154 Fed. 45.

Only such losses are regarded as were sustained concurrently with the making of profits and which resulted from the particular transaction on which the profits are allowed. *Canda v. Michigan M. I. Co.*, 81 C. C. A. 420, 152 Fed. 178.

Interest on the cost of a device and the cost of power will not be allowed unless they have been paid or incurred. *Herring v. Gage*, 15 Blatch. 124.

In *National Metal W. S. Co. v. Bredin*, 186 Fed. 490, the dividends paid and the sums expended for legal and expert services in the litigation over the patent were considered.

and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his own wrong. A more favorable rule would give a premium for dishonesty and invite to aggression.⁴ Although in an action for an accounting for profits the defendant is primarily entitled to credit for the cost of making the products by an infringing process, nevertheless, where he fails to satisfactorily account for the amount unsold he must be charged with the value of the product unaccounted for at least in the precise amount for which he claims credit.⁵ A stipulation between the parties as to the cost to the complainant of producing the product will be disregarded in an accounting for damages where it appears that the plaintiff procured the finished product from another at a higher cost, and such latter cost will be used as a basis for calculating the plaintiff's damages.⁶ Losses incurred by the defendant in consequence of his wrongful invasion of a patent are not chargeable to the plaintiff, nor can their amount be deducted from the compensation which he is entitled to.⁷ A decree enjoining infringement and for account of profits does not subject the defendant to liability for more than the profits he has actually realized; it cannot be made to embrace others which he by diligence might have realized.⁸ If the infringement is of a patent covering a process, in determining the gains and profits made by the infringer the expense of using the process in question is to be ascertained by the manner in which it has in fact been used; the comparison is not necessarily to be made with the cost at which the defendant used the process theretofore employed by

⁴ *Rubber Co. v. Goodyear*, 9 Wall. 788, 804, 19 L. ed. 566, 571; *Burdett v. Esley*, 19 Blatch. 1. Compare *Crosby V. Co. v. Safety V. Co.*, 141 U. S. 441, 35 L. ed. 809.

If the infringer has produced only one-half the product he might have made he will be credited with that proportion of the labor cost. *Kinner v. Shepard*, 118 Fed. 48.

⁵ *Continuous Glass Press Co. v.*

Schmertz Wire Glass Co., 135 C. C. A. 85, 219 Fed. 199.

⁶ *Continuous Glass Press Co. v. Schmertz Wire Glass Co.*, *supra*.

⁷ *Crosby V. Co. v. Safety V. Co.*, *supra*.

⁸ *Livingston v. Woodworth*, 15 How. 546, 14 L. ed. 809. See *Dean v. Mason*, 20 id. 198, 15 L. ed. 876; *Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764; *Packet Co. v. Sickles*, 19 Wall. 611, 22 L. ed. 203.

him. He may show that other persons engaged in the same business used such process at less cost than he did.⁹

Where contractors laid a pavement for a city which infringed the patent of N. and the city paid them as much therefor as it would have had to pay N. had he done the work, thus realizing no profits from the infringement, it was held that in a suit in equity to recover profits against the city and the contractors the latter alone were responsible, although the former might have been enjoined before the completion of the work and, perhaps, would have been liable in an action for damages.¹⁰ If an infringer has not realized profit from the use of the invention he cannot be called upon to respond for profits;¹¹ the patentee in such case is left to his remedy for damages. He is entitled to recover the profits realized from the use of his invention although from other causes the general business of the defendant in which the invention is employed may not have resulted in profits,—as where it is shown that his invention produced a definite saving in the process of a manufacture. On the contrary, though the defendant's general business be ever so profitable, if the use of the invention has not contributed to the profits none can be recovered;¹² and if other methods in common use produce the same results with equal expedition and without increased cost, if there is no established license fee for the use of the patented invention only nominal damages can be recovered.¹³ Where the suit was for the infringement of a patent for a design for carpets, and it was not established that the defendant had made profit, it was error to allow the

⁹ *Tilghman v. Proctor*, 125 U. S. 136, 151, 31 L. ed. 664, 669.

¹⁰ *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. ed. 1000.

¹¹ Mere proof that the patented article could be made at less expense than those previously used to accomplish the same purpose does not establish that the infringer made profits unless it is shown he is under obligation to make the older articles or would have made them if he had not manufactured

the patented one. *Bell v. United States S. Co.*, 32 Fed. 549.

¹² *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. ed. 1000; *Mowry v. Whitney*, 14 Wall. 434, 20 L. ed. 858; *Cawood Patent*, 94 U. S. 695, 24 L. ed. 238; *Tilghman v. Proctor*, *supra*; *Celluloid Mfg. Co. v. Cello-nite Mfg. Co.*, 40 Fed. 476; *Busch v. Jones*, 16 D. C. App. Cas. 32, 43.

¹³ *Black v. Thorne*, 111 U. S. 122, 28 L. ed. 372.

complainant as damages in respect of the yards of infringing carpets made and sold by the former the sum per yard which was the profit of the latter in making and selling carpets with such design, there being no evidence as to the added value of the carpet because of the appropriation of the design.¹⁴ The case was held to be, in the absence of such evidence, one for nominal damages only. The opinion approvingly quotes language used in *Garretson v. Clark*:¹⁵ "The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible and not conjectural or speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature." This principle was overlooked in a case in which a carpet manufacturer used patented looms. He was held liable for the net profits realized upon the number of yards of carpet made by the use of the invention in excess of the quantity that could have been made by the use of non-patentable looms.¹⁶ Wallace, J., clearly shows that this is wrong because it ignores all the expense of the processes which the raw material of which the carpet is composed undergoes before it is ready for the loom. He applied

¹⁴ *Dobson v. Hartford O. Co.*, 114 U. S. 439, 29 L. ed. 177, 5 Sup. Ct. 945, reversing *Bigelow C. Co. v. Dobson*, 10 Fed. 385; *Dobson v. Dornan*, 118 U. S. 10, 30 L. ed. 63. See 24 Stats. 387, as to liability for infringing patents for designs. As to liability for the penalty under that statute, see *Anderson v. Pittsburgh L. Co.*, 47 Fed. 67; and see as to the scope of that statute, *Untermeyer v. Freund*, 7 C. C. A. 183, 58 Fed. 205.

¹⁵ 111 U. S. 121, 28 L. ed. 371, 15 Blatch. 70, approved in *Keystone*

Mfg. Co. v. Adams, 151 U. S. 139, 38 L. ed. 103; *Seeger Refrigerator Co. v. American Car Foundry Co.*, 219 Fed. 565, rev'g 212 Fed. 745. (It was held, however, in the latter case that, under the evidence, the plaintiff was entitled to more than nominal damages, and that the profits were apportionable.) To the same effect: *Kansas City H. P. Co. v. Devol*, 127 Fed. 363; *Burdett v. Estey*, 19 Blatch. 1.

¹⁶ *Webster v. New Brunswick C. Co.*, 2 Ban. & Ard. 67.

a more just rule—the difference between the cost of weaving the carpet on the non-infringing and the infringing looms.¹⁷ If, however, the patent is complete in itself the fact that it can only be used in connection with something else, as a grate which is adaptable to a large variety of stoves, does not prevent a recovery of all the profits.¹⁸ And it has been held by Judge Coxe that under the act of 1887 the infringer of a design patent is liable for all the profits made on the article which embodies the design.¹⁹

§ 1191. Same subject. Interest on capital stock and “manufacturer’s profits” are rejected as not entering into the cost; but wear and tear and repairs and the value of the use of such real and personal estate belonging to the infringer, such as shops, fixtures and machinery employed in making the infringing machines, may be considered as part of the cost.²⁰ And so of the expense of advertising the business and the amount paid

¹⁷ Webster L. Co. v. Higgins, 43 Fed. 673.

¹⁸ Keep v. Fuller, 42 Fed. 896.

If nothing appears to show that some of the profits were the result of something other than the patented device, that being entirely new, the net profits may be recovered. Orr & L. H. Co. v. Murray, 89 C. C. A. 492, 163 Fed. 54.

¹⁹ Untermeyer v. Freund, 50 Fed. 77. The act provides: “And in case the total profit made by him [the infringer] from the manufacture or sale aforesaid of the article or articles to which the design or colorable imitation thereof has been applied exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the said sum of two hundred and fifty dollars.”

²⁰ Rubber Co. v. Goodyear, 9 Wall. 788, 804, 19 L. ed. 566, 571; Steam Stone-C. Co. v. Windsor Mfg. Co., 17 Blatch. 24; Am Ende v. Seabury, 43 Fed. 672; Winchester R.

A. Co. v. American B. & C. Co., 62 Fed. 278; Seabury v. Am Ende, 152 U. S. 561, 38 L. ed. 553.

In Goulds Mfg. Co. v. Cowing, 105 U. S. 257, 26 L. ed. 988, which has been styled an exceptional case, it was said that, in charging the defendant with profits, he should be allowed for the use of tools, machinery, power, and other facilities employed in the manufacture. In a later case (Seabury v. Am Ende, *supra*) the defendant’s plant and real estate were used for several other and wholly different kinds of manufacture than the patented article, and the evidence offered to distinguish between the profits derived from the use of the plant and real estate for making that article and those attributable to the other sources of profit was not sufficient to enable a satisfactory apportionment or allowance for interest on the investment, hence interest was denied.

as royalty for another patent which infringed upon plaintiff's, if the payment therefor was made in good faith.²¹ The amount paid for insurance, it being for the safety of the property generally and not for the benefit of the manufacturer of the infringing machines, will not be allowed as an item of their cost, nor the amount paid for local taxes on such property.²² A corporate infringer may employ stockholders in the infringing work or business, and their wages or salaries, paid in good faith for services actually rendered, and not for the purpose of dividing or concealing profits, will be regarded in arriving at the net profits.²³ A distinction seems to have been made in this respect between a corporation and the members of a partnership, upon what ground is not readily seen; probably there were suspicious circumstances connected with the case which holds that the members of a partnership are not to be credited with the value of their services, nor with moneys advanced for the prosecution of their business especially if these were paid after suit was begun.²⁴ If the defendant has cheapened the cost of producing the infringing device by an improvement of his own he is entitled to a corresponding credit in the ascertainment of the profits.²⁵ It is not the profits of the infringer's business, as a business, that are to be considered, but the advantage derived by him in the diminished cost of carrying it on by the use of the invention. Thus, in the case of the Cawood Patent²⁶ it was urged against the recovery of the profits found from the defendants' infringing use of the plaintiff's patented invention for mending the crushed and exfoliated ends of railroad rails, that it would have been better for the defendants if, instead of repairing such rails, they had cut off the ends and relaid the sound parts, or had caused the rails to be rerolled. Mr. Justice

²¹ *La Baw v. Hawkins*, 2 Ban. & Ard. 561.

²² *Steam Stone-C. Co. v. Windsor Mfg. Co.*, 17 Blatch. 24; *Winchester R. A. Co. v. American B. & C. Co.*, 62 Fed. 278; *Piaget N. Co. v. Headley*, 123 Fed. 897.

²³ *Id.* The fact that salaries were paid must be shown. *Am*

Ende v. Seabury, 43 Fed. 672; *Seabury v. Am Ende*, 152 U. S. 561, 570.

²⁴ *Kansas City H. P. Co. v. Devol*, 127 Fed. 363.

²⁵ *Mason v. Graham*, 23 Wall. 261, 23 L. ed. 86.

²⁶ 94 U. S. 710, 24 L. ed. 243.

Strong, delivering the opinion, thus answered this exception: "Experience, it is said, has proved that repairing worn-out ends of rails is not true economy, and hence it is inferred that defendants have derived no profits from the plaintiff's invention. The argument is plausible, but it is unsound. Assuming that experience has demonstrated what is claimed, the defendants undertook to repair the injured rails. They had the choice of repairing them on the common anvil or on the complainant's machine. By selecting the latter they saved a large part of what they must have expended in the use of the former. To that extent they had a positive advantage growing out of their invasion of the complainant's patent. If their general business was unprofitable it was the less so in consequence of their use of the plaintiff's property. They gained, therefore, to the extent that they saved themselves from loss. In settling an account between a patentee and an infringer of the patent the question is not what profits the latter has made in his business or his manner of conducting it, but what advantage he has derived from his use of the patented invention."²⁷ The making and selling of articles or machines which are an infringement are so far separable that, if there is a benefit on one portion and loss on another, the owner of the patent may claim the profits on those which yielded a profit without any deduction for the losses sustained by the infringer on others.²⁸

²⁷ *Knox v. Great Western Q. M. Co.*, 6 Sawyer 430; *Force v. Sawyer-B. Mfg. Co.*, 131 Fed. 884; *Brown Bag F. Mach. Co. v. Drohen*, 99 C. A. 192, 175 Fed. 576; *Herring v. Gage*, 15 Blatch. 124; *Burdette v. Estey*, 19 id. 1.

It is immaterial by what means the saving results to the infringer; whether because of human frailty or ordinary wear and tear. *Doten v. Boston*, 70 C. C. A. 308, 138 Fed. 406.

Where profits are recovered for sales of an infringing article the thing sold must be parted *solutio pretii emptoris loco habetur*. 2

Kent Com. 387. The recovery of such profits, especially if followed by satisfaction, will preclude the owner of the patent from any action against the purchaser of the infringing article, and will prevent the original vendor, when sued for the profits, from availing himself of any supposed liability to such purchasers to enhance the cost or diminish the profits. *Steam Stone-C. Co. v. Windsor Mfg. Co.*, 17 Blatch. 24.

²⁸ In the last case cited, *Wheeler, J.*, thus explains this point: "Here the Windsor Manufacturing Co. made eleven sales of eleven infringing-

It is no reason for refusing to allow a patentee damages that the infringer might have sold the ingredients of which the patented article is composed at a larger profit than was realized for it.²⁹ If there is a purchase of patents and of the machinery for making the patented articles, in an accounting of profits no definite part of the sum fixed as the price of the patents can be added to the profits on the making of the patented articles.³⁰ The period during which the computation of profits may be made is not limited to that in which the infringing article was

ing machines, for profit; and, whatever of that profit arose from the appropriation of those patented inventions by the making and selling those machines, the orator is entitled to here, and no more. Other machines were made by the defendant, embodying the invention, which have been disposed of without profit, or are still on hand and cannot be disposed of, and which, as they are left, involve serious loss to the defendant; but these facts do not vary the amount received for those sold on which the profit was made. The defendant did not make nor sell any of them for the orator. The whole was done on its own account, as part of its own business, exclusively. Each infringement was separate, and no claim accrued in favor of the defendant against the orator on account of any of them. The losses of unfortunate attempts were the defendant's own losses, and there is nothing to set off against the orator's right to the avails of the successful attempts. If the defendant had been acting for the orator, and the whole enterprise, in connection with making this kind of machines, had been the enterprise of the orator, the net result would have been what the orator would

Suth. Oam. Vol. IV.—51.

have to stand to; but the enterprise was an enterprise of the defendant; none of the machines were made by the defendant for the orator; neither has the orator adopted the making or selling of any machine as having been done for itself. It had nothing to do with any of the machines except as they included the patented invention, nor with the sale of any of the machines except as the sale included so much of the invention, and, as to that, it only claims what the invention brought, which is the same as if anything else belonging to the orator had been put into and sold with the machines, and the orator claimed what that brought. The orator waives the tort and proceeds for the money arising from the tort. The money arising here is what would be left, after deducting the cost of the machines which the defendant furnished, from the avails of the sales of the machines, including the invention that belonged to the orator." See s. c., 18 Blatch. 47.

²⁹ *Am Ende v. Seabury*, 43 Fed. 672.

³⁰ *Winchester R. A. Co. v. American B. & C. Co.*, 62 Fed. 278.

on the market, the price of the patented one being thereby affected; a reasonable time prior to that may be included.³¹

It has been ruled by Justice Harlan that in estimating the profits resulting from the infringement of a patent the comparison must be made between the patented invention and what was known and open to the use of the public at and before the date of the patent. The case involved the Cawood patent. The defendant claimed the right to use another patented device subsequent in date to that, and that such device produced equally as good results at less expense. The court said: The company had the right to use the subsequent device and take to itself all savings or profits derived from its use. "But it had no right to use the Cawood machine and enjoy the savings derived from said use, simply because it *may* have made the same profits at less expense from another machine, patented subsequently, which it was *at liberty* at use but chose *not* to use. * * * The owner of each invention is entitled to be protected in the exclusive enjoyment of his patent for the term prescribed by law. If the position of defendants' counsel be tenable, a prior patent may be practically destroyed and the owner be deprived of all profits arising therefrom by obtaining from a junior patentee a license to use his invention. If the latter be equally useful with the former the claim of the prior patentee for profits realized from the actual use of his invention by an infringer can always be defeated by showing that the infringer was *at liberty* to use, although he did not use, the subsequent invention, and might have made thereby the same or greater profit at less cost. Indeed, upon the principle or theory asserted by defendants' counsel, the junior patentee may himself use the invention of a prior patentee without liability to the latter for profits, provided he show that had he used his own invention he would have accomplished the same or better results at the same or less cost. I do not believe such to be the law, although in several cases cited by counsel there are general expressions which seem to sustain that view. But, after close study of those cases, I am of opinion that in no one

³¹ Bemis C. B. Co. v. Brill Co., 200 Fed. 749.

of them was the precise point now under consideration in the mind of the court or necessarily involved in the decision.”³² In a case at law Judge Woods charged that the value of the invention at the time it is appropriated by the defendant is to be regarded as the basis upon which to calculate damages.³³ Where the defendant made a contract with a foreign company for a supply of articles which infringed a patent granted by the United Kingdom, some of which articles were delivered during the continuance of the patent, the remainder being delivered after its expiration, damages were awarded only upon former, and not upon the whole profit which might have been made if the contract had been entered into with the plaintiff instead of with the foreign company.³⁴ The profits recoverable must be made in making, using or selling articles containing the patented invention, not those obtained in making, using or selling machines for manufacturing such articles.³⁵ It is not cause for refusing the recovery of the profits made that they were owing to its skill of the infringer,³⁶ nor that the losses sustained without the use of the patented device arose largely from the carelessness, improper operation and miscalculation of the defendant’s agents.³⁷

§ 1192. Same subject; computation, to what time made.

The account for profits of the infringement is not limited to the commencement of the suit nor the date of the decree unless the complainant limits the period within which he asks for damages.³⁸ Otherwise it is proper to extend the account down to the accounting unless the infringement has ceased before that

³² *Turrill v. Illinois Cent. R. Co.*, 20 Fed. 912. See *McCreary v. Pennsylvania C. Co.*, 141 U. S. 459, 466, 35 L. ed. 817, 820.

³³ *National Car Brake S. Co. v. Terre Haute C. & Mfg. Co.*, 19 Fed. 515.

³⁴ *British I. W. Co. v. Dublin U. T. Co.*, [1900] 1 Irish 287.

³⁵ *Diamond D. & M. Co. v. Kelley*, 131 Fed. 89.

³⁶ *Lawther v. Hamilton*, 64 Fed. 221.

³⁷ *Doten v. Boston*, 70 C. C. A. 308, 138 Fed. 406.

³⁸ *Creamer v. Bowers*, 35 Fed. 206.

The innocent user of the secret process of another is not liable for the profits made prior to the filing of a bill, but is liable for those made thereafter. *Vulcan D. Co. v. American C. Co.*, 75 N. J. Eq. 542, following *Edelsten v. Edelsten*, 1 DeGex, J. & S. 199.

time. The rights of the parties are settled by the decree, and nothing remains but to ascertain the damages and adjudge their payment. This practice saves a multiplicity of suits, time and expense, and promotes the ends of justice.³⁹ In a case in the district of California one exception to the master's report was that he should have limited his accounting to one furnace which contained the patented invention and was constructed prior to the commencement of the suit, and not have extended it to two furnaces erected and used at the same mine pending the suit; that, as to the latter, the cause of action had not arisen and it was not therefore involved. But the court overruled the exception. Sawyer, J., said: "The suit is for an infringement of complainant's patent by the use of his invention. It is not a matter of any moment by what particular machine defendant accomplished the infringement. He was infringing at the commencement of the suit, which is to obtain an account of profits resulting from the infringement and an injunction against further infringement. Defendant continued the infringement by using the same furnace then in use and by constructing and using others at the same mine. The profits resulting from the infringement in the use of the invention are sought to be recovered. The supreme court has held that the accounting should be continued down to the time of taking the account; and if so, I see no reason why it should not cover the profits of the entire use of the invention by whatever machine effected as well as the profits resulting from the use of the particular machine used at the time of the commencement of the suit. If the infringement is by the manufacture and sale of the invention the accounting must necessarily extend to all sales to the time of the accounting, or the accounting must stop at the commencement of the action, for the same machine cannot well be made and sold before the bringing of the suit and again after its commencement. I can perceive no reason for applying a different rule in the case of the use of an invention from that applicable to its manufacture and sale. Besides, an injunction would certainly not be lim-

³⁹ Rubber Co. v. Goodyear, 9 Wall. 800, 19 L. ed. 570.

ited to the machine in use before or at the time of the institution of the suit. I think the accounting properly embraced all the machines containing the invention used by the defendant at its mine down to the time of accounting."⁴⁰

§ 1193. Rule when whole article not patented. As we have had occasion to state, in cases where the patent is for a distinct improvement, separable from the rest of the article and not embracing the whole,⁴¹ or is an inseparable improvement of it,⁴² the profits must be limited accordingly.⁴³ The profits recoverable are only those which have accrued from the use of the patented improvement; in such case the owner of the patent is not entitled to all the profits made from the entire article,⁴⁴ and has the burden of showing what portion thereof was derived from the use of the patented part,⁴⁵ or that the entire value of

⁴⁰ *Knox v. Great Western Q. M. Co.*, 6 Sawyer, 430.

⁴¹ *Buerk v. Imhaeuser*, 14 Blatch. 19; *Tremolo Patent*, 23 Wall. 518, 23 L. ed. 97; *Mason v. Graham*, 23 Wall. 261, 23 L. ed. 86.

⁴² *Goulds' Mfg. Co. v. Cowing*, 14 Blatch. 315; *Jones v. Morehead*, 1 Wall. 155, 17 L. ed. 662.

⁴³ *National Metal W. S. Co. v. Bredin*, 186 Fed. 490; *Philp v. Nock*, 17 Wall. 460, 21 L. ed. 679; *Seymour v. McCormick*, 16 How. 480, 490, 14 L. ed. 1024, 1028; *Jones v. Morehead*, *supra*; *Ingels v. Mast*, 1 Flap. 424; *Buerk v. Imhaeuser*, 14 Blatch. 19; *Goulds' Mfg. Co. v. Cowing*, 12 id. 243, 14 id. 315; *Black v. Munson*, id. 265; *McCreary v. Pennsylvania C. Co.*, 141 U. S. 459, 35 L. ed. 817; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 38 L. ed. 103; *Robbins v. Illinois W. Co.*, 27 C. C. A. 21, 81 Fed. 957.

⁴⁴ Id.: *Oalkins v. Bertrand*, 8 Fed. 755; *Lattimore v. Hardeoeg Mfg. Co.*, 121 id. 986, 36 L. ed. 60.; *Sessions v. Romadka*, 145 U. S. 29; *Warren v. Keep*, 155 U. S. 255, 39 L. ed. 144; *Herman v. Youngstown*

Car Mfg. Co., 132 C. C. A. 608, 216 Fed. 604; *Canda v. Michigan M. I. Co.*, 81 C. C. A. 420, 152 Fed. 178; *Maier v. Brown*, 17 Fed. 736.

The mere fact that a mechanism is supplied under a contract and in conformity with specifications necessitating patent infringement with respect to some feature or detail included in such mechanism, without which requirement the contract would not have been given, does not entitle the patentee to the total profits, and the profits recoverable are those directly resulting from the infringement of the patent measured by the extent to which such infringement is pecuniarily beneficial to the wrongdoer. *Seeger Refrigerator Co. v. American Car & Foundry Co.*, 212 Fed. 745, reversed on other grounds in 219 Fed. 565.

⁴⁵ *Seeger Refrigerator Co. v. American Car & Foundry Co.*, *supra*; *Force v. Sawyer-B. Mfg. Co.*, 75 C. C. A. 102, 143 Fed. 894; *Kansas City H. P. Co. v. Devol*, 127 Fed. 363; *Baker v. Crane*, 70 C. C. A. 486, 138 Fed. 60; *Elizabeth v.*

the defendant's article was attributable to the patented features.⁴⁶

It is as true of a process invented and an improvement in the process of a manufacture as it is of an improvement in a machine that an infringer is not liable to the extent of his entire profits in the manufacture. The question is what advantage did the defendant derive from using the plaintiff's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits.⁴⁷ In *Mowry v. Whitney*⁴⁸ the defendant was charged by the master with \$91,000 as profits arising from the plaintiff's patent in manufacturing car wheels, which was the profit obtained from the manufacture of the entire wheel. Mr. Justice Strong said: "It is clear that Whitney is not entitled to more than the profits actually made in consequence of the use of his process in the manufacture of nineteen thousand eight hundred and nineteen wheels. It is the additional advantage the defend-

Pavement Co., 97 U. S. 126, 24 L. ed. 1000; *Dobson v. Hartford C. Co.*, 114 U. S. 439, 29 L. ed. 177; *Reed v. Lawrence*, 29 Fed. 915; *Fay v. Allen*, 30 id. 446; *Roemer v. Simon*, 31 id. 41; *Everest v. Buffalo L. O. Co.*, id. 742; *Elgin W. P. & P. Co. v. Nichols*, 45 C. C. A. 49, 105 Fed. 780; *Robbins v. Illinois W. Co.*, *supra*.

If, however, the defendant claims that any distinct part of the profits realized by him from the sale of the infringed article was the result of an improvement made by him he must establish his allegation. *Marrs v. Union F. Co.*, 39 Fed. 468.

⁴⁶ *Westinghouse v. New York A. B. Co.*, 72 C. C. A. 520, 140 Fed. 545; *Garretson v. Clark*, 111 U. S. 120, 28 L. ed. 371, 15 Blatch. 70.

⁴⁷ *Garretson v. Clark*, 111 U. S. 120, 28 L. ed. 371, 15 Blatch. 70; *Shannon v. Bruner*, 33 Fed. 871; *Tomkinson v. Willets Mfg. Co.*, 34

id. 536; *Crosby V. Co. v. Safety V. Co.*, 141 U. S. 441, 35 L. ed. 809; *Mowry v. Whitney*, 14 Wall. 620, 20 L. ed. 860; *Littlefield v. Perry*, 21 Wall. 205, 22 L. ed. 577; *Knox v. Great Western Q. M. Co.*, 6 Sawyer 430; *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609; § 1190; *Tuttle v. Claffin*, 22 C. C. A. 138, 76 Fed. 227; *Mosher v. Joyce*, 2 C. C. A. 322, 51 Fed. 441.

⁴⁸ 14 Wall. 620, 20 L. ed. 860.

The same rule has been applied where there was a breach of a contract not to furnish certain parts of a machine to rival concerns. The defaulting party was not liable for all the profits made in the manufacture of the articles, but was liable for the difference between the cost of their manufacture with the use of such parts and without their use. *New York B. N. Co. v. Hamilton B. N., etc. Co.*, 180 N. Y. 280.

ant derived from the process—advantage beyond what he had without it—for which he must account; * * * but the master charged the profit obtained from the entire wheel instead of that resulting from the use of Whitney's invention in a part of the manufacture." If the defendant has made additions to a patented machine which increased its effective power, although he took the whole of the vital and effective part of the invention, he may claim an apportionment of the profits; but the burden rests upon him to show that a portion of them resulted from such additions.⁴⁹ But there can be no apportionment where the essential parts of a patented machine are used if the infringing machine would be worthless without them, notwithstanding the substituted equivalents improved the work of the infringed machine,⁵⁰ nor where the chief value of the things sold was derived from the infringement.⁵¹

In *Goulds' Mfg. Co. v. Cowing*⁵² the master reported that the profits resulting from the patented portion of the pump could not be separated from those resulting from any other part of it, because, making a comparison between the machine as it stands with its patented improvements and what would be left of it if these improvements were taken away, the machine would be valueless and would, in fact, be no machine at all. Therefore, he reported as profits to be recovered the entire profits of the pump. This was held erroneous. The court observed that pumps have been in use since the earliest ages of the world. After adverting to the part covered by the patent, Hunt, J., said: "The portion of the pump in question which belongs to or is included in the improvement of the plaintiffs is very small, and a machine constructed upon other known principles and devices applicable to pumps, omitting the plaintiffs' improvement, would include nearly everything useful that is to be found in the present machine. * * * The patentee takes the well known portions of a pump used in pumping gas-oil, with passages, valves, piston, chambers, openings, etc., as ordinarily made and used, and adds a chamber of an import-

⁴⁹ *Tuttle v. Claffin, supra.*

⁵⁰ *Id.*

⁵¹ *Force v. Sawyer-B. Mfg. Co.*
131 Fed. 884.

⁵² 12 Blatch. 243.

tant construction, as it is alleged, and a combination with certain other parts described. Now if this addition is not a new and useful improvement no damages can be claimed for its use. If it is such an improvement, the improvement in its nature and by law is and must be capable of being described and pointed out and must be described and pointed out. Every skilful mechanic must be able to learn from the patent itself precisely what the monopoly covers.⁵³ If this alleged improvement is so confounded with portions of the machine which are the subjects of other patents, or which, from long continued use, are open to the public, that it cannot be separated from them, or if, when so separated, it has no value, it is not a patentable invention, and no damages are due for its use. The decree in this case has adjudged the patent in this case to be valid. In its nature, therefore, it is and must be capable of separation and distinction from other portions of the machine." On appeal⁵⁴ the supreme court reversed the decree on the accounting, and held that the rule laid down in *Mowry v. Whitney*⁵⁵ was applicable. That rule gave the patentee the fruits of the advantage which the defendant derived from using his invention over what he had in using other processes open to the public and adequate to enable him to obtain an equally beneficial result. "It does not necessarily follow," Waite, C. J., said, "that where the patent is for one of the constituent parts, and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately. If, without the improvement, a machine adapted to the same uses can be made which will be valuable in the market and salable, then, as was further said in that case, the inquiry is, 'What was the advantage in cost, in skill required, in convenience of operation or marketability,' gained by the use of the patented improvement? If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have

⁵³ Act of July 8, 1870, 16 U. S. Stats. at Large 201.

⁵⁴ 105 U. S. 253, 26 L. ed. 987.

⁵⁵ 14 Wall. 620, 20 L. ed. 860.

had, and that the fruits of this advantage are the entire profits he has made in that market. Such we think is this case. Pumps for all ordinary and many extraordinary uses were very old; but in the new developments of business something was wanted to take gas from the casing of an oil well and conduct it safely to the furnace of the engine. 'With that special purpose in view' this inventor took the well-known parts of an ordinary double-action pump, changed some of them slightly in form, added a new device, and produced something which would do what was wanted. While nominally he only made an improvement in pumps, he actually made an improved pump. For ordinary uses the improvement added nothing to the value of the old pump, but for the new and special purpose in view the old pump was useless without the improvement. The testimony shows that there was no market for pumps adapted to this particular use except in the oil-producing regions of Pennsylvania and Canada. The demand was limited as well as local. Less than a thousand pumps actually supplied all who wanted them. But for that particular use no other pump could at the time be sold. If the appellants kept the control of its monopoly under the patent it alone had the advantage of this market. Unless the appellees got the improved pump they could not become competitors in that field; and just to the extent they got into the field they drove the appellant out. Through their infringement they got the advantage of selling the pumps that had upon them the patented improvement. Without it no such sales would have been effected. The fruits of the advantage they gained by their infringement were therefore necessarily the profits they made on the entire sale. This is an exceptional case. A limited locality required a particular kind of pump to be used only in that locality for a special purpose. The market was not only limited to a particular locality, but it was unusually limited in demand. A single manufacturer, possessing the facilities the appellants had, could easily and with reasonable promptness fill every order that was made. There was no other pump that could successfully compete with that controlled by the patent. Under these circumstances it is easy to see that what was the appellees' gain in this business must

necessarily have been the appellant's loss, and consequently the appellant's damages are to be measured by the appellees' profits from their business in that special and limited market. This, as it seems to us, is the logical result of the rule which has been stated. By infringing on the plaintiff's rights the appellees obtained the advantage of the increased marketability of their pump. The action of the court below, therefore, limiting the field of inquiry as to damages cannot be sustained."⁵⁶

Where the rule stated applies and the infringing machine or appliance contains the improvements covered by the complainant's patents the profits will not be diminished because he did or did not use the invention; nor will any allowance be made the defendants for the value of improvements covered by subsequent patents owned and used by him; nor for machines made and destroyed before sale or thereafter and exchanged for other machines which are not stated in the account on either side; nor will a credit be allowed him for such machines against the profits realized on others.⁵⁷

§ 1194. **Same subject; mitigation of liability.** In the case of a patent for an ornamental chair as a new article of manufacture, where there is a difference in kind between that patented and prior chairs, and where what was open to the public could not make a chair like the patented article in its peculiar characteristics, the patentee is not, in ascertaining the damages sustained by an infringement of his patent, limited to the advantage derived by the defendant from using the peculiar features of the patented chair over what advantage he would have had from using what was so open to the public.⁵⁸ He is entitled to recover an equivalent for any advantage which the defendant has derived from any unlawful use of the patented invention, and this advantage may be estimated either from profits

⁵⁶ *Brennan v. Dowagiac Mfg. Co.*, 89 C. C. A. 392, 162 Fed. 472; *Field v. Whittemore*, 33 Fed. 835; *Welling v. La Ban*, 34 id. 40; *Holmes v. Truman*, 14 C. C. A. 517, 67 Fed. 542; *Wales v. Waterbury Mfg. Co.*, 41 C. C. A. 250, 101 Fed. 126; *Mosher v. Joyce*, 2 C. C. A.

322, 51 Fed. 441; *Hurlbut v. Schilling*, 130 U. S. 456, 32 L. ed. 1011; *Heaton Button-F. Co. v. Macdonald*, 57 Fed. 648.

⁵⁷ *Crosby V. Co. v. Safety V. Co.*, 141 U. S. 441, 35 L. ed. 809.

⁵⁸ *Mulford v. Pearce*, 14 Blatch. 141.

made therefrom separately or in combination with something else which the patent does not cover. The profits will be computed in the manner best suited to afford the injured party the full benefit of his patent unlawfully used and a just indemnity for the injuries he has thereby sustained.⁵⁹ If the improvement is only a constituent of a machine, but required to adapt it to a particular use, and there is no other way open to the public of supplying the demand for that use, then the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and the fruits of it are the entire profits made in that market.⁶⁰ In response to an order of reference to take an account of the plaintiff's damages and of the defendant's profits by infringement the master reported that there were no damages and no profits, but that the plaintiff was entitled to compensation for the defendant's use of his patent. It appeared that such use restored the salable character of the article the defendant made, and thus saved him from loss. It was held that the money value of this advantage could not be recovered as compensation.⁶¹ Remote profits or advantages of the infringement are not taken into account. Where the defendant, by the use of the plaintiff's patented process for preserving fish, was enabled to withdraw fish from the market and thus obtain a higher price for it unpreserved than he would otherwise have received, the profits resulting from such increased price were too remote and indirect to be charged to the defendant as profits realized from the infringement.⁶²

An infringer cannot mitigate his liability by raising collateral issues as to the validity of another patent and require the complainant to show what part of the profits claimed is due to his patent and what is due to the use of a part of it which infringes another patent.⁶³

⁵⁹ *Mason v. Graham*, 23 Wall. 261, 23 L. ed. 86; *Brinton v. Paxton*, 67 C. C. A. 204, 134 Fed. 78.

⁶⁰ *Goulds' Mfg. Co. v. Cowing*, 105 U. S. 253, 26 L. ed. 987; *Penfield v. Potts*, 61 C. C. A. 371, 126 Fed. 475.

⁶¹ *Sargent v. Yale L. Mfg. Co.*, 17 Blatch. 249.

⁶² *Piper v. Brown*, 1 Holmes 196.

⁶³ *Brinton v. Paxton*, 67 C. C. A. 204, 134 Fed. 78.

§ 1195. **Same subject; ascertainment of profits.** In determining the profits from the infringement of a patent which covers only a part of a machine or article made and sold a ratable proportion of the cost of production and sale must be taken into the account. In the case of the Tremolo Patent ⁶⁴ the defendants were vendors of musical instruments, including organs and melodeons, which they purchased from the manufacturers. Some of these contained the tremolo attachment, and others did not. For those containing such attachment they paid and sold for an increased price. They were found guilty of infringing the plaintiff's patent in making sales of the organs having that attachment. In the ascertainment of the profits made by the sale of the attachment the defendants were allowed by the master to prove the general expenses of their business incurred in effecting the sales of all musical instruments, and to deduct a ratable proportion from the profits made by the sale of those with that attachment. It was contended in behalf of the plaintiff that the patent infringed was not the tremolo itself, but for the combination of the organ and tremolo, and that if the defendants obtained an extra price for the organ combined with the tremolo without incurring any additional expense the whole of that extra price was obtained from the addition of the combination; also, that the rule in such a case was that if the infringing device is an integral part of the whole instrument, without which it is incapable of use, and for which a single charge is made, then in ascertaining profits on a part of the organization general expenses should be apportioned according to the cost or to some other equitable rule. But when the infringing device is an optional one, used or not at pleasure, and an extra price is charged and received for it when used, the true profit made is the extra sum received for the addition, deducting only such expenses as are incurred by reason of it. In answer to this argument the court say: "We think such a rule, even if it sometimes may be just, is inapplicable to the present case. We cannot see why the general expenses incurred by the defendants in carrying on their business, such expenses as store rent,

⁶⁴ 23 Wall. 518, 23 L. ed. 97.

clerk hire, fuel, gas, portorage, etc., do not concern one part of their business as much as another. It may be said that the selling a tremolo attachment did not add to their expenses, and therefore that no part of those expenses should be deducted from the price obtained from such an attachment. This is, however, but a partial view. The store rent, the clerk hire, etc., may, it is true, have been the same if that single attachment had never been bought or sold. So it is true that the general expenses of their business would have been the same if instead of buying and selling one hundred organs they had bought and sold only ninety-nine. But will it be contended that because buying and selling an additional organ involved no increase of the general expenses the price obtained for that organ above the price paid was all profit? Can any part of the whole number sold be singled out as justly chargeable with all the expenses of the business? Assuredly no. The organ with the tremolo attachment is a single piece of mechanism, though composed of many parts. It was bought and sold as a whole by the defendants. It may be said the general expenses of the business would have been the same if any one of these parts had been absent from the instrument sold. If, therefore, in estimating profits every part is not chargeable with a proportionate share of the expenses, no part can be. But such a result would be an injustice that no one would defend. We think it very plain, therefore, that there was no error in the rule adopted for the ascertainment of the profits made by the defendants out of their infringement of the complainant's patent."⁶⁵ It has been ruled that a proper method of ascertaining the patentee's damages where the whole article is not covered by the patent is to take the profits made upon one of them by the defendant and deduct from them the profits made upon such an article "without the use of the patent, and credit the difference to the patent."⁶⁶

⁶⁵ See *Steam Stone-C. Co. v. Windsor Mfg. Co.*, 18 Blatch. 47.

In *Zane v. Peck*, 13 Fed. 475, the amount paid for clerk hire, storage, freight, etc., was not deducted in estimating the cost of manufacture

and sale. Because the items would aggregate but a trifling sum the court refused to order a reaccounting.

⁶⁶ *Maier v. Brown*, 17 Fed. 736.

§ 1196. Profits recoverable though no license fee established.

The owner of the patent is entitled in equity to recover profits made by the infringer though the former was exercising his monopoly by granting licenses. He is not limited in that forum to license fees, though such profits exceed in amount what he would have realized in such fees for what was done by the infringer. By the express provisions of the statute the plaintiff is entitled to recover in addition to the profits to be accounted for by the defendant "the damages sustained by the infringement."⁶⁷ This shows that in contemplation of law the profits actually realized by the infringer belong to the patentee, and that when the profits will not compensate for the damages sustained, as they may not in many cases, he is entitled to damages beyond.⁶⁸ The right given by the statute to recover in equity damages besides profits is not intended to give the owner double compensation; but the net profits made from the unlawful use of his invention and such supplemental damages proved as will make the decree on the whole a full compensation. If the business of the infringer is so improvidently conducted that he makes no substantial profits the owner of the patent may have his compensation calculated on the basis of a license fee.⁶⁹ In the ascertainment of such damages there is required the same certainty of proof as at law. Where there is a loss of profits in the plaintiff's business by a diversion of his customers by the defendant's sale of an infringing article or machine, or a reduction of price from the same cause, damages may be recovered therefor.⁷⁰ It will not be presumed as matter of law but must be established as a fact, that because the defendant

⁶⁷ R. S., § 4921. Independently of statute both profits and damages cannot be recovered. *United Horse S. & N. Co. v. Stewart*, 13 App. Cas. 401; *Neilson v. Betts*, L. R. 5 H. of L. 1.

⁶⁸ *Wooster v. Taylor*, 14 Blatch. 403; *Carew v. Boston, etc. Co.*, 3 Cliff. 356; *Williams v. Rome, etc. R. Co.*, 18 Blatch. 181.

⁶⁹ *Marsh v. Seymour*, 97 U. S.

348, 24 L. ed. 963; *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. ed. 802.

⁷⁰ *Buerk v. Imhaeuser*, 14 Blatch. 19; *Carter v. Baker*, 1 Sawyer 527; *Birdsall v. Coolidge*, *supra*; *Zane v. Peck*, 13 Fed. 475; *Am Ende v. Seabury*, 43 id. 672; *Yale L. Mfg. Co. v. Sargent*, 117 U. S. 536, 29 L. ed 954; *United Horse S. & N. Co. v. Stewart*, 13 App. Cas. 401; *American B. W. Co. v. Thompson*, 44 Ch. Div. 274.

has sold an infringing article there has been a corresponding or any falling off of the plaintiff's business.⁷¹ In one case⁷² the court said: "It was not made to appear that the plaintiff could have sold his watches to the persons who purchased from the defendants. The watches have been adjudged to be identical in principle, but they differ in structure and appearance; and it cannot be known that those who bought the infringing articles would have bought the plaintiff's watches under any circumstances. The difference in structure, as well as the difference in price, enter into that question, and no means are afforded for determining it by proofs."⁷³ Where the infringer originally bought large numbers of a patented article from the patentee and subsequently began its manufacture himself, but did not wholly cease buying, it was held reasonable to believe that had he not manufactured he would have purchased as large a number as he made and used.⁷⁴ If machines are substantially alike and are made in the same locality for a similar market the profits made by one manufacturer furnish a sufficiently reliable basis upon which to estimate those made by another, especially if the defendant refuses to disclose his profits.⁷⁵

§ 1197. **Interest in equity.** Profits being regarded as unliquidated damages, interest is not usually allowed until they have been judicially liquidated.⁷⁶ It is not to be allowed from

⁷¹ Boesch v. Graff, 133 U. S. 697, 33 L. ed. 787.

⁷² Buerk v. Imhaeuser, *supra*.

⁷³ Smith v. Pryor, 2 Sawyer, 461; Carter v. Baker, 1 id. 512; Seymour v. McCormick, 16 How. 480, 14 L. ed. 1024; Iugersoll v. Musgrove, 14 Blatch. 541. See McSherry Mfg. Co. v. Dowagiac Mfg. Co., 89 C. C. A. 26, 160 Fed. 948, for an elaborate discussion of the question of the sufficiency of evidence on the point indicated in the text; and Doten v. Boston, 138 Fed. 406, for evidence held sufficient to support the recovery of lost profits.

If it appears that the defendant placed the infringing article on the

market at a much lower price than the patented one was sold by the complainant it cannot be assumed as a basis for computing his loss of profits that, but for the infringement, there would have been sold at the higher price the same number of articles as were sold at the lower price. Jennings v. Rogers S. P. Co., 105 Fed. 967.

⁷⁴ Creamer v. Bowers, 35 Fed. 206. See note to § 1190.

⁷⁵ Adams v. Keystone Mfg. Co., 41 Fed. 595.

⁷⁶ Mowry v. Whitney, 14 Wall. 653, 20 L. ed. 866; Parks v. Booth, 102 U. S. 96, 26 L. ed. 54; Steam Stone-C. Co. v. Windsor Mfg. Co.,

the date of the establishment of a license fee for the use of the patent infringed, but from the time the obligation to pay arose.⁷⁷ It may be refused altogether, or allowed after interlocutory or after final decree, according to the circumstances of the case. If a reference is made to a master interest is not usually to be allowed before the date of the submission of his report, and only upon the amount shown thereby and by the accompanying evidence to be due.⁷⁸ It is properly allowed from that time.⁷⁹ Where damages are doubled under the statute interest cannot be allowed from the filing of the bill. This would result in doubling the interest, which would not be lawful even if interest was allowable.⁸⁰ In such a case interest runs only from the date of the decree.⁸¹ The judicial allowance of damages on the royalty basis will not be accepted as a predicate for interest in a subsequent suit for the infringement of the same patent when the allowance was not based on a customary charge and the patentee thereafter sought to recover on the basis of a larger allowance.⁸²

17 Blatch. 35, 18 id. 47; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577, 581. See Silsby v. Foote, 20 How. 378, 15 L. ed. 953.

⁷⁷ Diamond Stone S. M. Co. v. Brown, 155 Fed. 753; Burdett v. Estey, 19 Blatch. 1.

⁷⁸ Tilghman v. Proctor, 125 U. S. 136, 31 L. ed. 664; Creamer v. Bowers, 35 Fed. 206 (from date of interlocutory decree. See Emigh v. B. & O. R. Co., 4 Hughes 271.

⁷⁹ Crosby V. Co. v. Safety V. Co.,

141 U. S. 441, 35 L. ed. 809; Campbell v. Mayor, etc., 105 Fed. 631; Westinghouse v. New York A. B. Co., 133 Fed. 936; National F. B. & P. Co. v. Robertson's Est., 125 Fed. 524; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 28 L. ed. 154.

⁸⁰ National Folding-Box & P. Co. v. Elsas, 81 Fed. 197.

⁸¹ National F. B. & P. Co. v. Robertson's Est., *supra*.

⁸² Graham v. Plano Mfg. Co., 35 Fed. 597.

CHAPTER XXXII.

INFRINGEMENT OF COPYRIGHT.

§1198. Copyright is statutory.

1199. Compensatory and penal recoveries.

§ 1198. Copyright is statutory. The law recognizes and protects literary property, which is the right of the owner to possess, use and dispose of intellectual productions.¹ It is a property which does not come into being until some mental conception has been embodied in written or spoken language, or otherwise signified as an intellectual creation in such manner as to be capable of recognition and identification. It includes copyright, playright and original proprietorship in works of art.² It is property held by a peculiar tenure. Whatever may have been the original common law, it seems to have been long settled on both sides of the Atlantic that beyond an absolute right to such productions before publication, the author or his assigns have only such special right in them

¹Drone on Copyright 97; Press Pub. Co. v. Monroe, 51 L.R.A. 353, 19 C. C. A. 429, 73 Fed. 196; Maxwell v. Goodwin, 93 Fed. 665.

²Lord Mansfield, in Millar v. Taylor, 4 Burr. 2396, said: "I use the word 'copy' in the technical sense in which that name or term has been used for ages to signify an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters."

The intellectual productions to which the law extends protection are of three classes: First, writings or drawings capable of being multiplied by the arts of printing and engraving; second, designs of form or configuration capable of being reproduced upon the surface or in the

shape of bodies; third, inventions in what are called the useful arts. To the first class belong books, maps, charts, music, prints, and engravings; to the second class belong statuary, bas-reliefs, designs for ornamenting any surface and configuration of bodies; the third class comprehends machinery, tools, manufactures, compositions of matter, and processes or methods in the arts. According to the practice of legislation in England and America, the term *copyright* is confined to the exclusive right secured to the author or proprietor of a writing or drawing which may be multiplied by the art of printing in any of its branches. Property in other classes of intellectual objects is usually se-

afterwards as is granted by statute.³ An author has the same right to his unpublished manuscripts as to any other property, and may resort to the same legal and equitable remedies in case of actual or threatened infractions in one case as in the other. He may publish his productions or not as he chooses, and may prevent their publication without his consent.⁴ But when he has published them he is supposed to have thereby obtained remuneration and thenceforth has no special property in them; he has no exclusive right to multiply copies or to control the subsequent issue of copies by others. The right to multiply copies to the exclusion of others is the copyright, and is restricted and governed by the statutes on that subject.⁵

§ 1199. **Compensatory and penal recoveries.** The former statute provided a distinct remedy for infringement in respect to the different classes of literary property and according to the nature of the wrong.⁶ After the title page was deposited the author could maintain an action for an infringement or violation of his rights.⁷ But after publication it must be shown as a condition of recovery that within ten days from publication he delivered at the office of the librarian of congress, or deposited in the mail properly addressed to that officer, two copies of such copyrighted book.⁸ The forfeitures declared in

cured by letters patent, and the interest is called patent-right. But the distinction is arbitrary and conventional. *Bouv. L. Dic.*

³ *Turner v. Robinson*, 10 Irish Ch. (N.S.) 121, 501; *Oliver v. Oliver*, 11 C. B. (N.S.) 139; *Prince Albert v. Strange*, 1 MacN. & G. 25; *Wheaton v. Peters*, 8 Pet. 656, 8 L. ed. 1079; *Boucicault v. Wood*, 2 Biss. 33; *Crowe v. Aiken*, id. 208; *Wall v. Gordon*, 12 Abb. Pr. (N.S.) 349; *Palmer v. Dewitt*, 47 N. Y. 532, 7 Am. Rep. 480; *Stevens v. Gladding*, 17 How. 447, 15 L. ed. 155; *Little v. Hall*, 18 id. 165, 15 L. ed. 328. See *Donaldson v. Becket*, 4 Burr. 2408.

⁴ *Press Pub. Co. v. Monroe*, *supra*.

⁵ See cases cited in note 3 *supra*; *Short's Law of Literature* 48 *Parton v. Prang*, 3 Cliff. 537; *Bartlette v. Crittenden*, 4 McLean 300; *Paige v. Banks*, 13 Wall. 608, 20 L. ed. 709; *Bobb-M. Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086; *Saake v. Lederer*, 98 C. C. A. 571, 174 Fed. 135; *Carter v. Bailey*, 64 Me. 458, 18 Am. Rep. 273; *Banker v. Caldwell*, 3 Minn. 94; *Kiernan v. Manhattan Q. Tel. Co.*, 50 How. Pr. 194. See *Drone on Copyright*, p. 100.

⁶ §§ 4964 *et seq.*, R. S. of U. S., as amended in 1891.

⁷ *Roberts v. Myers*, 13 Law Rep. 398; *Boucicault v. Wood*, 2 Biss. 34.

⁸ *Merrell v. Tice*, 104 U. S. 557, 26 L. ed. 854. See *Callaghan v.*

the statute could only be recovered by actions at law.⁹ And it was so with regard to the damages, other than profits as such.¹⁰ In this particular the remedy in equity is less comprehensive than that allowed by the statute for infringement of patent-rights. By the statute¹¹ jurisdiction was given to the courts of the United States of suits and actions arising under the copyright laws, and power is given them to grant injunctions according to the course and practice of courts of equity, an incident of which is the right to an account of profits.¹² In *Stevens v. Gladding* the court refer to *Colburn v. Simms*,¹³ in which it is said: "It is true that the court does not by an account actually measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court by the account as the nearest approximation it can make to justice takes from the wrong-doer all the profits he has made by his piracy and gives them to the party who has been wronged. In doing this the court may often give the injured party more in fact than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold if the injury by the sale of the cheaper had not been committed. The court of equity, however, does not give anything beyond the account." In *Stevens v. Gladding*, at the circuit,¹⁴ the court held the owner of a copyright entitled to the profits arising from the sales on commission of pirated copies; a court of equity may decree an account of such profits as it would those realized by a partnership.¹⁵ Where a story was dramatized a

Myers, 128 U. S. 617, 32 L. ed. 547. The statute is sufficiently complied with if the copies are deposited immediately before the publication of the book. *Belford v. Scribner*, 144 U. S. 488, 36 L. ed. 514.

⁹ *Stevens v. Cady*, 2 Curt. 200; *Stevens v. Gladding*, 17 How. 447, 15 L. ed. 155; *Callaghan v. Myers*, *supra*.

¹⁰ *Chapman v. Ferry*, 12 Fed. 693.

See *Ohman v. New York*, 168 Fed. 953.

¹¹ § 4970.

¹² *Stevens v. Gladding*, *Chapman v. Ferry*, *supra*. See *West Pub. Co. v. Edward Thompson Co.*, 184 Fed. 749.

¹³ 2 Hare 554.

¹⁴ 2 Curt. 608.

¹⁵ In this case *Curtis, J.*, said: "I perceive no sound reasons for re-

majority of the court awarded all the profits on the theory that the practical effect of denying them would leave the author without redress because he could not show the proportion of the profits he would have realized in consequence of its production.¹⁶ The case of *Backus v. Gould*¹⁷ arose under the act of 1831, and in the argument of Mr. Bayard is a statement of the English and American statutes on the subject of copyright to that time. Section 6 of that act provided, among other things, that the infringer "shall forfeit and pay fifty cents for every sheet which may be found in his possession, either printed, printing, published, imported or exposed to sale contrary to the intent of this act." It was held that this clause was penal and should be strictly construed; therefore the penalty was only collectible in respect of sheets found in the possession of the infringer. The corresponding section in the later patent law substitutes for the foregoing clause one for the recovery of damages. But section 4965 contained a similar clause relative to pirated maps, charts,¹⁸ dramatic or musical compositions,

striking those gains to the difference between the cost and the sale price of a map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does in truth sell on his own account, so far as he is entitled to a percentage on the amount of sales. What he so receives is the gross profits coming to him from the proceeds of the sale, and what he so receives diminishes the net profit of him who employs him to sell. When the latter is called on to account he has an allowance for the commissions he has paid, because those sums, though part of the gross profits of the sales, he has not received."

In *Pike v. Nicholas*, L. R. 5 Ch. 260, note, James, Vice Ch., thus laid down the rule of accounting in equity: "The defendant is to ac-

count for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies."

¹⁶ *Dam v. Kirk La Shelle Co.*, 99 C. C. A. 392, 175 Fed. 902, following *Callaghan v. Myers*, *supra*, in which the profits made on a book sold in the market measured the recovery.

¹⁷ 7 How. 798, 12 L. ed. 919.

It is said in *Bolles v. Outing Co.*, 175 U. S. 262, 267, 44 L. ed. 156, 158, that *Backus v. Gould* must be regarded as overruling anything to be found to the contrary in *Reed v. Carusi*, Taney 72, 20 Fed. Cas. 431; *Dwight v. Appleton*, 8 Fed. Cas. 143; *Millet v. Snowden*, 17 id. 374.

¹⁸ See *Taylor v. Gilman*, 24 Fed. 632.

prints, cuts, engravings, photographs or chromos.¹⁹ That section has received the same construction as was given the earlier act,²⁰ and the same rule has been applied to the section as amended by the act of 1895.²¹

There are not many decisions in respect to damages at law under the provisions of the statute providing for their recovery. In *Boucicault v. Wood*²² the court submitted the question of the amount generally to the jury, stating that it is a question of proof, and upon that the jury were to form their own conclusions as to the damages the plaintiff had sustained. It is believed that the same considerations that govern in legal actions for infringement of patent-rights would apply. The injury is similar, and such cases would appear to be analogous. The view thus expressed in the first edition of this work has been confirmed by the case of *Callaghan v. Meyers*.²³ It is there laid down that in ascertaining the profits made by an infringing publisher of several volumes of judicial reports that the cost of stereotyping them, the amount paid to the members of the infringing firm for their services as salaries for conducting the firm business during the time the infringing was done, the cost of producing copies which remained unsold, the amount paid for editorial work in preparing such volumes, is not to be deducted. The infringer is chargeable with the profit made on the resale of volumes originally sold by him as well as with that realized on the first sale. If part of the matter in the volumes, such as the opinions of the court, is not the subject of copyright, but it is useless without the head-notes, statements of fact, arguments of counsel, table of cases and other matter prepared by the reporter who has obtained the copyright, the

¹⁹ The statute is penal and must be construed strictly. A principal is not liable for the prescribed penalty or forfeiture because of the acts of his agent done without his knowledge. *Taylor v. Gilman*, *supra*.

²⁰ *Bolles v. Outing Co.*, 175 U. S. 262, 267, 44 L. ed. 156, 158; *Thorn-*

ton v. Schreiber, 124 U. S. 612, 31 L. ed. 577.

²¹ *Falk v. Curtis Pub. Co.*, 46 C. C. A. 201, 107 Fed. 126; *Child v. New York Times Co.*, 110 Fed. 527.

²² 2 Biss. 34.

²³ 128 U. S. 617, 32 L. ed. 547, 24 Fed. 636.

entire profit on the whole may be recovered.²⁴ In equity the entire profits made by the publisher of an infringing directory have been decreed against him, he not having made any effort to distinguish between the infringing and the non-infringing matter.²⁵

A married woman whose work has been copyrighted by her publisher and who has settled with him from time to time for royalties will be presumed to have conveyed to him the legal title to the copyright so that he may recover the profits made by an infringing publisher, notwithstanding there is no proof that the laws of her domicile have removed her common-law disabilities or that her husband joined in the conveyance of his wife's rights.²⁶ The printer of an infringing book is liable with the publisher for whom he does the work for the profits realized.²⁷

Where a manuscript is published in wanton disregard of the rights of the author the jury may award exemplary damages, notwithstanding proof of actual pecuniary damage was not made; and if the publication was made by a corporation which ratified the act of its representative the liability for such damages, in the discretion of the jury, exists.²⁸ Section 4966²⁹ has no semblance of a penal nature; it provides a minimum sum for a recovery in any case, leaving the case open for a larger recovery upon proof of greater damage. The liability, extra the statute, is for all the damages that are the direct result of the wrongful act.³⁰

The statute of 1909³¹ provides that an infringer of copyright shall pay to the copyright proprietor such damages as he may have suffered by the wrong, as well as all the profits made thereby; in proving profits the plaintiff is required to prove

²⁴ *Belford v. Scribner*, 144 U. S. 488, 36 L. ed. 514.

²⁵ *Hartford P. Co. v. Hartford D. & P. Co.*, 146 Fed. 332.

²⁶ *Belford v. Scribner*, *supra*.

²⁷ *Id.*

²⁸ *Press Pub. Co. v. Monroe*, 51 L.R.A. 353, 19 C. C. A. 429, 73 Fed. 196.

²⁹ See first note to this section.

³⁰ *Brady v. Daly*, 175 U. S. 148, 154, 44 L. ed. 109, 112. See *Chatterton v. Cave*, L. R. 3 App. Cas. 483, 492, which seems to be in accord.

³¹ 35 U. S. Stats., ch. 320.

sales only, and the defendant must prove every element of cost he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, the maximum sum being fixed according to the nature of the article infringed and a minimum sum being designated. The assessment may be made by a jury under the direction of the court,³² or it may be referred to a master.³³ The provision authorizing such damages as shall be just seems inconsistent with that fixing the maximum sum. These provisions are said to mean that where the court is satisfied that substantial damages have been sustained, if the evidence is incomplete or insufficient, so that it cannot be ascertained just what they are, they may be allowed according to the minimum sum fixed, but if the court is satisfied that the damages sustained are less than that sum it may fix them accordingly. It is not presumed that copies of an infringing publication given away would have been sold,³⁴ nor will it be inferred that the sale of an infringing leaflet at 3 cents per copy prevented a sale of a copy of a book selling for \$1.60.³⁵ The measure of damages as prescribed by the above mentioned act applies to an infringement occurring after the act went into effect though the copyright infringed was obtained prior thereto.³⁶

Under the English copyright act the proprietor of a copyright in a book has a remedy for the infringement thereof by a special action on the case; he may also sue the offender in detinue or trover, or, if necessary, in both combined. All these remedies may be availed of by action in the chancery division. If the defendant has possession of some of the infringing copies and has sold others, without profit thereon, the plaintiff is entitled to recover the former and also to damages representing the proceeds of the copies sold.³⁷

³² Mail & Express Co. v. Life Pub. Co., 192 Fed. 899.

³³ Huebsch v. Arthur H. Crist Co., 209 Fed. 385.

³⁴ Woodman v. Lydiard P. Co., 192 Fed. 67.

³⁵ Huebsch v. Arthur H. Crist Co., 209 Fed. 885.

³⁶ Id.

³⁷ Muddock v. Blackwood, [1895] 1 Ch. 58.

CHAPTER XXXIII.

INFRINGEMENT OF TRADE-MARKS.

§ 1200. Nature of the right to a trade-mark and of the wrong of infringement; parties defendant.

1201, 1202. The measure of damages; in equity and at law.

§ 1200. **Nature of the right to a trade-mark and of the wrong of infringement; parties defendant.** This injury is one to the good-will of a business. Redress for it by recovery of damages is founded on the obvious principle that if one, by any false pretense, draws away another's customers, either with intent to lessen the latter's profits or to unlawfully appropriate them, he commits a wrong for which compensation proportioned to the injury may be recovered. This principle embraces all deceits by which that injurious loss of business is accomplished. Thus a merchant designated his goods by a label which would not be protected as a trade-mark; the words used were not strictly true, though they were not calculated to deceive or injure the public. Another merchant adopted the same label, placed it upon inferior goods, which he put upon the market. It was held that he was liable in an action in the nature of deceit; that specific damage need not be alleged or proved to sustain the action, but the jury might give general damages.¹ Everywhere courts proceed upon the theory that a party has a valuable interest in the good-will of his trade, and in the labels or marks which he adopts to enlarge and perpetuate it.²

¹ *Conrad v. Uhrig B. Co.*, 8 Mo. App. 277; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Wotherspoon v. Currie*, L. R. 5 Eng. & Ir. App. 508; *Rodgers v. Nowill*, 6 Hare 325, 5 M., G. & S. 109; *Lee v. Haley*, L. R. 5 Ch. App. 155; *Wilson v. Smith*, 2 New South Wales St. Rep. 174; *Baker v. Slack*, 65 C. C. A. 138,

130 Fed. 514. See *Cusimano v. Olive Oil I. Co.*, 114 La. 312; *Auburn, etc. P. R. Co. v. Douglass*, 12 Barb. 557.

² *Id.*; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Colladay v. Baird*, 4 Phila. 139; *Partridge v. Menck*, 2 Barb. Ch. 101; *Walton v. Crowley*, 3 Blatch. 440; *Levy v. Walker*, 10

A dealer has a property in his trade-mark. The ownership is allowed him that he may have the exclusive benefit of the reputation which his skill has given to articles made or sold by him that no other person may be able to sell to the public as his that which is not his.³ And there is no difference between citizens and aliens in respect to their rights in trade-marks and in being entitled to have such rights protected in our courts.⁴

The infringement of a trade-mark causes injury by legal presumption as the result of a fraudulent representation that the infringer's use of that mark is the proprietor's use. If it be a label or mark upon goods manufactured or sold there is in the infringer's use of it an implied representation by him that the goods on which he places the label or mark are those of the person who adopted the mark and has been accustomed to designate his goods by it. Such infringement may injure the proprietor of the mark in three ways: By dividing, and to some extent diminishing, the demand upon him for his goods; by depreciating them by having their merits determined by the deceived consumers of or the dealers in the inferior article,⁵ and by compelling the plaintiff to reduce his prices.⁶ The quality, however, of the simulated article is immaterial except as it affects the amount of the injury. The proprietor of the trade-mark suffers injury and has undoubted claim to damages

Ch. Div. 436, 27 Moak 17, note; Shaw v. Pilling, 175 Pa. 78; Armington v. Palmer, 21 R. I. 109, 43 L.R.A. 95; Fairbank Co. v. Windsor, 118 Fed. 96.

³ Clark v. Clark, 25 Barb. 76; Williams v. Johnson, 2 Bosw. 1; Dixon C. Co. v. Guggenheim, 2 Brewster 321; Derringer v. Plate, 29 Cal. 292, 87 Am. Dec. 170; Marshall v. Pinkham, 52 Wis. 572, 38 Am. Rep. 756; Congress S. Co. v. High Rock S. Co., 45 N. Y. 291, 6 Am. Rep. 82; El Modello O. Mfg. Co. v. Gato, 28 Fla. 886, 23 Am. St. 537. See Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550.

⁴ Taylor v. Carpenter, 2 Woodb. & M. 1; Coats v. Holbrook, 2 Sandf. Ch. 586.

⁵ Peltz v. Eichele, 62 Mo. 171; Morrison v. Salmon, 2 M. & G. 385; Blanchard v. Hill, 2 Atk. 484; Singleton v. Bolton, 3 Doug. 293; Blofield v. Payne, 4 B. & Ad. 410; Southern v. How, Poph. 143; Graham v. Plate, 40 Cal. 593, 6 Am. Rep. 639; Taylor v. Carpenter, 2 Sandf. Ch. 603, and note to Coats v. Holbrook, id. 599; Shaw v. Pilling, *supra*; Alexander v. Henry, 12 Rep. of Pat. Cas. 360.

⁶ Alexander v. Henry, *supra*.

if the natural effect of the transaction of the infringer is to palm off on purchasers a different article from that which they intended to buy, and to interfere with the right of such proprietor to profits to which the reputation of his article justly entitled him.⁷ One commits a legal wrong when he adopts a trade-mark which is untrue and deceptive to sell his own goods as the goods of another, for thereby the latter is injured and the public deceived.⁸ The infringement is presumed to proceed from a fraudulent purpose to induce the public or those buying the article to believe that the goods wrongfully designated by it are those made or sold by the owner of the trade-mark and to supplant him in the good-will of his trade.⁹ Damages will be presumed from infringement, and at least a nominal sum can be recovered.¹⁰ It will not be assumed that all the sales made by the defendant were because of his fraud, though it is shown that his business was generally fraudulently con-

⁷ *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Taylor v. Carpenter*, id. 603 (and note to *Coats v. Holbrook*, id. 599), 11 Paige 292, 42 Am. Dec. 114; *Lynn S. Co. v. Auburn-Lynn S. Co.*, 100 Me. 461, 4 L.R.A.(N.S.) 960. See *New Orleans C. Co. v. American C. Co.*, 124 La. 19.

⁸ *Newman v. Alvord*, 51 N. Y. 195, 10 Am. Rep. 588; *Morrison v. Salmon*, 2 M. & G. 385; *Lynn S. Co. v. Auburn-Lynn S. Co.*, 100 Me. 461, 4 L.R.A.(N.S.) 960; *Fox v. Glynn*, 191 Mass. 344, 114, 9 L.R.A.(N.S.) 1096, 114 Am. St. 619 (the wholesaler's intent as to retailers to whom he sells is immaterial; his wrong is done by furnishing them the means to deceive the consumers).

⁹ *Taylor v. Carpenter*, 11 Paige 292, 42 Am. Dec. 114, 2 Sandf. Ch. 603; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Marsh v. Billings*, 7 Cush. 322, 54 Am. Dec. 723; *Thompson v. Winchester*, 19 Pick. 214, 31 Am. Dec. 165; *Blofield v. Payne*, 4 B. & Ad. 410; *Rodgers v.*

Nowill, 5 M. G., & S. 109; *Coffeen v. Brunton*, 4 McLean 516; *Shaw v. Pilling*, 175 Pa. 78.

¹⁰ *Blofield v. Payne*, 4 B. & Ad. 410; *Le Page v. Russia C. Co.*, 51 Fed. 941, 17 L.R.A. 354. See *Kimball v. Hall*, 87 Conn. 563.

More than nominal damages have been recovered, apart from any direct proof of loss of profits or damage to reputation. *Littlejohn v. Mulligan*, 3 New Zeal. L. R. (Sup Ct.) 446.

The fact that the nature of the infringement is such that careful buyers would not have been deceived has no tendency to show that no injury was done plaintiff, but merely to reduce the extent of it. *Howard Dustless Duster Co. v. Carleton*, 219 Fed. 913.

Where the evidence is sufficient in law to support a judgment for nominal damages for infringement, the plaintiff is entitled to go to hearing on the merits. *Kimball v. Hall*, 87 Conn. 563.

ducted.¹¹ Positive proof of fraudulent intent on the part of the infringer is not required where the infringement is clearly shown, as his liability arises from the fact that he is enabled, through the unwarranted use of the trade-mark, to sell a simulated article as and for the one which is genuine.¹² It is sufficient to show the proprietary right of the plaintiff and its actual infringement.¹³ Cases arising out of unfair competition are recognized as analogous to those in which there have been violations of trade-marks.¹⁴ The officers of a corporation who are vested with the full management of its business and who intentionally participated in its fraudulent acts and received the principal benefit therefrom are jointly and severally liable with the corporation, and are bound by a judgment against it, they having controlled and directed the suit in which it was rendered.¹⁵

§ 1201. The measure of damages; in equity and at law.¹⁶ The compensation to the owner of a trade-mark for the injury he suffers from a wrongful and unauthorized use of it by another is ascertained and computed on substantially the same principles as damages for infringement of patents and copy-rights.¹⁷ In equity, if there is ground for invoking its juris-

¹¹ *Lynn S. Co. v. Auburn-Lynn S. Co.*, 103 Me. 334.

¹² *McLean v. Fleming*, 96 U. S. 253, 24 L. ed. 831; *Wotherspoon v. Currie*, L. R. 5 Eng. & Ir. App. 512; *Davis v. Kendall*, 2 R. I. 566; *Shaw v. Pilling*, *supra*; *Armington v. Palmer*, 21 R. I. 109, 43 L.R.A. 95; *Le Page Co. v. Russia C. Co.*, *supra*.

¹³ *Colman v. Crump*, 70 N. Y. 578; *American Grocer v. Grocer Pub. Co.*, 25 Hun 402; *Dale v. Smithson*, 12 Abb. Pr. 237; *Guillion v. Lindo*, 9 Bosw. 605; *Kinahan v. Bolton*, 15 Ir. Ch. (N.S.) 75; *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275; *Stonebreaker v. Stonebreaker*, 33 Md. 252; *Holmes v. Holmes*, etc. Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324; *Edelsten v. Edelsten*, 9 Jur. (N.S.) 479.

¹⁴ *Notaseme Hosiery Co. v. Straus*, 131 C. C. A. 503, 215 Fed. 361; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 34 L. ed. 997; *Fairbank Co. v. Windsor*, 118 Fed. 96; *Lynn S. Co. v. Auburn-Lynn S. Co.*, 100 Me. 461, 4 L.R.A.(N.S.) 960.

¹⁵ *Saxlehner v. Eisner*, 140 Fed. 938.

¹⁶ See *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550, declaring the trade-mark legislation of congress unconstitutional.

¹⁷ *Fairbank Co. v. Windsor*, 118 Fed. 96.

It has been doubted whether the analogy holds. See *Benkert v. Feder*, 34 Fed. 534. It is said in *Regis v. Jaynes*, 191 Mass. 245, that where a small article is sold with an unskillful imitation of a trade-mark

diction, and an infringement has been found and decreed, and there has been no unreasonable delay in commencing the suit,¹⁸ an account of profits will be decreed, which means the net profits the infringer has actually realized.¹⁹ This rule holds good

it is to be treated as an undivided whole, and that as against the wrongdoer it must be taken to be a sale brought about by means of the unlawful trade-mark. If any analogy from patent cases is to be adopted, we ought rather to follow the rule that where the infringing machine or device derives its entire commercial value from the patented feature or improvement, then the patentee is entitled to the entire profits realized from its sale.

¹⁸ *Harrison v. Taylor*, 11 Jur. (N.S.) 408, 12 L. T. Rep. (N.S.) 339; *Amoskeag Mfg. Co. v. Garner*, 4 Am. L. Times (N.S.) 176. See, as to unfair competition, *Wolf Bros. & Co. v. Hamilton-B. S. Co.*, 206 Fed. 611.

"In England the rule is stringent in trade-mark cases that lack of diligence in suing deprives the complainant in equity of the right either to an injunction or an account. Our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights if he would hold a wrong-doer to an account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant." *Sawyer v. Kellogg*, 9 Fed. 601; *El Modello C. Mfg. Co. v. Gato*, 25 Fla. 889, 6 L.R.A. 823, 23 Am. St. 537. If plaintiff re-

mains silent after knowledge of the infringement he will be allowed damages only on such sales as are made after his action is begun. *Enoch Morgan's Sons Co. v. Troxell*, 57 How. Pr. 121.

¹⁹ *Merriam Co. v. Saalfeld*, 198 Fed. 369; *Foster Mfg. Co. v. Cutter-T. Co.*, 215 Mass. 136; *Modesto Creamery v. Stanilaus Creamery Co.*, 168 Cal. 289; *Baker v. Slack*, 65 C. C. A. 138, 130 Fed. 514; *Lynn S. Co. v. Auburn-Lynn S. Co.*, 100 Me. 461, 4 L.R.A.(N.S.) 961, 103 Me. 334; *Nelson v. Winchell*, 203 Mass. 75, 23 L.R.A.(N.S.) 1150; *Reading S. Works v. Howes Co.*, 201 Mass. 437, 21 L.R.A.(N.S.) 979; *Regis v. Jaynes*, 191 Mass. 245; *Martin Co. v. Martin & W. Co.*, 75 N. J. Eq. 257, 21 L.R.A.(N.S.) 526; *Rowley v. Rowley*, 193 Fed. 390; *Frazer v. Frazer L. Co.*, 18 Ill. App. 450; *Avery v. Meikle*, 85 Ky. 435, 7 Am. St. 604; *Fairbank Co. v. Windsor*, 118 Fed. 96; *El Modello C. Mfg. Co. v. Gato*, 25 Fla. 889, 6 L.R.A. 823, 23 Am. St. 537; *Hostetter v. Vowinkle*, 1 Dill. 329; *Wilder v. Gaylor*, 1 Blatch. 511; *Hennessey v. Wilmerding-L. Co.*, 103 Fed. 90; *Benkert v. Feder*, 34 Fed. 534.

The rule stated in the text will be applied to a case where there has been no violation of an exclusive right in a technical trade-mark, but where defendant has used devices calculated to pass off his goods as those of plaintiff. *Modesto Creamery v. Stanilaus Creamery Co.*, 168 Cal. 289.

In *Hostetter v. Vowinkle*, *supra*,

regardless of whether the owner would have recovered a like profit on similar sales. All that is necessary is that a fraudulent

the court seemed to limit the profits to those realized on that amount of the infringer's trade which represented the consequent diminution of the plaintiffs'. Dillon, J., said: "From the evidence of one of the defendants I find that he admits sales to the extent of two hundred dozen bottles. The evidence shows that the sales of the plaintiffs in Omaha fell off during the time the defendants were manufacturing and selling their imitation bitters even to a greater amount than this. I am satisfied that the plaintiffs' sales have been lessened at least to the extent of the two hundred dozen bottles, and that their profits would have been on each case of one dozen bottles the sum of four dollars."

If the action is for an injunction and the complainant elects to accept the profits as damages the court will not require him to show affirmatively that he has been damaged, but will assume as matter of law that persons who have purchased simulated goods would have purchased the genuine but for the defendant's wrong. Though damages are prayed for the election may be made to take the profits if no other special injury is alleged or claimed. *Avery v. Meikle*, 85 Ky. 435, 7 Am. St. 604.

It is immaterial to this right of recovery whether the complainant would have realized the profits made by the defendant or not. If the latter made profits by his invasion of the complainant's rights he is entitled to them whether the same profits would have been made by him or not, and not to any more, for the same profits could not be

made by both. *Atlantic M. Co. v. Rowland*, 27 Fed. 24.

In the computation of profits deduction for expenses was refused where the infringing was carried on in connection with the defendant's regular business and without increasing the gross expenses. *Societe Anonyme v. Western D. Co.*, 46 Fed. 921. But see § 1191.

One who advertises and sells a proprietary article in a specified territory contrary to the terms of a contract is not liable to the other party to such contract for money expended by the latter in advertising for the purpose of counteracting the effect of such a breach. Application should be made, in the first instance, to the courts for restraint of the party thus guilty. Equity will not, in a suit for an injunction and an accounting for the violation of such a contract, award anything for losses sustained by the complainant because of the reduction made by him in the price of his article to meet the competition of the defendant. Where the article has been made by both parties after the same formula the profits will be computed upon the basis of the actual cost to the defendant regardless of the expense at which it might have been made and sold by the defendant. *Fowle v. Park*, 48 Fed. 789.

"We think it is questionable whether the cost of advertising by a complainant prior to an injunction, warning the public of the counterfeiting of his trade-mark by a respondent can be allowed as damages properly in equity, as we understand that a complainant's right to recover is limited to the profits

intent be found as a fact,²⁰ and the damages caused thereby be substantial.²¹ The profits realized by one who wrongfully obtained and used information which was the property of another have been recovered on the same principle.²² Though it has been said that interest on the profits is not always to be allowed,²³ the weight of authority favors its recovery.²⁴ A defendant ordered to account cannot be charged with bad debts as profits; and, on the other hand, he cannot charge the plaintiff with the cost of manufacturing the goods in respect of which such debts were incurred.²⁵ If the manufacture of the article which

made by the respondent from the use of the trade-mark. *Fowle v. Park*, 48 Fed. 789. But, however this may be, we are clearly of the opinion that the cost of such advertisement subsequent to the granting of the injunction is not allowable." *Buchanan v. Carpenter*, 19 R. I. 337.

The recovery of profits was denied where the plaintiff had not been competed with unfairly and his loss bore no relation to the defendant's gains. *Lawrence v. Hull*, 169 Mass. 250.

The cases in which profits have been decreed are proper trade-mark cases; that rule does not apply where one dresses up his publications unlawfully. In such cases if it appears that an inquiry as to damages or profits would be fruitless, or if each party has invaded the rights of the other the court will not award an accounting. *Merriam Co. v. Ogilvie*, 95 C. C. A. 423, 170 Fed. 167.

²⁰ *Notaseme Hosiery Co. v. Straus*, 131 C. C. A. 503, 215 Fed. 361.

"There is some conflict in the decisions, but we think that the weight of modern authority is in favor of the rule that an account of profits will not be taken where the wrongful use of a trade-mark or

a trade name has been merely accidental or without any actual wrongful intent to defraud a plaintiff, or to deceive the public." *Regis v. Jaynes*, 191 Mass. 245, citing *Elgin-National W. Co. v. Illinois W. C. Co.*, 179 U. S. 665, 674, 45 L. ed. 365, 379; *Saxlehner v. Siegel-C. Co.*, 179 U. S. 42, 45 L. ed. 77; *Fairbank v. Windsor*, 142 Fed. 200; *Stagg v. Taylor*, 95 Ky. 651, 669; *Beebe v. Tolerton*, 117 Iowa 593; *North Cheshire & M. B. Co. v. Manchester B. Co.* (1899) App. Cas. 83; *Moet v. Couston*, 33 Beav. 578; *Hodgson v. Kynoch*, 15 Rep. of Pat. Cas. 465.

²¹ *Hennessy v. Wine Growers' Ass'n*, 212 Fed. 308 (where an accounting was denied on the ground that the evidence showed the damages to be too insignificant to warrant the accounting).

²² *International R. Co. v. Recording Fare R. Co.*, 139 Fed. 785.

²³ *Avery v. Meikle*, 85 Ky. 435, 7 Am. St. 604.

²⁴ *Nelson v. Winchell* *infra*; *Fowle v. Park*, 48 Fed. 789.

Where the profits made are ascertainable by the defendant interest thereon will be allowed from the time suit was begun. *Cutter v. Gudelbrod*, 190 N. Y. 252.

²⁵ *Nelson v. Winchell*, 203 Mass.

is offered as that of another is carried on in connection with the defendant's regular business and the same agencies are employed in doing that which is lawful and that which is unlawful no deduction will be made for expenses in estimating the profits of the unlawful business.²⁶ This rule seems not to be accepted in New York. There deduction has been made on account of the expense of sales though it was not shown that there had been any increase in the expense account of the defendant because the illegal sales were made.²⁷ Deduction for the salaries of the managing officers of a corporation, who were practically the corporation and the perpetrators of the fraud, has been refused on the ground that its allowance would be compelling the plaintiff to pay them for wronging it.²⁸ Where the trade-mark infringed belongs to several independent manufacturers the defendant should not be required to account for all the profits realized: his liability to each manufacturer is for only so much of the profits as has been diverted from him.²⁹ If the plaintiff is a jobber merely the profits to which he is entitled will be those he would have made as such; if the defendant had the right to manufacture the goods it sold, but unauthorizedly used the plaintiff's label on them, its right to profits is limited to those it was entitled to make as a manufacturer.³⁰

75, 23 L.R.A.(N.S.) 1150; *Edelsten v. Edelsten*, 10 L. T. Rep. (N.S.) 780.

²⁶ *Fairbank Co. v. Windsor*, 118 Fed. 96; *Societe Anonyme v. Western D. Co.*, 46 id. 921; *Baker v. Slack*, 130 id. 514, 65 C. C. A. 138; *Nelson v. Winchell*, *Regis v. Jaynes*, *supra*.

²⁷ *Cutter v. Guderbrod*, 190 N. Y. 252.

²⁸ *Lynn S. Co. v. Auburn-Lynn S. Co.*, 103 Me. 334, 100 Me. 461, 4 L.R.A.(N.S.) 960.

It is otherwise where the officer whose salary is sought to be deducted is a minority stockholder, and where the corporation was formed in good faith and not to

cover up individual activities as where a corporation was formed to take over an individual business, and where two-thirds of the capital was furnished by persons other than the officer whose salary is sought to be deducted. The reason given for the decision is that in justice to the majority stockholders, the salary in question should be treated like any other disbursement. *Nashville Syrup Co. v. Coca Cola Co.*, 132 C. C. A. 39, 215 Fed. 527.

²⁹ *Clark T. Co. v. Clark Co.*, 56 N. J. Eq. 789; *Regis v. Jaynes*, 191 Mass. 245.

³⁰ *Nelson v. Winchell*, 203 Mass. 75, 23 L.R.A.(N.S.) 1150.

There is the same singularity of different modes of estimating and proving compensation in equity and at law as exists in case of infringement of the other rights referred to. The net profits may be recovered in equity as profits made by the use of the plaintiff's property and the defendant, as constructive trustee, compelled to account for them. But at law only damages can be recovered, and they will be measured by the plaintiff's loss, and not by the defendant's gain; profits are there held not to be the measure of damages, nor an element thereof, where there is any other method of ascertaining and measuring them. Profits may be shown at law when necessary; they do not, however, measure the damages except as they are shown to represent loss to the plaintiff by a corresponding decrease of profits in his own business occasioned by such competition. The defendant's profits, as such, do not at law, as they do in equity, belong to the plaintiff. Nor will the proof of profits warrant a legal presumption that the plaintiff's loss is a corresponding amount. Perhaps the difference comes from a claim in the one case of damages which is properly cognizable at law, and in the other a claim of profits recoverable as the fruit of a constructive trust cognizable only in equity. On a bill in equity to restrain the infringement of the plaintiff's trade-mark a decree had been obtained for an injunction. A decree for an account of profits had been offered by the court, and refused by the plaintiff, who elected to take in lieu thereof an inquiry as to damages for the defendant's unlawful use of the trade-mark. On that inquiry the plaintiff did not prove direct damages and could not show to what extent his mark had been used; he claimed damages equal to all the profits made by the defendant on all his sales of the article on which the pirated trade-mark was used, but the court rejected this claim, holding that the plaintiff was not so entitled; that on such an inquiry the *onus* lies on him of proving some special damage by loss of custom or otherwise; and that it will not be intended, in the absence of evidence, that the amount of goods sold by the defendant by the fraudulent use of the trade-mark would otherwise have been

sold by the plaintiff.³¹ Both damages and profits are not recoverable; they may overlap and result in double compensa-

³¹ Davidson v. Munsey, 29 Utah 181; Merriam v. Saalfeld, 198 Fed. 369; Leather Cloth Co. v. Hirschfeld, L. R. 1 Eq. 299; Seymour v. McCormick, 16 How. 480, 14 L. ed. 1024; Ransom v. Mayor, 1 Fish. Pat. Cas. 252; Avery v. Meikle, 85 Ky. 435, 451, 35 L.R.A.(N.S.) 870, 7 Am. St. 604; Addington v. Cullinane, 28 Mo. App. 238; Atlantic M. Co. v. Robinson, 20 Fed. 217. See § 1185.

In Peltz v. Eichele, 62 Mo. 171, it appeared that the defendant, who was a manufacturer of and dealer in matches in St. Louis, entered into a contract with the plaintiff for the sale to him, for a certain sum, of his entire factory and stock in trade, together with the good-will, proprietary stamp, trade-marks, brands, and the use of the names of A. Eichele and A. Eichele & Co. employed by him in such business. This contract contained the following covenant: "Said Eichele, further covenanting, agrees that he will not enter into the manufacture of matches at this or any other place for the term of five years, nor lend his influence, skill, name or countenance to any other party or parties so engaged, to the detriment of the business so transferred." In about a year the defendant erected a new factory six blocks from the one he sold to the plaintiff, and at once engaged in the manufacture and sale of matches under the name and style of P. Eichele & Co. The trial court instructed the jury that the measure of damages is not the difference of plaintiff's profits subsequent to the re-entry of the defend-

ant into business, but only so much of this difference as was thus reaped by the defendant, and the proof of how much was thus reaped devolves on the plaintiff. That while, as part of the circumstantial proof, plaintiffs have been permitted to show their sales during the several years, the jury are not to adopt as the measure of damages the profits of one year computed on sales compared with those computed on the sales of another year unless they believe from the evidence that the difference between the sales of the different years had no other cause than that the defendant re-entered into the business. Hence, if the jury believe from the evidence that the customers who left plaintiffs to return to defendant bought not solely of defendant, but of other parties, then the measure of damages would be only upon the sales made by defendant, and proof of this amount devolves on the plaintiff, and the jury, in the absence of proof, cannot presume what amount they were. The plaintiff having obtained a verdict and judgment, on the defendant's appeal the supreme court affirmed the judgment.

In Baker v. Slack, 65 C. C. A. 138, 130 Fed. 514, there are *obiter* remarks in favor of the recovery of the difference between the cost to the injured party of the manufacture of his article and the price at which he is able to dispose of it, together with such sum as the court might think the genuine article had lost in reputation by the substitution of the spurious one.

tion.³² In Maine it has been ruled that the inquiry in equity covers both profits and damages. If there is uncertainty as to the profits the decree will include all those derived from the goods sold in the simulated garb and contrary to the rights of the plaintiff.³³ A manufacturer who innocently produces an article bearing a certain name or mark for the use of a person not authorized to use such name or mark may recover from such person the sum paid the owner thereof in compromising his liability to him and the expenses of the action brought by the latter.³⁴

§ 1202. **Same subject.** The jury are to give the actual damages the plaintiff has sustained,—not vindictive nor speculative damages,³⁵ but such as his proof has shown to their satisfaction he has actually sustained by the infringement.³⁶ M. agreed

³² *Martin v. Martin & W. Co.*, 75 N. J. Eq. 257, 21 L.R.A.(N.S.) 526.

³³ *Lynn S. Co. v. Auburn-Lynn S. Co.*, 100 Me. 461, 4 L.R.A.(N.S.) 960.

A court of equity may decree an accounting of profits as well as an award of damages in a case of unfair competition if there be what seems to the court sufficient grounds therefor. "Damages," as a word of art, being a term of clear legal import, and merely including the concept of indemnity for loss, does not include profits within its meaning, hence a decree that a master "ascertain and assess the damages" cannot be construed as a decree to make an accounting of profits. *P. E. Sharpless Co. v. Lawrence*, 130 C. C. A. 59, 213 Fed. 423.

³⁴ *Dixon v. Fawcus* 3 L. T. Rep. (N.S.) 693.

³⁵ These cannot be awarded by a master on an accounting in an equity suit. *Hennessy v. Wilmerding-L. Co.*, 103 Fed. 90, 94.

They may be recovered under a statute making it a misdemeanor to imitate a trade-mark and providing

for the recovery of such damages as are reasonable and just, in addition to the profits made by the defendant from the infringed article. *Cusimmano v. Olive Oil I. Co.*, 114 La. 312.

Punitive damages may be allowed if the infringement was wilful. *Lampert v. Judge & D. D. Co.*, 238 Mo. 409, 37 L.R.A.(N.S.) 533, differing from the intermediate court. Same case 119 Mo. App. 693.

³⁶ *Ransom v. Mayor, etc.*, 1 Fish. Pat. Cas. 252; *Parker v. Hulme*, id. 44; *Addington v. Cullinane*, 28 Mo. App. 238.

Mr. Hopkins, in his *Law of Unfair Trade*, 241, 242, says that to his mind the better rule is announced in *Warner v. Rochr*, Fed. Cas. No. 17,189A, in which the instructions of Judge Blodgett to a jury were, in part: "In cases of this character, where you are satisfied from the proof and from the admissions in the case that the fraud—the intention to defraud—is at the bottom of the matter, * * * the jury are not confined to exact monetary damages, but may give what

with S., the lessee of the Revere House, to keep good carriages, horses and drivers on the arrival of certain specified trains at a railroad station to convey passengers to the Revere House, and in consideration thereof S. agreed to employ M. to carry all the passengers from that house to the station, and authorized him to put upon his coaches and the caps of his drivers as a badge the words "Revere House." A similar agreement, previously existing between S. and B., had been terminated by mutual consent; but B. continued to use those words as a badge on his coaches and on the caps of his drivers, although requested not to do so by S., and his drivers called "Revere House" at the station, and diverted passengers from M.'s coaches into B.'s. In an action on the case, brought by M. against B. for using said badge and diverting passengers, it was held that M., by his agreement with S., had the exclusive right to use the words "Revere House" for the purpose of indicating that he had the patronage of that house for the conveyance of passengers; that if B. used these words for the purpose of holding himself out as having the patronage and confidence of that establishment and in that way to induce passengers to go in his coaches rather than in M.'s, this would be a fraud on the plaintiff and a violation of his rights, for which the action would lie without proof of actual, specific damage, and that M. would be entitled to recover such damages as the jury, upon the whole evidence, should be satisfied he had sustained, and not merely for the loss

are known as vindictive or exemplary damages for the purpose of deterring others from embarking in the same schemes of fraud and deception." The author says that it is not to be doubted that this doctrine is more reasonable and just, and better adapted to protect society from the ravages of trade-mark infringers than the rule stated in *Taylor v. Carpenter*, 2 Wood & M. 1 Fed. Cas. No. 13,785, and *Addington v. Cullinane*, 28 Mo. App. 238. It is difficult to see how the result stated in those two cases has been attained. They are wholly without

precedent and opposed to the rule of damages which obtained at common law. Mr. Hopkins bases his criticism, in effect, upon the ground that there is no good reason for making a distinction between the allowance of exemplary damages in cases of the character now being considered than in actions of trespass and all actions on the case for torts. So far, the editor agrees with him. Indeed, he thinks there are special reasons why such damages should be allowed. In the first place, fraud is an odious tort, and punitive damages, as is elsewhere

of such passengers as he could prove to have been diverted from his coaches to the defendant's.³⁷

It has sometimes been stated and held at law that the proprietor of a trade-mark may recover the value of the illegal user while it continued, or, in other words, the amount of profits.³⁸ In a case in California³⁹ the court, by Crockett, J., thus vindicates that measure and mode of redress: "It is clearly in proof that the defendant has made a profit of \$1,770 by sale of pistols made in imitation of the Derringer pistol, and bearing Derringer's trade-mark stamped thereon without his consent; and the court rendered a judgment for this amount against the defendant. It is insisted on behalf of the defendant that the profit realized by him from sale of the spurious article under the simulated trade-mark is not a proper measure of damages. It is conceded that this is the proper rule in an action for damages for the infringement of a patent. It is said that the patentee, having the exclusive right to manufacture and vend the patented article, is entitled, legally and equitably, to all the profits made by any one from the manufacture and sale

shown, are recoverable in actions based on fraud if the aggravating circumstances authorizing their imposition are proven. In the second place, the interests of the public are much more affected by frauds of this nature than by the ordinary frauds practiced by one individual upon another, and the public health and safety may well justify the imposition of "smart money" upon those who disregard them to the extent of putting fraudulent articles of food and medicine upon the market. These considerations do not seem to have been present in the minds of the courts which have denied the recovery of such money. See preceding note.

If actual damages are not shown a nominal sum may be recovered. *Lampert v. Judge & D. D. Co.*, 119 Mo. App. 693.

³⁷ *Marsh v. Billings*, 7 Cush. 322, 54 Am. Dec. 723.

While the plaintiff must furnish evidence affording some basis for an intelligent judgment, for at least a probable estimate as to how much of his damage was caused by the defendant, it is not required that he show the resulting damages in separation from other damages with mathematical precision or anything like it. It is enough if the evidence is such as will enable the court to make a reasonably probable estimate of the extent of the damages. *Lynn S. Co. v. Auburn-Lynn S. Co.*, 103 Me. 334.

³⁸ *Taylor v. Carpenter*, 2 Woodb. & M. 1; *Guyon v. Serrell*, 1 Blatch. 244.

³⁹ *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639; *Fairbank Co. v. Windsor*, 118 Fed. 96.

of it in violation of the rights of the patentee; but one who has acquired an exclusive right to use a particular trade-mark has not thereby acquired an exclusive right to make and vend the commodity to which the trade-mark is affixed; that any one has the right to make and vend the same commodity in exact imitation of that made by the owner of the trade-mark, and that the offense consists, not in imitating the commodity, but the trade-mark only. Hence, it is argued, the profit made by a sale of the commodity ought not to be a measure of the damages; but the party is entitled to only such damages as resulted from a piracy of the trade-mark; and the profit realized by a sale of the commodity does not establish the amount of this damage, which may be greater or less than the amount of the profit. It is evident that the profit realized by the wrong-doer is not the *only* measure of damages. The spurious article may have injured the credit of the genuine one, and the profits of the owner of the trade-mark may have been greatly reduced, whilst the wrong-doer has made little or no profit. But whilst the profit made by the latter does not limit the recovery, the owner of the trade-mark is entitled to all the profit which was in fact realized. In sales made under a simulated trade-mark it is impossible to decide how much of the profit resulted from the intrinsic value of the commodity in the market, and how much from the credit given to it by the trade-mark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales, and at what prices, except for the use of the trade-mark. No one will deny that on every principle of reason and justice the owner of the trade-mark is entitled to so much of the profit as resulted from the trade-mark. The difficulty lies in ascertaining what proportion of the profit is due to the trade-mark and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another so that they cannot be

distinguished and separated he shall lose the whole, for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party who in no way contributed to the wrong."

It has been ruled in New York that the plaintiff may recover as damages the amount received by the defendant upon sales made by him, less the sum it would have cost the former to make and sell the quantity made and sold by the defendant in addition to what he made and sold.⁴⁰ Where the circumstances connected with the sale of the spurious goods are aggravated there may be a recovery, in addition to the profits, of damages for injury to the reputation of the goods of the complainant.⁴¹

In New Zealand the plaintiff may sue for damages or for an account of profits; he cannot have both remedies. In an action for damages the recovery is measured by the extent to which the infringement has interfered with the plaintiff's sales,⁴² including any prospective interference arising from the infringement in respect of which the action is brought. The profits received by the defendant do not measure the damages

⁴⁰ *Champlin v. Stoddard*, 34 Hun 109.

It is said in *Westcott C. Co. v. Oneida Nat. C. Co.*, 199 N. Y. 247, 139 Am. St. 907, that the unreported case of *Faber v. Hovey*, Cox Trade Mark Cas. (2nd ed.) 481, is authority to the effect that where no proof is given of the profits actually made by the defendant those the plaintiff would have realized establish the measure of damages.

⁴¹ *Hennessy v. Wilmerding-L Co.*, 103 Fed. 90, 94.

This rule is recognized in a late case in which it was said: If, for example, the defendant has attempted to undersell the plaintiff, thus cutting down his profits without correspondingly increasing his own, or if the defendant has cheapened his production by the use of

inferior materials or by unsuitable processes of manufacture, and thus has depreciated the value of the plaintiff's trade-mark or otherwise has injured the reputation of his goods and thereby caused an appreciable loss to the maker, in addition to that caused by the actual sales made by the defendant, there may be a recovery for such a loss in addition to the profits. But there may not be a recovery both of the profits and damages upon the theory that the plaintiff, but for the defendant's wrongful acts, would have made the sales made by the latter; that would be allowing double compensation. *Foster Mfg. Co. v. Cutter-T. Co.*, 215 Mass. 136.

⁴² *Atlantic M. Co. v. Robinson*, 20 Fed. 217.

because it does not follow that sales made by the defendant at a reduced price would have been equaled by sales at a higher price made by the plaintiff.⁴³ "If, however, it be proved that large sales have taken place, though at a reduced price, it is a reasonable inference that there has been a substantial interference with the plaintiff's sales, though, perhaps, not to the extent of the fraudulent sales. In the present case the defendant admits on the pleadings that he has for some time past infringed the plaintiff's trade-mark and has sold, and has continued from time to time to sell, under the false trade-mark, pills not manufactured by the plaintiff. At the hearing the imitation was proved to be as fraudulent as possible. Although, therefore, the damages are in no way to be given as a punishment for fraud, yet it would be quite a proper direction to a jury to tell them that in such circumstances the damages should not, as the phrase is, be weighed in golden scales, and that in assessing them every inference that could fairly be drawn against the defendant should be drawn. Where it is clearly proved that the plaintiff has suffered some substantial, and not merely nominal, damage from the fraudulent acts of the defendant, then, as the difficulty of proving to a nicety the exact amount of damage has been mainly caused by the acts of the defendant, a jury would be justified, as in any other action of tort, in looking at all the probabilities arising from the evidence in order to estimate the damage the plaintiff has sustained."⁴⁴ The owner of a secret process who seeks to restrain its further use and to recover the profits derived by the defendant treats the latter as a *quasi* trustee merely. In ascertaining the profits all the expenses of conducting the business in which the process was used will be deducted, including abnormal depreciation, no matter from what cause. Interest will be allowed with annual rests, on the annual profits.⁴⁵

⁴³ *Leather-Cloth Co. v. Hirschfield*, L. R. 1 Eq. 299.

⁴⁴ *Beecham v. Hanlon*, 12 New Zeal. L. R. 554.

⁴⁵ *Vulcan D. Co. v. American C. Co.* (N. J. L.), 85 Atl. 318.

CHAPTER XXXIV.

SLANDER AND LIBEL.

SECTION 1.

PLAINTIFF'S CASE.

- § 1203. Nature of the wrong.
1204. Accusations actionable per se; scope of rule in libel.
1205. Malice the gist of the action; how shown.
1206, 1207. General damages; considerations upon which based.
1208, 1209. Same subject; aggravation of damages.
1210, 1211. Same subject; wealth and rank of the parties.
1212. Evidence of reputation.
1213. Injuries to business.
1214. Mental suffering and physical incapacity.
1215. Special damages.
1216. Exemplary damages.
1217. Damages in discretion of jury.
1218, 1219. Special damages when words not actionable per se.
1220. Same subject; injury to feelings.
1221. Same subject; natural consequence.
1222. Criticism of the doctrine last stated.
1223. Slander of title.

SECTION 2.

THE DEFENSE.

1224. Failure of plea of justification.
1225. Same subject; effect of statutes.
1226. Evidence in mitigation; plaintiff's bad character; his conduct and declarations.
1227. Same subject; evidence of common reports as to plaintiff's guilt.
1228, 1229. Same subject; proof of truth of words.
1230. Same subject; effect of statutes.
1231-1233. Evidence in mitigation generally.

SECTION 1.

PLAINTIFF'S CASE.

§ 1203. Nature of the wrong. The wrong now to be considered is one by which the wrong-doer injures the reputation

of another by maliciously publishing a falsehood concerning him. The extent of the injury and the consequent right to damages therefor depends on how good the previous reputation of the injured party was and the nature of the false charge made against him. The law presumes, until the contrary is shown, that every person is innocent; that one has done nothing to forfeit the good opinion of the community and hence enjoys its respect and confidence.¹ It regards this good reputation as valuable to its possessor, and its preservation important to his happiness.² The public utterance of a false accusation by which a good name is destroyed or sullied is, therefore, an injury for which damages may be recovered. Slander and libel are different names for the same wrong committed in different ways. Slander is oral defamation published without legal excuse, and libel is defamation so published by means of writing, printing, pictures, images or anything that is the object of the sense of sight.³

§ 1204. **Accusations actionable per se; scope of rule in libel.** Certain vocal utterances are actionable *per se*; an action will lie for them without an allegation or proof of actual damage because it is legally presumed that they cause injury as a natural and immediate consequence. Other utterances of a defamatory tendency are not so obviously injurious that injury therefrom is presumed. When such defamation is the subject of an action special injury must be alleged and proved to sustain the action.⁴ In the following cases words falsely spoken are actionable in themselves: First, where they impute to another the commission of some criminal offense involving moral turpitude, for which, if the charge is true, he may be indicted and punished; or, as the test is more generally stated, where the charge, if true, must subject the party charged to indictment for a crime involving moral turpitude, or subject him to punishment.⁵ The injury from such a slander consists, not in

¹ Holmes v. Clisby, 121 Ga. 241; Clark v. North American Co., 203 Pa. 346.

² Times Pub. Co. v. Carlisle, 36 C. C. A. 475, 94 Fed. 762.

³ Cooley on Torts 193.

⁴ Cooley on Torts 203. *Contra*, under a statute. Guisti v. Galveston Tribune, 105 Tex. 497.

⁵ Herler v. Pierce, 50 Pa. Super.

the exposure to prosecution for the implied crime, but the disgrace and loss of reputation which the law presumes to result from such imputation.⁶ It makes no difference that the person of whom the words were spoken is not in the state where he is punishable; for though the crime have locality, the effect of the imputation has not.⁷ Second, where the words falsely spoken of a person impute that he is infected with some contagious disease, when, if the charge is true, it would exclude him from society.⁸ The charge must be such as can have the effect mentioned after the words are spoken, and, therefore,

Ct. 568; *Sipp v. Coleman*, 179 Fed. 997; *Phillips v. Bradshaw*, 167 Ala. 199; *Taylor v. Gumpert*, 96 Ark. 354; *Bohan v. Record Pub. Co.*, 1 Cal. App. 429; *Short v. Acton*, 33 Ind. App. 361; *Burgess v. Patterson*, 139 Ky. 547; *Shockey v. McCauley*, 101 Md. 461; *Smith v. Hubbell*, 142 Mich. 637; *Cook v. Globe P. Co.*, 227 Mo. 471; *Brown v. Knapp*, 213 Mo. 655; *Miller v. Dorsey*, 149 Mo. App. 24; *Saunders v. Post-S. Co.*, 107 App. Div. (N.Y.) 84; *Woolley v. Plaindealer Pub. Co.*, 47 Ore. 619, 5 L.R.A.(N.S.) 498; *Flint v. Holman*, 82 Vt. 297; *Earley v. Winn*, 129 Wis. 291 (assault and battery punishable by confinement in county jail); *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Davis v. Starrett*, 97 Me. 568; *McCuen v. Ludlum*, 17 N. J. L. 12; *Brooker v. Coffin*, 5 Johns. 188, 4 Am. Dec. 337; *Anonymous*, 60 N. Y. 262, 19 Am. Rep. 174; *Hoag v. Hatch*, 23 Conn. 585; *Davis v. Brown*, 27 Ohio St. 326; *Hollingsworth v. Shaw*, 19 id. 430, 2 Am. Rep. 411; *Dial v. Holter*, 6 Ohio St. 228; *Montgomery v. Deely*, 3 Wis. 709; *Filber v. Dautermann*, 26 id. 518; *Ranger v. Goodrich*, 17 id. 78; *Miller v. Parish*, 8 Pick. 384; *Dottarer v. Bushey*, 16 Pa. 204; *Stitzell v. Reynolds*, 67 id. 54, 5 Am. Rep. 396;

De Pew v. Robinson, 95 Ind. 109; *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307; *Brooks v. Harrison*, 91 N. Y. 83; *Davis v. Sladden*, 17 Ore. 259; *Zeliff v. Jennings*, 61 Tex. 458; *Campbell v. Campbell*, 54 Wis. 90; *Jones v. Townsend*, 21 Fla. 431; *Griebel v. Rochester P. Co.*, 60 Hun 319; *Nolte v. Herter*, 65 Ill. App. 430; *Ransom v. McCurley*, 140 Ill. 626; *Gray v. Elzroth*, 10 Ind. App. 587; *Walker v. Wickens*, 49 Kan. 42; *Savoie v. Scanlan*, 43 La. Ann. 967; *Taylor v. Ellington*, 46 La. Ann. 371, 26 Am. St. 200; *Gaines v. Belding*, 56 Ark. 100; *Tottleben v. Blankenship*, 58 Ill. App. 47; *Upchurch v. Robertson*, 127 N. C. 127; *Hulbert v. New Nonpareil Co.*, 111 Iowa 490; *Pokrok Zapadu P. Co. v. Zizovsky*, 42 Neb. 64; *Gomez v. Hawaiian Gazette P. Co.*, 10 Hawaii 108.

⁶ *Webb v. Gray*, 181 Ala. 408; *Witham v. Atlanta Journal*, 124 Ga. 688, 4 L.R.A.(N.S.) 977; *Rea v. Harrington*, 58 Vt. 181, 56 Am. Rep. 561; *Cooley on Torts* 200; *Davis v. Brown*, 27 Ohio St. 326.

⁷ *Shipp v. McCraw*, 3 Murph. 463, 9 Am. Dec. 611.

⁸ *McDonald v. Nugent*, 122 Iowa 651; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Feise v. Linder*, 3 B. & P. 374, note *a*.

must impute the existence of the disease at the present time.⁹ Third, where the words falsely spoken of a person impute to him misconduct in an office of profit¹⁰ or a public office of trust, though not of profit, and regardless of whether there is a power of removal from the office for the misconduct charged against the incumbent or not,¹¹ or a want of fitness to perform its duties, or those which pertain to his trade or profession.¹²

⁹ Taylor v. Hall, 2 Str. 1189; Bruce v. Soule, 69 Me. 566; Williams v. Holdredge, 22 Barb. 396; Carslake v. Mapledoram, 2 T. R. 473; Nichols v. Guy, 2 Ind. 82; Kancher v. Blinn, 29 Ohio St. 62, 23 Am. Rep. 727; Irons v. Field, 9 R. I. 216.

¹⁰ Reilly v. Curtiss, 83 N. J. L. 77; Dauphiny v. Buhne, 153 Cal. 757, 126 Am. St. 136; Osborn v. Leach, 135 N. C. 628, 66 L.R.A. 227; Calderin v. Heraldo Espanol, 4 Porto Rico Fed. 376; Alexander v. Jenkins, [1892] 1 Q. B. 797; Nehrling v. Herold Co., 112 Wis. 558.

¹¹ Booth v. Arnold, [1895] 1 Q. B. 571, in the Court of Appeal; Advertiser Co. v. Jones, 169 Ala. 196; Hassett v. Carroll, 85 Conn. 23; Livingston v. McCartin, Viet. L. R. (1907) 48.

¹² Sternberg Mfg. Co. v. Miller, etc. Mfg. Co., 95 C. C. A. 494, 170 Fed. 298; Flanders v. Daley, 124 Ga. 714; Holmes v. Clisby, 118 Ga. 820; Dorn v. Cooper, 139 Iowa 742; Sunley v. Metropolitan L. Ins. Co., 132 Iowa 123, 12 L.R.A.(N.S.) 91; Schreiber v. Gunby, 81 Kan. 459; Pennsylvania I. W. Co. v. Vogt Mach. Co., 139 Ky. 497, 8 L.R.A.(N.S.) 1023, 139 Am. St. 504; Fred v. Traylor, 115 Ky. 94; Cole v. Millsbaugh, 111 Minn. 159, 28 L.R.A.(N.S.) 152, 137 Am. St. 546; Pattison v. Gulf B. Co., 116 La. 963, 114 Am. St. 570; Brinsfield v. Howeth, 110 Md. 520; Empire C. S.

Co. v. De Laval D. S. Co., 75 N. J. L. 207; Bornmann v. Star Co., 174 N. Y. 212; Holland v. Flick, 212 Pa. 201; Mayo v. Goldman, 57 Tex. Civ. App. 509; Lathrop v. Sundberg, 55 Wash. 144, 25 L.R.A.(N.S.) 381; Pollard v. Lyon, 91 U. S. 225, 23 L. ed. 308; Camp v. Martin, 23 Conn. 86; Sumner v. Utley, 7 id. 258; Jones v. Diver, 22 Ind. 184; McMillan v. Birch, 1 Bin. 178, 2 Am. Dec. 426; Lewis v. Hawley, 2 Day 495, 2 Am. Dec. 121; Burtch v. Nickerson, 17 Johns. 217, 8 Am. Dec. 390; Hogg v. Dorrah, 2 Port. 212; Hayner v. Cowden, 27 Ohio St. 292; Goodenow v. Tappan, 1 Ohio 38; Chaddock v. Briggs, 13 Mass. 248; Hartley v. Herring, 8 T. R. 130; Craig v. Brown, 5 Blackf. 44; Gove v. Blethen, 21 Minn. 80, 18 Am. Rep. 380; Robbins v. Treadway, 2 J. J. Marsh. 540, 19 Am. Dec. 152; Oram v. Franklin, 5 Blackf. 42; Lansing v. Carpenter, 9 Wis. 540, 76 Am. Dec. 280; Lindsey v. Smith, 7 Johns. 359; Forward v. Adams, 7 Wend. 204; Secor v. Harris, 18 Barb. 425; Carrol v. White, 33 id. 615; Rice v. Cottrell, 5 R. I. 340; Garr v. Selden, 6 Barb. 416; Ayre v. Craven, 2 Ad. & El. 7; Gallwey v. Marshall, 24 Eng. L. & Eq. 463; Frolich v. McKiernan, 84 Cal. 177; Franklin v. Browne, 67 Ga. 272; Clifford v. Cochrane, 10 Ill. App. 570; Blumhart v. Rohr, 70 Md. 328; Pratt v. Pioneer Press Co., 32 Minn. 217;

To render defamatory words of this latter class actionable without averment or proof of special damage they must apply to the party defamed in respect to his office or employment, or to his conduct relative thereto, and be calculated to prejudice him in an office of which he is an incumbent, or a profession or calling in which he is engaged.¹³

Cotulla v. Kerr, 74 Tex. 89, 15 Am. St. 819; Larrabee v. Minnesota Tribune Co., 36 Minn. 141; Cruikshank v. Gordon, 118 N. Y. 178; Lovejoy v. Whitcomb, 174 Mass. 586; St. James Military Academy v. Gaiser, 125 Mo. 517, 28 L.R.A. (N.S.) 667, 46 Am. St. 502; Bray v. Callihan, 155 Mo. 43; Gideon v. Dwyer, 87 Hun 246; Bank v. Bowdre, 92 Tenn. 723; Brown v. Vannaman, 85 Wis. 451, 39 Am. St. 860; Hanchett v. Chiatovich, 41 C. C. A. 648, 101 Fed. 742; Tonini v. Cevasco, 114 Cal. 266; Brown v. Holton, 109 Ga. 431; Gerald v. Inter Ocean Pub. Co., 90 Ill. App. 205; Norfolk & W. S. Co. v. Davis, 12 App. Cas. (D. C.) 306; Schomberg v. Walker, 132 Cal. 224; Krug v. Pitass, 162 N. Y. 154, 76 Am. St. 317; Freisinger v. Moore, 65 N. J. L. 286; Jones v. Roberts, 73 Vt. 201; Wofford v. Meeks, 129 Ala. 349, 55 L.R.A. 214.

¹³ Flanders v. Daley, 120 Ga. 885 (in the case of a minister of the gospel it is not essential that he receives compensation for his services); Williams v. Riddle, 145 Ky. 459, 36 L.R.A. 974; Wooten v. Martin, 140 Ky. 781; Kuhne v. Ahlers, 45 N. Y. Misc. 454; Chomley v. Watson, Viet. L. R. (1907) 502; Bellamy v. Burch, 16 M. & W. 590; Forward v. Adams, 7 Wend. 204; Edwards v. Howell, 10 Ired. 211; Allen v. Hillman, 12 Pick. 101; Orr v. Skoffield, 56 Me. 483; Whittemore v. Weiss, 33 Mich. 348; Backus v.

Richardson, 5 Johns. 476; Mattice v. Wilcox, 147 N. Y. 624; Gattis v. Kilgo, 128 N. C. 402.

The test to bring a case within the first class is arbitrary, and appears to have been adopted for the purpose of having a fixed and precise rule. It is worthy of notice that notwithstanding it is desirable to have a definite rule the law determines the actionable character of other slanders and of libel from their intrinsic nature. It authorizes the court to hold any matter libelous and actionable *per se* when the imputation is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or exclusion from society. So of other kinds of slander; they are actionable *per se* if injurious to one in his office, trade or profession, or tend to exclude him from society for having an infectious disease. Their intrinsic character and injurious tendency are recognized and determined by the court. But when the words, falsely spoken, impute to him pestilent or flagrant immorality, no matter how gross or outrageous, if not made a crime, indictable and punishable in the temporal courts, they are not legally presumed to be injurious, although the judge who so declares the law and every juror who must follow it as so declared, knows as a man that the imputation, to the extent that it is believed, will render the defamed

The wrong done by libel is like that done by slander; but it is defamation communicated and published in a form and manner which implies more deliberation and is likely to be more widely disseminated and more lasting in detrimental effect. For this reason there is broader scope of libelous matter which is actionable *per se*; the law will presume damage from less serious matter when thus published than when orally uttered. Though no special damage is alleged, and no averments of such extrinsic facts as might be requisite to make the publication in question import a charge of crime are made the action is nevertheless maintainable if the published charge is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule or deprive him of the benefits of public confidence and social intercourse.¹⁴ The

party odious, subject him to contempt and tend to exclusion from decent society. *Davis v. Brown*, 27 Ohio St. 326, is an illustration of the severe arbitrariness of the test referred to. See *Malone v. Stewart*, 15 Ohio 319, 45 Am. Dec. 577.

This principle is not strictly applied to clergymen. See *Potter v. New York Evening Journal Pub. Co.*, 68 App. Div. (N. Y.) 95.

Statutes in several states make the imputation of unchastity against a female libelous *per se*. *Williams v. Riddle*, 145 Ky. 459, 36 L.R.A.(N.S.) 974; *Hatcher v. Range*, 98 Tex. 85; *Charleson v. Russell*, 144 Iowa 38; *Cooper v. Seaverns*, 81 Kan. 267, 135 Am. St. 359, 25 L.R.A.(N.S.) 517; *Cairnes v. Pelton*, 103 Md. 40; *Richter v. Stolze*, 158 Mich. 594.

¹⁴ *Saunders v. Post-Standard Pub. Co.*, 107 App. Div. (N. Y.) 84; *Merchants' Ins. Co. v. Buckner*, 39 C. C. A. 9, 98 Fed. 222; *Warner v. Ingersoll*, 157 Fed. 311; *Farbenfabriken of Eberfeld Co. v. Beringer*, 86 C. C. A. 62, 158 Fed. 802; *Dempster v. Mann*, 157 Fed. 319; *Weiters-*

hausen v. Crotian P. & P. Co., 151 Fed. 947; *Union R. T. Co. v. McClure Co.*, 146 Fed. 623; *Washington Times Co. v. Downey*, 26 App. Cas. (D. C.) 258; *Pavesich v. New England L. Ins. Co.*, 122 Ga. 190, 106 Am. St. 104, 69 L.R.A. 101 (invasion of privacy by publishing picture as an advertisement); *Cronin v. Zimmerman*, 44 Ind. App. 118, 90 id. 339; *Sheibley v. Ashton*, 130 Iowa 195; *Prewitt v. Wilson*, 128 Iowa 198; *Morse v. Times-R. P. Co.*, 124 Iowa 707; *Eckert v. Van Pelt*, 69 Kan. 357, 66 L.R.A. 266; *Williams v. Riddle*, 145 Ky. 459, 36 L.R.A.(N.S.) 974; *Foster-M. Co. v. Chinn*, 134 Ky. 424, 34 L.R.A.(N.S.) 1137, 135 Am. St. 417; *De Witt v. Scarlett*, 113 Md. 47; *Craig v. Warren*, 99 Minn. 246; *Ukam v. Daily Record Co.*, 189 Mo. 378; *Munden v. Harris*, 153 Mo. App. 652; *People's U. S. Bank v. Goodwin*, 148 Mo. App. 364; *Farley v. Evening Chronicle Pub. Co.*, 113 Mo. App. 216; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. 416; *Williams v. Fuller*, 68 Neb. 354; *Logan v. Hodges*, 146 N. C. 38; *Mank v. Brundage*, 68

nature of the charge must be such that the court can legally presume that the plaintiff has been disgraced in the estimation of his acquaintances or of the public, or has suffered some other loss either in his property, character or business, or in his domestic or social relations in consequence of the publication.¹⁵ In the case of one holding an office it is not necessary that he be in office at the time the publication was made.¹⁶ Whether the alleged defamatory matter is actionable *per se* or not is a question for the court,¹⁷ unless the language used is capable of two meanings, when the court determines if the meaning

Ohio 89, 62 L.R.A. 477; Moss v. Harwood, 102 Va. 386; Reynolds v. Holland, 46 Wash. 537; Gross C. Co. v. Rose, 126 Wis. 24, 2 L.R.A. (N.S.) 741, 110 Am. St. 894; Scofield v. Milwaukee Free Press Co., 126 Wis. 81, 2 L.R.A. (N.S.) 691; Orchard v. Globe P. Co., 240 Mo. 575; Galveston Tribune v. Johnson (Tex. Civ. App.), 141 S. W. 302; Tillson v. Robbins, 68 Me. 298, 28 Am. Rep. 50; State v. Smily, 37 Ohio St. 33, 41 Am. Rep. 487; Watson v. Trask, 6 Ohio 531, 27 Am. Rep. 271; Tappan v. Wilson, 7 Ohio 190; Smart v. Blanchard, 42 N. H. 151; Price v. Whitely, 50 Mo. 439; Lindley v. Horton, 27 Conn. 58; Cary v. Allen, 39 Wis. 481; Atwill v. Mackintosh, 120 Mass. 177; Hand v. Winton, 38 N. J. L. 122; Cramer v. Noonan, 4 Wis. 231; Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105; Montgomery v. Knox, 23 Fla. 595; Jones v. Greeley, 25 Fla. 629; Republican P. Co. v. Conroy, 5 Colo. App. 262; Prussing v. Jackson, 85 Ill. App. 324; Weil v. Israel, 42 La. Ann. 955; Haynes v. Clinton P. Co., 169 Mass. 512; Peterson v. Western U. Tel. Co., 65 Minn. 18, 33 L.R.A. 302; Byram v. Aiken, 65 Minn. 87; Martin v. Paine, 69 Minn. 482; Ferguson v. Evening Chronicle P. Co., 72 Mo. App. 462; Winchell

v. Argus Co., 69 Hun 354; Rider v. Rulison, 74 Hun 239; Hollingsworth v. Spectator Co., 49 App. Div. (N. Y.) 16; Thomas v. Bowen, 29 Ore. 258; Belo v. Fuller, 84 Tex. 450, 31 Am. St. 75, citing the text; State v. Keenan, 111 Iowa 286; Cerveney v. Chicago Daily News Co., 139 Ill. 345, 13 L.R.A. 864; Taylor v. Hearst, 107 Cal. 262; Randall v. Evening News Ass'n, 101 Mich. 561; Sanders v. Hall, 22 Tex. Civ. App. 282; Republican P. Co. v. Mosman, 15 Colo. 399; Merchants' Ins. Co. v. Buckner, 39 C. C. A. 19, 98 Fed. 222; Houston P. Co. v. Moulden, 15 Tex. Civ. App. 574; Schomberg v. Walker, 132 Cal. 224; Alwin v. Liesch, 86 Minn. 281.

¹⁵ Stone v. Cooper, 2 Denio 299, 43 Am. Dec. 740; Mitchell v. Bradstreet Co., 116 Mo. 226, 38 Am. St. 592, 20 L.R.A. 138; Bee P. Co. v. World P. Co., 59 Neb. 713.

¹⁶ Sharpe v. Larson, 67 Minn. 428; Pratt v. Pioneer Press Co., 32 Minn. 217.

¹⁷ Wagaman v. Byers, 17 Md. 183; Hume v. Arrasmith, 1 Bibb 165, 4 Am. Dec. 626; Sharpe v. Larson, *supra*; Bank v. Bowdre, 92 Tenn. 723; Gerald v. Inter Ocean P. Co., 90 Ill. App. 205.

ascribed to it by the innuendo is fair and the jury whether it was truly ascribed to it.¹⁸

§ 1205. **Malice the gist of the action; how shown.** Malice, which is said to be the gist of an action for libel and slander, does not mean malice or ill-will towards the individual affected in the usual sense of the term. In ordinary cases of slander the term "maliciously" means intentionally and wrongfully, without any legal ground of excuse. Malice is an implication of law from the false and injurious nature of the charge, and differs from actual malice and ill-will towards the individual frequently given in evidence to enhance the damages.¹⁹ If a plaintiff has been injured in his character or feelings by an unauthorized publication it is the duty of a jury to award him full compensation in damages without reference to any particular ill-will entertained against him by the defendant. Actual ill-will or malice will enhance the damages and may be shown for that purpose except, of course, where exemplary damages are not allowable,²⁰ but need not be shown to entitle the plaintiff to recover,²¹ except in cases in which the communication

¹⁸ *Berger v. Freeman Tribune P. Co.*, 132 Iowa 290.

¹⁹ *Beeson v. Gossard Co.*, 167 Ill. App. 561; *Ott v. Murphy*, 160 Iowa 730; *Houston Chronicle P. Co. v. McDavid* (Tex. Civ. App.), 157 S. W. 224; *Mann v. Dempster*, 104 C. A. 110, 181 Fed. 76; *Short v. Acton*, 33 Ind. App. 361; *Berger v. Freeman Tribune P. Co.*, *supra*; *Sheibley v. Nelson*, 84 Neb. 393; *Hassett v. Carroll*, 85 Conn. 23; *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102; *Times P. Co. v. Carlisle*, 36 C. C. A. 475, 94 Fed. 762; *Wright v. Gregory*, 9 App. Div. (N. Y.) 85; *Young v. Fox*, 26 App. Div. (N. Y.) 261. See *Williams v. Hicks Printing Co.*, 159 Wis. 90.

It has been said that malice in fact is never presumed, and that the utmost limit of the law is reached when the jury are in-

structed that by proof of the unprivileged character of a publication libelous *per se* they may infer the existence of such malice. *Davis v. Hearst*, 160 Cal. 143; *Lewis v. Hayes*, 165 Cal. 527.

²⁰ *Bee P. Co. v. World P. Co.*, 59 Neb. 713; *Gallagher v. Singer & Mach. Co.*, 177 Ill. App. 198.

²¹ Cases cited in next to last preceding note; *Casey v. Hulgán*, 118 Ind. 590; *Wabash P. & P. Co. v. Crumrine*, 123 Ind. 89; *Wynne v. Parsons*, 57 Conn. 73; *Langton v. Hagerty*, 35 Wis. 150; *Wilson v. Noonan*, *id.* 349; *Griebel v. Rochester P. Co.*, 60 Hun 319; *Morey v. Morning Journal Ass'n*, 123 N. Y. 207, 20 Am. St. 730, 9 L.R.A. 621; *Childers v. San Jose Mercury P. & P. Co.*, 105 Cal. 284, 45 Am. St. 40; *Taylor v. Hearst*, 107 Cal. 262, 118 Cal. 366; *Gilman*

complained of is privileged, when express malice must be averred and proved.²² A corporation may entertain the express

v. McClatchy, 111 Cal. 606; Nailor v. Ponder, 1 Marvel 408; Gray v. Elzroth, 10 Ind. App. 587, 53 Am. St. 400; Owen v. Dewey, 107 Mich. 67; Austin v. Hyndman, 119 Mich. 615; Callahan v. Ingram, 122 Mo. 355, 369, 43 Am. St. 583, citing the text; Holmes v. Jones, 147 N. Y. 59, 49 Am. St. 646; Van Lugen v. Star Co., 1 App. Div. (N. Y.) 429, affirmed without opinion, 157 N. Y. 695; Krug v. Pitass, 162 N. Y. 154, 76 Am. St. 317; Moore v. Leader P. Co., 8 Pa. Super. Ct. 152; Buckstaff v. Hicks, 94 Wis. 34; Republican P. Co. v. Mosman, 15 Colo. 399, 410, citing the text; Washington G. L. Co. v. Lansden, 9 App. Cas. (D. C.) 508; International T. B. Co. v. Leader P. Co., 189 Fed. 86; Butler v. Every Evening P. Co., 140 Fed. 934; Advertiser Co. v. Jones, 169 Ala. 196; Phillips v. Bradshaw, 167 Ala. 199; Taylor v. Gumpert, 96 Ark. 354; Murray v. Galbraith, 95 Ark. 199; Davis v. Hearst, 160 Cal. 143; Tingley v. Times Mirror Co., 151 Cal. 1; Bohan v. Record P. Co., 1 Cal. App. 429; Melcher v. Beeler, 48 Colo. 233, 139 Am. St. 273; Holmes v. Chishy, 121 Ga. 241; Dorn v. Cooper, 139 Iowa 742; Sunley v. Metropolitan L. Ins. Co., 132 Iowa 123, 12 L.R.A. (N.S.) 91; Berger v. Freeman Tribune Co., 132 Iowa 290; Sheibley v. Ashton, 130 Iowa 195; Pennsylvania I. W. Co. v. Vogt Mach. Co., 139 Ky. 497, 139 Am. St. 504, 8 L.R.A. (N.S.) 1023; Levert v. Daily States P. Co., 123 La. 594, 23 L.R.A. (N.S.) 726, 131 Am. St. 356; Covington v. Roberson, 111 La. 326; Cairnes v. Pelton, 103 Md. 40; Hubbard v. Allyn, 200 Mass. 166; Schattler v. Daily Herald Co.,

162 Mich. 115; Richter v. Stolze, 158 Mich. 594 (error to direct a verdict for nominal damages); Burch v. Bernard, 107 Minn. 210; Cook v. Globe P. Co., 227 Mo. 471; Brown v. Same, 213 Mo. 611, 127 Am. St. 627; Ukam v. Daily Record Co., 189 Mo. 378; Carpenter v. Hamilton, 185 Mo. 603; Vanloon v. Vanloon, 159 Mo. App. 255; Anderson v. Shockley, 159 Mo. App. 334; Patterson v. Evans, 153 Mo. App. 684; Humphreys v. Pile, 144 Mo. App. 28; Farley v. Evening Chronicle Co., 113 Mo. App. 216; Israel v. Israel, 109 Mo. App. 366; Paxton v. Woodward, 31 Mont. 195, 107 Am. St. 416; Battles v. Tyson, 77 Neb. 563, 24 L.R.A. (N.S.) 577; Williams v. Fuller, 68 Neb. 354; Richardson v. Thorpe, 73 N. H. 532; Knowlden v. Guardian P. & P. Co., 69 N. J. L. 670; Fields v. Bynum, 156 N. C. 413; Logan v. Hodges, 146 N. C. 38; Mauk v. Brundage, 68 Ohio 89, 62 L.R.A. 477; Mayo v. Goldman, 57 Tex. Civ. App. 475; Reynolds v. Holland, 46 Wash. 537; Ott v. Press P. Co., 40 Wash. 308; Byrne v. Funk, 38 Wash. 506; Driesel v. Urkart, 147 Wis. 154; Gross C. Co. v. Rose, 126 Wis. 24, 2 L.R.A. (N.S.) 741, 110 Am. St. 894; Richardson v. Thorpe, 73 N. H. 532; Empire C. S. Co. v. De Laval D. S. Co., 75 N. J. L. 207.

The rule has been applied where an infant's right of privacy has been violated. Munden v. Harris, 153 Mo. App. 652.

²² Houston Chronicle P. Co. v. McDavid (Tex. Civ. App.), 157 S. W. 224; Williams v. Hicks Printing Co., 159 Wis. 90; Thompson v. Rake, 140 Iowa 232, 18 L.R.A. (N.S.)

malice necessary to render it liable for the publication of a libel or a slander²³ such malice may be shown by evidence of knowledge of the falsity of the publication, the surrounding circumstances, a repetition of it after notice thereof,²⁴ or at

921; *Vial v. Larson*, 132 Iowa 208; *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 26 L.R.A.(N.S.) 1080; *Morton v. Knipe*, 128 App. Div. (N. Y.) 94; *Spielberg v. Kuhn*, 39 Utah 276; *Farley v. Thalhimer*, 103 Va. 504; *McClure v. Review P. Co.*, 38 Wash. 160; *Williams P. Co. v. Saunders*, 113 Va. 156; *Wilson v. Noonan*, 35 Wis. 349; *Gultis v. Kilgo*, 128 N. C. 402; *Henry v. Moherly*, 6 Ind. App. 490, 23 Ind. App. 305.

If an absolute privilege is shown malice is conclusively rebutted, but if a qualified privilege only is established it may be overcome by proof of actual or express malice. *Cadle v. McIntosh*, 51 Ind. App. 365.

²³ *Pennsylvania I. W. Co. v. Vogt Mach. Co.*, 139 Ky. 497, 139 Am. St. 504, 8 L.R.A.(N.S.) 1023; *Rivers v. Yazoo & M. R. Co.*, 90 Miss. 196, 9 L.R.A.(N.S.) 931; *Minter v. Bradstreet Co.*, 174 Mo. 444; *Pfister v. Milwaukee Free Press Co.*, 139 Wis. 627; *Missouri Pac. R. Co. v. Behee*, 2 Tex. Civ. App. 107; *Hypes v. Southern R. Co.*, 82 S. C. 315, 21 L.R.A.(N.S.) 873, disapproving *Behre v. National C. R. Co.*, 100 Ga. 213, 62 Am. St. 320, as to slander. To the same effect as the cases first cited is *Sawyer v. Norfolk & S. R. Co.*, 142 N. C. 1.

A corporation is liable for the slanderous utterances of its servants only when it authorizes, approves or ratifies them. *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 9 L.R.A.

Suth. Dam. Vol. IV.—54.

(N.S.) 929, 124 Am. St. 90; *McIntire v. Cudahy P. Co.*, 179 Ala. 404.

²⁴ *Id.*; *Schomberg v. Walker*, 132 Cal. 224; *Botsford v. Chase*, 108 Mich. 432; *Gallagher v. Singer Sewing Mach. Co.*, 177 Ill. App. 198; *Downs v. Cassidy*, 47 Mont. 471; *Colbert v. Journal Pub. Co.*, 19 N. M. 156; *Sunley v. Metropolitan L. Ins. Co.*, 132 Iowa 123, 12 L.R.A.(N.S.) 91; *National C. R. Co. v. Salling*, 97 C. C. A. 334, 173 Fed. 22; *Murray v. Galbraith*, 86 Ark. 50, 126 Am. St. 1078; *Melcher v. Beeler*, 48 Colo. 233, 139 Am. St. 273; *Morse v. Times-R. P. Co.*, 124 Iowa 707; *Johnson v. Featherstone*, 141 Ky. 793; *Levert v. Daily States P. Co.*, 123 La. 594, 23 L.R.A.(N.S.) 726, 131 Am. St. 356; *Pattison v. Gulf B. Co.*, 116 La. 963, 114 Am. St. 570; *Hubbard v. Allyn*, 200 Mass. 166; *Crafer v. Hooper*, 194 Mass. 68; *Meriwether v. Knapp*, 211 Mo. 199; *Fish v. St. Louis County P. & P. Co.*, 102 Mo. App. 6; *Flint v. Holman*, 82 Vt. 297. See *Mulderig v. Wilkes-Barre Times*, 215 Pa. 470, 114 Am. St. 967.

Republishing a libel in a pleading, without expectation of proving it is true, is to be considered only as bearing upon exemplary damages. *Davis v. Hearst*, 160 Cal. 143.

Libels on third parties have been admitted to show malice and the general character of the defendant's publication. *Williams P. Co. v. Saunders*, 113 Va. 156.

other times,²⁵ the previous use of the language complained of,²⁶ by failing to make an investigation as to the truth of statements in a clipping from another paper before publishing it,²⁷ or by refusing to publish a retraction, cause for so doing being shown.²⁸ Where a charge made in a pleading is libelous proof of malice, aside from that afforded by the charge and the circumstances under which it was made, is unnecessary.²⁹

§ 1206. General damages; considerations upon which based.

There is no legal measure of damages in actions for these wrongs. The amount which the injured party ought to recover is referred to the sound discretion of the jury.³⁰ The damages are intended to repair the injury done; and all that the law can determine in a given case is what facts proved may be taken into account, and what are fair considerations to influence the jurors' judgments. They are to consider the plaintiff's injured feelings and tarnished reputation, taking into account the nature of the imputation, the extent of its publicity, the character, condition and influence of the parties.³¹ And as a matter

²⁵ Gill v. Ruggles, 95 S. C. 90.

²⁶ Davis v. Starrett, 97 Me. 568; Anderson v. Shockley, 159 Mo. App. 334; Weicherding v. Krueger, 109 Minn. 461.

²⁷ Morning Union Co. v. Butler, 80 C. C. A. 464, 151 Fed. 188.

²⁸ Clark v. North American Co., 203 Pa. 346; Farley v. Thalhimer, *supra*; Friedman v. Pulitzer P. Co., 102 Mo. App. 683; Crane v. Bennett, 177 N. Y. 106; Kloths v. Hess, 126 Wis. 587. *Contra*, exemplary damages not being recoverable. Dennison v. Daily News P. Co., 82 Neb. 675, 23 L.R.A.(N.S.) 362.

²⁹ Union Mut. L. Ins. Co. v. Thomas, 28 C. C. A. 96, 83 Fed. 803; Thompson v. Rake, 140 Iowa 232, 18 L.R.A.(N.S.) 921.

³⁰ Pattison v. Gulf B. Co., 116 La. 963, 114 Am. St. 570.

³¹ Williams v. Fulks, 113 Ark. 82 (extent of publicity); Bresstin v. Star Co., 85 Misc. (N. Y.)

609, citing the text, affirmed in 166 App. Div. 89; Advertiser Co. v. Jones, 169 Ala. 196, citing the text; Dauphiny v. Buhne, 153 Cal. 757, 126 Am. St. 136; Cook v. Globe P. Co., 227 Mo. 471; Miller v. Dorsey, 149 Mo. App. 24; Bee Pub. Co. v. Shields, 68 Neb. 750; Lord v. New York Evening Journal Co., 130 App. Div. (N. Y.) 105; Butler v. Gazette Co., 119 App. Div. (N. Y.) 767; San Antonio Light P. Co. v. Lewy, 52 Tex. Civ. App. 22, citing the text; Calderin v. Heraldo Espanol, 4 Porto Rico Fed. 376; Belck v. Belck, 97 Ind. 73; Belo v. Wren, 63 Tex. 686, 727; Bradley v. Cramer, 66 Wis. 297; Davis v. Shepstone, L. R. 11 App. Cas. 187; Henderson v. Fox, 83 Ga. 233; Littlejohn v. Greeley, 13 Abb. 41; Fulkerson v. George, 3 id. 75; Flint v. Clark, 13 Conn. 361; Markham v. Russell, 12 Allen 573, 90 Am. Dec. 169; Childers v. San Jose

of course, in considering each of these elements of damage, they will also take into account, in every case, what seems to them the

Mercury P. & P. Co., 105 Cal. 284, 45 Am. St. 40; *Sanders v. Hall*, 22 Tex. Civ. App. 282; *Turner v. Stevens*, 8 Utah 75, quoting the text; *Fenstermaker v. Tribune P. Co.*, 13 Utah 532, 35 L.R.A. 611, citing the text; *Pellardis v. Journal P. Co.*, 99 Wis. 156; *Smith v. Sun P. & P. Ass'n*, 5 C. C. A. 91, 55 Fed. 240; *Ellis v. Whitehead*, 95 Mich. 105; *Smith v. Times Co.*, 4 Pa. Dist. 399; *Arnold v. Sayings Co.*, 76 Mo. App. 159; *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, 669, citing the text; *Hacker v. Hainey*, 111 Wis. 313.

It is erroneous to give instructions which leave the jury entirely at large on the question of damages, as to direct them to give such as the plaintiff is entitled to. *True v. Plumley*, 36 Me. 466; *Rose v. Story*, 1 Pa. 190, 44 Am. Dec. 121. And also to tell them to arrive at the question by bringing it home to themselves and testing it by the sum they would be willing to take as compensation for such a wrong. *Prescott v. Tousey*, 50 N. Y. Super. 12.

Proof of malice in fact authorizes an increase of the damages. *True v. Plumley*, 36 Me. 466.

In *Burt v. McBain*, 29 Mich. 260, which was slander by imputing to the plaintiff, a female, a want of chastity, these instructions were approved on error: "You should consider whether there is any evidence showing express, positive malice on the part of the plaintiff. If you were satisfied by the testimony in the case that she was governed in the utterance of these words by actual, existing malice, then the compensation or award of damages should be higher and more severe

than if you were satisfied that the words were uttered without any express malice. If they were thoughtlessly uttered, without due consideration of the import of the words, without any intent to injure the plaintiff—if there is no express malice proven in the case to your satisfaction, you should give less damages than you would if it is proved. You should take another matter into consideration in fixing the amount of damages. Satisfy your minds before fixing upon the amount whether this defendant originated this story herself, or whether she simply repeated what she heard. If she originated the story, and it is false; if it was the outgrowth of a wicked heart; if it is the offspring of her own brain; the coinage of her own mind,—her guilt would be greater than it would be if she received it from some one else, and simply gave it further circulation thoughtlessly, without any design to injure, without any intent to wrong. The proof upon this point you should carefully consider, and see to it that your verdict is not as light in the one case as it would be in the other."

In *Knowlden v. Guardian P. & P. Co.*, 69 N. J. L. 670, the court of errors and appeals approved a charge in favor of a female whose virtue had been assailed to the effect that the courts would feel the same sense of shame and mortification as the plaintiff felt when the publication was first made if a verdict for six cents was returned. "It would be an utter disgrace to the administration of law to say that such a publication, such a damage to reputation, such an invasion of feelings, was to be compensated for by six

probable future injury to the plaintiff.³² Where the publication is actionable *per se* the legal presumption of damage goes to the jury,³³ and they, in view of the particular circumstances of the case, are required, in the exercise of their judgment, to determine what sum will afford proper reparation.³⁴ To enable

cents. It is your duty in this case to see that she has substantial compensation for this grievous wrong."

It is competent to show as bearing upon the actual damages suffered by a newspaper libel that a scandal with which the libel connected plaintiff had been a matter of public notoriety and newspaper comment when it occurred. *Garrison v. Newark Call Printing & Publishing Co.*, 87 N. J. L. 217, 92 Atl. 590.

Nominal damages only should be allowed where the publication of a libel is made a few minutes before it becomes privileged. *Walling v. Commercial Advertiser Ass'n*, 165 App. Div. (N. Y.) 26.

It may be shown that the plaintiff was a member of a certain lodge, and was the next highest officer therein, and that about the time the slander was circulated she was, without apparent cause, dropped out of line, and not promoted to the highest office. *Williams v. Fuls*, 113 Ark. 82.

The damages are measurable by the injury done the plaintiff, not by what "the jury believes the defendant ought to pay." *Beeson v. Gosard Co.*, 167 Ill. App. 561.

Damage to reputation must be compensated for though not specified in a statute enumerating the elements of damage. *Andrews v. Booth*, 148 Mich. 333.

³² *Bloomfield v. Pinn*, 84 Neb. 472.

³³ *Sheibley v. Nelson*, 84 Neb. 393;

Osborn v. Leach, 135 N. C. 628, 66 L.R.A. 648.

³⁴ *Hayward v. Maroney*, 86 Conn. 261; *Andreas v. Hinson*, 157 Iowa 43; *Reilly v. Curtiss*, 83 N. J. L. 77; *Paxton v. Woodward*, *infra*, quoting the text; *Graybill v. De Young*, 140 Cal. 323; *Dunn v. Hearst*, 139 Cal. 239; *Brown v. Globe P. Co.*, 213 Mo. 611, 127 Am. St. 627; *Brown v. Knapp*, 213 Mo. 655; *Morse v. Times-R. P. Co.*, 124 Iowa 707; *Prewitt v. Wilson*, 128 Iowa 198; *Jensen v. Damm*, 127 Iowa 555; *Washington Times Co. v. Downey*, 26 App. Cas. (D. C.) 268; *Minter v. Bradstreet Co.*, 174 Mo. 444; *Clair v. Battle Creek Journal Co.*, 168 Mich. 467; *Newman v. Stein*, 75 Mich. 402, 13 Am. St. 447; *Meyer v. Press P. Co.*, 46 N. Y. Super. Ct. 127; *Miles v. Harrington*, 8 Kan. 425; *Pool v. Devers*, 30 Ala. 672; *Alley v. Neeley*, 5 Blackf. 200; *Herrick v. Lapham*, 10 Johns. 281; *Rogers v. Fitzgerald*, 72 Conn. 731; *Taylor v. Hearst*, 107 Cal. 262; *Forke v. Homann*, 14 Tex. Civ. App. 670; *Belo v. Fuller*, 84 Tex. 450, 31 Am. St. 75.

The plaintiff may testify that the libel damaged him, but not that it required him to make an explanation of it. *Ferdon v. Dickens*, 161 Ala. 181.

If the libel is against the official character of the plaintiff the damages may include compensation for all injury proximately resulting to him as an officer, but not for conse-

the jury justly to determine the amount of damages it is important to know what effect can and should be given to the speaking or publishing of the same defamatory charges at other times than those stated in the declaration. Such unalleged repetitions are generally allowed to be proved,³⁵ but in certain states they are to be considered only as evidence of malice in the speaking or publication charged and cannot themselves be the ground of additional damages except as they increase the injury by showing greater malice than would otherwise be implied.³⁶ For

quences disconnected from his official character. *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. 819.

Where the slander imputed want of chastity to a woman and the words were spoken in the presence of but four persons, all members of the plaintiff's family, the court refused to disturb a verdict for nominal damages. *Estes v. Estes*, 75 Me. 478.

Where the communication is libelous the law presumes such general damages to the plaintiff as mental suffering and injury to his reputation, and these elements of damages need not be alleged in the complaint nor supported by proof. *Starks v. Comer*, — Ala. —, 67 So. 440.

Where the language is libelous *per se* and the jury so finds under instructions of the court the plaintiff is entitled to recover general damages without proof of special damages. *Weatherholt v. Howard*, 143 Ga. 41.

³⁵ *Leonard v. Pope*, 27 Mich. 148; *Gambrill v. Schooley*, 95 Md. 260, 63 L.R.A. 427; *Barlow v. Brands*, 15 N. J. L. 248; *Cavanagh v. Austin*, 42 Vt. 576; *Stearns v. Cox*, 17 Ohio 590; *State v. Jeandell*, 5 Harr. 475; *Elliott v. Boyles*, 31 Pa. 65; *Johnson v. Brown*, 57 Barb. 118; *Alpin v. Morton*, 21 Ohio St. 536; .

Delegall v. Highley, 8 C. & P. 444; *Perry v. Breed*, 117 Mass. 155; *Severance v. Hilton*, 32 N. H. 289; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Harman v. Cundiff*, 82 Va. 239, 245; *Preston v. Frey*, 91 Cal. 107; *Hacker v. Heiney*, 111 Wis. 313, 319; *Davis v. Starrett*, 97 Me. 568; *Gaines v. Gaines*, 109 Ill. App. 226 (verbal repetition of matter published); *Cain v. Shutt*, 105 Md. 304. See *Brinsfield v. Howeth*, 107 Md. 278, 24 L.R.A.(N.S.) 583.

³⁶ *Ott v. Murphy*, 160 Iowa 730; *Collier v. Postum Cereal Co.*, 150 App. Div. (N. Y.) 169 (publication in a particular county alleged); *Ball v. Evening American P. Co.*, 237 Ill. 592; *Yager v. Bruce*, 116 Mo. App. 473; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. 416; *Bee P. Co. v. Shields*, 68 Neb. 750; *Ward v. Dick*, 47 Conn. 300, 36 Am. Rep. 75; *McAlmont v. McClelland*, 14 S. & R. 359; *Robbins v. Fletcher*, 101 Mass. 115; *Meyer v. Bohlfling*, 44 Ind. 238; *McGlemery v. Keeler*, 3 Blackf. 488; *Vanderveer v. Sutphin*, 5 Ohio St. 294; *Baldwin v. Soule*, 6 Gray 321; *Hinkle v. Davenport*, 38 Iowa 355; *Ellis v. Lindley*, id. 461; *Beardsley v. Bridgman*, 17 id. 290; *Chamberlin v. Vance*, 51 Cal. 75; *Parmer v. Anderson*, 33 Ala. 78; *Trabue v. Mays*, 3 Dana, 138, 28 Am. Dec. 61;

this purpose it is held no objection to the proof of words not charged in the declaration that they have been charged and recovered for in a previous action,³⁷ are words for which an action is barred by the statute of limitations,³⁸ or were spoken after the commencement of the action.³⁹

§ 1207. **Same subject.** In Connecticut it is also held that of this nature is the allegation in the plea of the truth of the charge by way of justification made for the purpose of spreading and perpetuating the slander; it is only to be considered as so much more evidence of malice in the original speaking.⁴⁰ On this theory each utterance or publication of the same charge must be regarded as a distinct wrong; but in practice it must be difficult, where there is a succession of suits, to prevent double recoveries for the same wrong if all the repetitions of the same charge may be proved in each case. In other states and in England such testimony is admitted without restriction to increase damages. All the utterances of the same charge constitute one slander, as all the copies of a newspaper containing a libel constitute one publication. The frequency of the utterances or the number of the issues of a newspaper may be shown to prove the extent of publicity given to the defama-

Adkins, v. Williams, 23 Ga. 222; Symonds v. Carter, 32 N. H. 458; Markham v. Russell, 12 Allen, 573, 90 Am. Dec. 169; Casey v. Hulgán, 118 Ind. 590; Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715; Hastings v. Stetson, 130 Mass. 76; Lanius v. Druggist P. Co., 20 Mo. App. 12; Zeliff v. Jennings, 61 Tex. 458; Letton v. Young, 2 Metc. (Ky.) 558; Grace v. McArthur, 76 Wis. 641, 651; Rea v. Harrington, 58 Vt. 181, 56 Am. Rep. 561; Larrabee v. Minnesota Tribune Co., 36 Minn. 141; Enos v. Enos, 135 N. Y. 609.

³⁷ Swift v. Dickerman, 31 Conn. 285.

³⁸ Harmon v. Harmon, 61 Me. 233; Throgmorton v. Davis, 4

Blackf. 174; Lincoln v. Chrisman, 10 Leigh 338.

³⁹ Beardsley v. Bridgman, 17 Iowa 290; Schrimper v. Heilman, 24 id. 505; Parmer v. Anderson, 33 Ala. 78; Hinkle v. Davenport, 38 Iowa 355; Bodwell v. Swan, 3 Pick. 376; Ellis v. Lindley, 38 Iowa 461; McAlmont v. McClelland, 14 S. & R. 359; Smith v. Wyman, 16 Me. 13; Norris v. Elliott, 39 Cal. 72; Baldwin v. Soule, 6 Gray 321; Thompson v. Bowers, 1 Doug. 321; McIntire v. Young, 6 Blackf. 496, 39 Am. Dec. 443; Williams P. Co. v. Saunders, 113 Va. 156.

⁴⁰ Ward v. Dick, 47 Conn. 300, 36 Am. Rep. 75.

tory charge; but only one recovery is allowed.⁴¹ In one case ⁴² a newspaper containing a libel had been published more than six years before suit and the case was made out by the purchase of a single copy within that period; the court refused to confine the damages to the injury arising out of the publication of that copy. In *Barwell v. Adkins* ⁴³ suit was brought on a libelous article published in a newspaper and on the trial the judge allowed proof of a second article published afterwards, reasserting the same charges, and told the jury to take both paragraphs with them "and give the plaintiff such damages as they considered he was entitled to under the circumstances." ⁴⁴ In *Root v. Lowndes* ⁴⁵ Bronson, J., said: "When the plaintiff does not go beyond the words laid in the declaration I see no reason why he may not show that these words have been spoken on a dozen different occasions, although there may be but one count in the declaration. If the defendant has told twenty persons at as many different times that the plaintiff is a thief, it cannot be necessary to insert twenty counts, precisely alike, for the purpose of enabling the plaintiff to prove all the conversations, allowing the proof can work no injury to the defendant. He is advised by the declaration what words the plaintiff intends to give in evidence, and whether all the different occasions of speaking them are proved or not the judgment will be a bar to another action." ⁴⁶ An action for libel was held barred by a judgment in an action for malicious prosecution, the arrest being made under papers containing the libelous matter.⁴⁷ The

⁴¹ *Fry v. Bennett*, 28 N. Y. 324; *Gathercole v. Miall*, 15 M. & W. 319; *Defries v. Davis*, 7 C. & P. 112; *Rosewater v. Hoffman*, 24 Neb. 222; *Whitney v. Moignard*, 24 Q. B. Div. 630; *Bigelow v. Sprague*, 140 Mass. 425.

The shipping, mailing and subscription lists of a newspaper are competent to show the extent of the injury caused by printing and circulating libelous matter. *Dalton v. Calhoun Co. Dist. Court*, 164 Iowa 187.

⁴² *Brunswick v. Harmer*, 14 Q. B. 185.

⁴³ 1 Man. & Gr. 807.

⁴⁴ *Leonard v. Pope*, 27 Mich. 148, 149.

⁴⁵ 6 Hill, 518, 41 Am. Dec. 762.

⁴⁶ *Campbell v. Butts*, 3 N. Y. 174; *Howard v. Sexton*, 4 id. 157; *Wallis v. Mease*, 3 Bin. 546; *Kean v. McLaughlin*, 2 S. & R. 469; *Hansbrough v. Stinnett*, 25 Gratt. 495.

⁴⁷ *Rockwell v. Brown*, 36 N. Y. 207.

In *Leonard v. Pope*, *supra*, Camp-

legal theory is that a verdict for the plaintiff vindicates his character; hence where injury thereto is the only ground of damage there cannot be a recovery for prospective damage which may be claimed as the result of the words which formed the basis of the action.⁴⁸ Compensatory damages do not include the expense of the plaintiff and compensation for his trouble in carrying on his action.⁴⁹

§ 1208. **Same subject; aggravation of damages.** Repetitions of the same slander or libel are so far distinct wrongs that if repeated after suit brought a new action lies as for a fresh injury; and such repetitions are not admissible for any purpose in the first action.⁵⁰ Nor are other slanders or libels than those alleged in the declaration provable for the purpose of showing malice, even with a caution not to allow additional damages for them, for they would imperceptibly influence the judgment of the jury and thus the defendant might be twice subjected to damages for the same wrong.⁵¹ A different view has been

bell, J., said: "This principle appears just and sensible and avoids the difficulty of drawing intangible distinctions which no jury can appreciate, between allowing testimony of repetition of wrongs to bear upon an important element in a case, and yet not allowing damages except for the original wrongful act independent of the wrong done by the repetition. Such niceties are not to be favored, and should not be introduced where they can be avoided. It was only the accident of calling one witness before another that would have prevented any one of the slanders proven to have stood as the one to which the defendant claims the recovery should be confined. Any one of them would have made out a cause of action under the declaration. A justification of one would have answered them all. A future action for any of them is therefore barred."

⁴⁸ *Bradley v. Cramer*, 66 Wis. 297; *Halstead v. Nelson*, 24 Hun 395.

⁴⁹ *Indianapolis Journal N. Co. v. Pugh*, 6 Ind. App. 510, 527; *Grotius v. Ross*, 24 Ind. App. 543.

⁵⁰ *Frazier v. McCloskey*, 60 N. Y. 337, 19 Am. Rep. 193; *Daly v. Byrne*, 77 N. Y. 182; *Woods v. Pangburn*, 75 id. 495; *Keenholtz v. Becker*, 3 Denio 346; *Howell v. Cheatham*, Cooke 247; *Eccles v. Radam*, 75 Hun 535; *Cassidy v. Brooklyn Daily Eagle*, 138 N. Y. 239; *Upton v. Hume*, 24 Ore. 420, 435, 21 L.R.A. 493, 41 Am. St. 863; *Barker v. Prizer*, 150 Ind. 4; *Underwood v. Smith*, 93 Tenn. 687, 42 Am. St. 946.

⁵¹ *Alsop v. Ray*, 175 Ill. App. 621; *Root v. Lowndes*, 6 Hill 520, 521, 41 Am. Dec. 762; *Thomas v. Crowell*, 7 Johns. 264, 5 Am. Dec. 269; *Finerty v. Tipper*, 2 Camp. 72; *Conant v. Leslie*, 85 Me. 257; *Bodwell v. Swan*, 3 Pick. 376; *Watson v. Moore*, 2 Cush. 133; *Commonwealth*

expressed by the circuit court of appeals, sixth circuit, Judges Taft, Lurton and Ricks sitting, and Judge Taft writing the opinion. The rule declared was that a prior or contemporaneous publication in another newspaper owned by the defendant is competent evidence on the question of malice, although a separate suit is pending thereon. "By the weight of authority, prior and contemporaneous publications of the same libel, other than that declared on, are competent evidence to show malice, whether such publications may themselves be made the basis of recovery in separate suits or not; and the danger of a double recovery for the same publication is to be avoided by a caution from the court that damages are to be allowed only for the article sued on."⁵² But if the circumstances are such that a

v. Damon, 136 Mass. 441, 448; Mix v. Woodward, 12 Conn. 262.

In *Howard v. Sexton*, 4 N. Y. 161, Gardiner, J., said: "It has sometimes been argued that proof of this character shows general malice upon the part of the defendant, which may properly enhance the damages against him. So would evidence that he had set fire to the house of the plaintiff, or committed battery upon his person furnish stronger proof of general malice than mere words, however opprobrious. The principle does not stop with proof of different words, but extends to the whole conduct of the defendant. Some of the adjudged cases certainly seem to go this length. *Finnerty v. Tipper*, 2 Camp. 72; 2 Stark. Ev. 635, note A. And if the proposition we are considering is sound they were rightly decided. But the modern, and I think the better, doctrine is that the action for slander was not designed to punish the defendant for general ill-will to his neighbor, but to afford the plaintiff redress for a specific injury. To constitute that injury malice must be proved, not

mere general ill-will, but malice in the special case set forth in the pleadings to be inferred from it and the attending circumstances. The plaintiff may show a repetition of the charge for which the action is brought, but not a different slander for any purpose; and if such evidence is received without objection, with a view to establish malice, the plaintiff may, notwithstanding, bring a subsequent action for the same words, and recover. *Root v. Lowndes*, 6 Hill 519, 41 Am. Dec. 762; *Campbell v. Butts*, 3 N. Y. 174;" *Medaugh v. Wright*, 27 Ind 137; *Fry v. Bennett*, 28 N. Y. 328; *Barr v. Hack*, 46 Iowa 308.

⁵² *Post P. Co. v. Hallam*, 8 C. C. A. 201, 59 Fed. 530, citing *Van Derveer v. Sutphin*, 5 Ohio St. 593; *Peason v. Lemaitre*, 5 Mann. & G. 700; *Chamberlin v. Vance*, 51 Cal. 75; *Shock v. McChesney*, 2 Yeates 473; *Gibson v. Cincinnati Enquirer*, 2 Flip. 121. This is in accord with *Hearne v. De Young*, 119 Cal. 670, 677, and local cases cited; *Tingley v. Times Mirror Co.*, 151 Cal. 1; *Julian v. Kansas City Star Co.*, 209 Mo. 35; *Bloomfield v. Pinn*, 84 Neb.

double liability does not exist the reiteration of a libel or slander after suit brought may be proved on the question of malice and damages. No case holds that such a repetition is in its nature not competent evidence on the question, and whenever it has been excluded on that question it has always been upon the ground that it was an independent cause of action.⁵³

It has been held that the fact that the defendant, after he had once been sued for slander and admitted liability for it by settling the suit, deliberately uttered it again is strong evidence to warrant punitive damages if the jury think proper to award them.⁵⁴ The damages for which an initial libeler is responsible cannot be aggravated because other newspapers unconnected with the initial libeler repeat and republish the libel, although the same reporter who reported to the initial libeler also reported to the other papers.⁵⁵ Damages will be increased by every circumstance which aggravates the wrong and adds to the injury. Repetition of a slander does this in two ways: by giving larger publicity to defamation, and by evincing greater malice. There is a conclusive presumption of malice from falsely speaking words actionable in themselves unless a legal justification or excuse is shown. The malicious intent of the perpetrator of a slander or libel is not a question of fact; it is a conclusion of law; being so, the plaintiff is not required to prove it except by showing the publication of the defamatory matter; nor can the defendant deny or disprove it as a separate element of the wrong.⁵⁶ This is malice in law,

472; *Gribble v. Pioneer Press Co.*, 34 Minn. 342.

⁵³ Per Earl, J., in *Turton v. New York Recorder Co.*, 144 N. Y. 144; *Vest v. Speakman*, 153 Ala. 393; *Smith v. Hubbell*, 142 Mich. 637.

⁵⁴ *Glanders v. Graff*, 25 Hun 553.

⁵⁵ *Age-Herald Pub. Co. v. Waterman*, 188 Ala. 272.

⁵⁶ *Fry v. Bennett*, 1 Code Rep. (N. S.) 243, 5 Sandf. 54; *Littlejohn v. Greeley*, 13 Abb. 55; *Weaver v. Hendrick*, 30 Mo. 502; *Sanderson v. Caldwell*, 45 N. Y. 308, 6 Am. Rep.

90; *Dexter v. Spear*, 4 Mason 115; *Mason v. Mason*, 4 N. H. 110; *Wilson v. Noonan*, 35 Wis. 321; *Bodwell v. Osgood*, 3 Pick. 379; *Harwood v. Keech*, 4 Hun 389; *Daly v. Byrne*, 1 Abb. N. C. 150; *Fox v. Broderick*, 14 Irish L. (N.S.) 453; *Gilmer v. Eubank*, 13 Ill. 271; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Blumhardt v. Rohr*, 70 Md. 328; *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307; *Pratt v. Pioneer Press Co.*, 32 Minn. 217; *Neeb v. Hope*, 111 Pa. 145; *Barr v.*

but it is nevertheless a bad intent assumed to exist in fact. As the injury will be aggravated by showing more malice than the law implies from mere proof of the defamation alleged, the plaintiff may prove any circumstances which tend to magnify the malice; they will tend not only to confirm as true in fact what the law so presumes, but they may also show that the wrong and injury did not result from mere heedless and aimless gossip, but a malevolent eagerness to inflict pain and destroy reputation by originating or giving currency to a conscious fabrication.⁵⁷

The true rule seems to be that when the words are actionable in themselves and are not uttered upon a lawful occasion and with justifiable motives the law will infer malice so as to enable the plaintiff to recover damages although none be proved. But of this technical or legal malice, as it may be termed, there may be various degrees as indicated by the manner in and the circumstances under which the slanderous charges are made. And other circumstances may exist which show not merely technical malice, but actual hatred and revengeful feelings, the malignant design of the slanderer to do the utmost possible injury. For acts done or words uttered under such

Moore, 87 Pa. 385, 30 Am. Rep. 367; Smedley v. Soule, 125 Mich. 192; Hintz v. Graupner, 138 Ill. 158; Taylor v. Ellington, 46 La. Ann. 371; Ellis v. Whitehead, 95 Mich. 105; Upton v. Hume, 24 Ore. 420, 431, 21 L.R.A. 493, 41 Am. St. 863.
⁵⁷ Ladwig v. Heyer, 136 Iowa 196; Hulbert v. Arnold, 83 N. J. L. 114; Clair v. Battle Creek Journal Co., 168 Mich. 467; Good v. Grit P. Co., 36 Pa. Super. Ct. 238; Welch v. Ware, 32 Mich. 84; Detroit Daily Post v. McArthur, 16 Mich. 447; Fry v. Bennett, 28 N. Y. 324; McDonald v. Woodruff, 2 Dill. 244; Sawyer v. Hopkins, 22 Me. 268; Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632; Townshend on Sland. & L., § 392; Ransom v. McCurley,

140 Ill. 626, 636; Craven v. Walker, 101 Ga. 845; Bailey v. Bailey, 94 Iowa 598; Alcorn v. Powell, 22 Ky. L. Rep. 1353; Conant v. Leslie, 85 Me. 257; Ellis v. Whitehead, 95 Mich. 105; Enos v. Enos, 135 N. Y. 609; Wright v. Gregory, 9 App. Div. (N.Y.) 85; Barker v. Prizer, 150 Ind. 4; Halley v. Gregg, 74 Iowa 563; Botsford v. Chase, 108 Mich. 432.

The failure to publish a retraction, after being properly requested to do so, "is competent evidence as to the feeling and intention of the publisher with which the libel was published." Stokes v. Morning Journal Ass'n, 72 App. Div. (N. Y.) 184; Bird v. Press Pub. Co., 154 App. Div. (N. Y.) 491.

different circumstances and with such variant motives and purposes on the part of the slanderer the same measure of damages cannot be properly awarded.⁵⁸

§ 1209. **Same subject.** Actions for such wrongs are designed not only to furnish some indemnity, so far as money can do it, for the injury inflicted, but to vindicate the character of the person unjustly assailed and to protect against a repetition of the outrage. It is right that juries should make a discrimination in the damages they award according to the proven circumstances, position, conduct, motives and purposes of the slanderer; and they may rightfully award more severe damages for the wilful, designed, malicious and mischievous repetition of a story known to be false and repeated with a design to injure than for the idle and garrulous repetition of a tale supposed, or even believed without examination, to be true. If the defendant has indicated his intention to injure by his direct declarations, by repetitions of the slander or other acts having a tendency to show malice in its common acceptance of personal ill-will, that may be shown in evidence.⁵⁹ And so may the fact that the defendant knew the charge to be false when he uttered it, for the necessary inference from such proof must be hatred and malignity.⁶⁰ To show that the defendant knew of the falsity of a published charge of theft from the person, it was allowed to be proved by the plaintiff that, after the stated time of the theft, the defendant continued upon friendly terms with him.⁶¹ So where the defendant made the defamatory charge professedly on information stated by

⁵⁸ *Symonds v. Carter*, 32 N. H. 467; *Schattler v. Daily Herald Co.*, 162 Mich. 115.

⁵⁹ *Ladwig v. Heyer*, 136 Iowa 196; *Meriwether v. Knapp*, 224 Mo. 617; *Jones v. Greeley*, 25 Fla. 629, 642; *Cruikshank v. Gordon*, 118 N. Y. 178; *Symonds v. Carter*, 32 N. H. 467; *Westerfield v. Scripps*, 119 Cal. 607; *Hearne v. De Young*, 119 Cal. 670; *Alliance Review P. Co. v. Valentine*, 9 Ohio C. C. 387; *Upton*

v. Hume, 24 Ore. 420, 21 L.R.A. 493, 41 Am. St. 863.

⁶⁰ *Bingham v. Gaynor*, 135 App. Div. (N. Y.) 426; *Plummer v. Johnsen*, 70 Wis. 131; *Stow v. Converse*, 3 Conn. 325, 8 Am. Dec. 189; *Harwood v. Keech*, 4 Hun 389; *Bullock v. Cloyes*, 4 Vt. 304; *Sexton v. Brock*, 15 Ark. 345; *Farley v. Ranck*, 3 W. & S. 554; *Fountain v. Boodle*, 3 Q. B. 5. But see *Hartman v. Hesser*, 34 Pa. 117.

⁶¹ *Burton v. March*, 6 Jones 409.

him to be derived from certain named persons who were witnesses of the crime charged, evidence by them that they had given no such information was received to show actual malice.⁶² Preferring a bill of indictment against the plaintiff, which is ignored by the grand jury, may be shown to prove malice;⁶³ as may the fact that the defendant employed a person to interview people about the case and to inquire in connection with it in general, the inquiries having been made in a manner and form capable of aggravating the original wrong.⁶⁴

The refusal of the editor of a newspaper to publish a retraction of a libel published in his paper does not tend to prove his *animus* to have been malicious,⁶⁵ but such refusal is admissible for the purpose of enhancing damages,⁶⁶ and so is the refusal to retract a verbal slander.⁶⁷ In an action for slander in charging an infant with larceny, evidence of a previous quarrel between defendant and plaintiff's father and next friend is inadmissible to prove malice in the defendant towards the plaintiff.⁶⁸ The plaintiff may give in evidence any expressions of the defendant, oral or written, which indicate spite or ill-will for the purpose of showing the temper and disposition with which he made the publication complained of.⁶⁹ The style and character of the language are also circumstances which may be left, with others, to the consideration of the jury on the question whether the words were spoken maliciously,

⁶² Harwood v. Keech, 4 Hun 389.

⁶³ Tolleson v. Posey, 32 Ga. 372;
Hintz v. Graupner, 138 Ill. 158;
Harbison v. Shook, 41 Ill. 141.

⁶⁴ Praed v. Graham, 24 Q. B. Div. 53; Raftery v. Russell, 10 New South Wales St. Rep. 200.

⁶⁵ Bradley v. Cramer, 66 Wis. 297.

⁶⁶ Mix v. North American Co., 12 Pa. Dist. 446; Edsall v. Brooks, 2 Robert. 414; Pratt v. Pioneer Press Co., 35 Minn. 251; Barnes v. Campbell, 60 N. H. 27; Malloy v. Bennett, 15 Fed. 371; Long v. Tribune P. Co., 107 Mich. 207. See McCormick v. Hawkins, 169 Mich. 641.

⁶⁷ Klewin v. Bauman, 53 Wis. 244.

⁶⁸ York v. Pease, 2 Gray 282.

⁶⁹ Folkard's Stark. on Slander & L. 452; Wright v. Woodgate, 2 Cr. M. & R. 573; Wright v. Gregory, 9 App. Div. (N. Y.) 85; Smith v. Times Co., 4 Pa. Dist. 399.

If the defendant's case is conducted with spite and malice counsel cannot shelter his client by assuming responsibility therefor. The defendant must answer for the course taken by counsel. Lamb v. West, 15 New South Wales L. R. 120, 127.

and especially when the question is if they were maliciously uttered under color of privilege.⁷⁰ The manner in which the publication is made may offer in itself strong evidence of malice.⁷¹ The unnecessary transmission of libelous matter by telegraph or post-card, when it might be sent by letter, is evidence of malice.⁷² Where the defamatory matter is published upon a lawful occasion, that is, upon an occasion which furnishes, *prima facie*, a legal excuse for it, as where it is done in the discharge of some public or private legal or moral duty, or in the conduct of the defendant's own affairs, in matters where his interest is concerned,⁷³ it is said to be conditionally a privileged communication or publication. The legal excuse for the publication rebuts the presumption of malice from the falsity of the communication; and where such matter is the subject of an action the plaintiff must show malice to maintain it.⁷⁴ Testimony honestly given in a judicial proceeding of the circumstances connected with the utterance of the slanderous words on which the suit is based and tending to a mitigation of the damages is not to be considered as a malicious repetition of the slander.⁷⁵

§ 1210. **Same subject; wealth and rank of the parties.** The plaintiff may prove in aggravation of damages his rank and condition in society.⁷⁶ Thus, where the charge was that a

⁷⁰ *Toogood v. Spyring*, 1 Cr., M. & R. 181; *Fryer v. Kennersley*, 15 C. B. (N.S.) 422; *Cooke v. Wildes*, 5 El. & B. 328; *Jones v. Greeley*, 25 Fla. 629, 642.

⁷¹ *Berger v. Freeman Tribune Pub. Co.*, 132 Iowa 290 (headlines to article); *Halley v. Gregg*, 82 Iowa 622.

The entire article complained of is admissible. *Mann v. Dempster*, 104 C. C. A. 110, 181 Fed. 76.

⁷² *Williamson v. Freen*, L. R. 9 C. P. 393. The jury may consider what the defendant's conduct has been before action, after action, and in court during the trial. *Praed v. Graham*, 24 Q. B. Div. 53.

⁷³ *Toogood v. Spyring*, *supra*.

⁷⁴ *Cockayne v. Hodgkisson*, 5 C. & P. 543; *Servatius v. Pichel*, 34 Wis. 292; *Townshend on Slander & L.*, pp. 248, 249. See *Howard v. Keech*, 4 Hun 389.

⁷⁵ *Thompson v. McCready*, 194 Pa. 32.

⁷⁶ *Bingham v. Gaynor*, 135 App. Div. (N. Y.) 426; *Sotham v. Drovers' T. Co.*, 239 Mo. 606; *Klumph v. Dunn*, 66 Pa. 141, 5 Am. Rep. 355; *Smith v. Lovelace*, 1 Duv. 215; *Bodwell v. Swan*, 3 Pick. 376; *Howe v. Perry*, 15 id. 506; *Justice v. Kirlin*, 17 Ind. 588; *Hosley v. Brooks*, 20 Ill. 115, 71 Am. Dec. 252; *Peltier v. Mict*, 50 Ill. 511; *Tillotson v. Cheetham*, 3 Johns. 56, 3 Am. Dec. 459;

criminal offense had been committed it was held that, inasmuch as mental suffering is an element of damages and its extent may be heightened and the damages consequently increased by the disgrace the plaintiff's family will suffer, it was proper to show he had a wife and child.⁷⁷ Though the poverty of the

Larned v. Buffinton, 3 Mass. 546, 3 Am. Dec. 185; Clements v. Maloney, 55 Mo. 352; Harman v. Cundiff, 82 Va. 239; Palmer v. Haskins, 23 Barb. '90; Turner v. Hearst, 115 Cal. 394; Alliance Review P. Co. v. Valentine, 9 Ohio C. C. 387; Smith v. Times Co., 4 Pa. Dist. 399, 402; Buckstaff v. Hicks, 94 Wis. 34. See Prescott v. Tousey, 50 N. Y. Super. 12; Perrine v. Winter, 73 Iowa 645; Williamson v. Eckhoff, 185 Mo. App. 234; Williams v. Hicks Printing Co., 159 Wis. 90.

In a recent Irish case it is said: "The character, reputation and position of a plaintiff seeking to recover damages for a libel published against him must naturally constitute a material element for the consideration of a jury in estimating damages in such cases. Accordingly the object of the defendant in the present case has been to vilify the character and reputation of the plaintiff. Now, the plaintiff is a gentleman who for several years acted as a crown solicitor for the government. During that period he has conducted very important criminal cases with great ability, intelligence and integrity, and he was until lately believed, and I believe truly, to occupy a higher respectable position as a landed proprietor in Ireland. But on the other hand, the plaintiff, having tendered himself as witness in this case, has been obliged to admit certain matters made use of for the purpose of damaging his character and reducing the amount of

damages. It appears, therefore, that the plaintiff some years ago married as a second wife a lady possessed of a considerable fortune, not of tender years, but rather the reverse, inasmuch as she had attained the mature age of seventy, and being a widow of some years' standing. And it was elicited from the plaintiff that some twelve years ago he had an immoral connection with a maid servant of his wife. This connection lasted for about one week and was not afterwards renewed. The plaintiff was then about fifty years of age; he had a wife living and also daughters by his former wife. It must be admitted that this conduct of the plaintiff was highly to be reprobated, but considering the time that has since elapsed and all the circumstances it does not occur to me that any jurymen possessing any knowledge of the world, and the unhappy events which so often occur in it, would think it proper to make any very large reduction from any damages which he might otherwise think ought to be awarded owing to this unhappy occurrence." Bolton v. O'Brien, 16 L. R. Ir. 97, 110.

⁷⁷ Barnes v. Campbell, 60 N. H. 27; Cahill v. Murphy, 94 Cal. 29, 28 Am. St. 88; Smith v. Hubbell, 142 Mich. 637; Dennison v. Daily News P. Co., 82 Neb. 675, 23 L.R.A. (N.S.) 362; Binder v. Pottstown Daily News P. Co., 33 Pa. Super. Ct. 411.

A married woman charged with unchastity may show she has a family of young children. Enos v. Enos,

plaintiff may not be shown to establish the effect of the libel, where such suffering is involved it may be shown that the plaintiff was an orphan and dependent on her own exertions.⁷⁸ A plaintiff may show he was poor when he went to the place where the libel was published and the success achieved there.⁷⁹

There is a conflict of authority on the question, but it is believed the better opinion is that the rank, condition and wealth of the defendant may be shown for the same purpose, that is, to affect as well compensatory as punitive damages.⁸⁰

135 N. Y. 609; *Enquirer Co. v. Johnston*, 18 C. C. A. 628, 72 Fed. 443.

Where the statement was that the plaintiff was threatened with a breach of promise suit it was proper for him to show the nature of his business, and that he was married; these facts bore upon the hurtful tendency of the libel and the general damage. *Morey v. Morning Journal Ass'n*, 123 N. Y. 207, 9 L.R.A. 621, 20 Am. St. 730.

⁷⁸ *Washington Times Co. v. Downey*, 26 App. Cas. (D. C.) 258.

⁷⁹ *Smith v. Hubbell*, *supra*.

Evidence of the plaintiff's poverty is inadmissible in aggravation of damages. He may show his occupation, but cannot go further in making out his case in chief. *Perrine v. Winter*, 73 Iowa 645. This is so though it be offered only to affect punitive damages; "there may be cases in which it may be proper in determining his actual damages." *Reeves v. Winn*, 97 N. C. 246. As to the latter point, it is otherwise in Alabama. *Pool v. Devers*, 30 Ala. 672.

⁸⁰ *Slaughter v. Johnson*, 181 Ill. App. 693; *Mills v. Flynn*, 149 Iowa 477; *Hahn v. Lumpa*, 158 Iowa 560; *McCloy v. Vaughan*, — Mich. —, 151 N. W. 667 (reputed, not actual worth); *Williamson v. Eckhoff*, 185

Mo. App. 234; *Graybill v. De Young*, 140 Cal. 323; *Geringer v. Novak*, 117 Ill. App. 160; *Burch v. Bernard*, 107 Minn. 210; *Mix v. North American Co.*, 12 Pa. Dist. 446; *Calderin v. Heraldo Espanol*, 4 Porto Rico Fed. 376; §§ 404, 405; *Johnson v. Smith*, 64 Me. 553; *Humphreis v. Parker*, 52 id. 507, 508; *Stanwood v. Whitmore*, 63 Me. 209; *Barber v. Barber*, 33 Conn. 335; *Brown v. Barnes*, 39 Mich. 211; *Buckley v. Knapp*, 48 Mo. 152; *Bodwell v. Osgood*, 3 Pick. 379; *Karney v. Paisley*, 13 Iowa 89 (but it is said in *Perrine v. Winter*, 73 id. 645, 647, that "there are grave doubts whether this reasoning is correct, because it is not universally true that a man possessed of wealth has the confidence and respect of the community in which he lives"); *Lewis v. Chapman*, 19 Barb. 252; *Kniffen v. McConnell*, 30 N. Y. 289; *Bennett v. Hyde*, 6 Conn. 24; *Case v. Marks*, 20 id. 248; *McAlmont v. McClelland*, 14 S. & R. 359; *Adecock v. Marsh*, 8 Ired. 360; *Wilms v. White*, 26 Md. 380, 90 Am. Dec. 113; *Kunkel v. Markell*, 26 Md. 390; 2 Greenlf. Ev. 299; *Jones v. Greeley*, 25 Fla. 629, 641; *Bimford v. Young*, 115 Ind. 174; *Rea v. Harrington*, 58 Vt. 181, 56 Am. Rep. 561; *Nailor v. Ponder*, 1 Marvel 408 (but not his wealth); *Hintz v. Graupner*, 138 Ill.

The injury will be proportioned to the rank and influence of the defendant in the community where he publishes the defamatory matter. A knowledge of his standing there is important to enable the jury to appreciate the injury resulting from his slanderous declarations; to enable them to determine what the injured party ought to receive for compensation and, in their discretion, what the defendant, for example and punishment, should pay.⁸¹ As is shown by the notes there is not entire accord as to the purpose for which evidence of the reputed wealth of the defendant may be received: generally it is admissible to affect both compensatory and punitive damages; but in some states it is admissible only as to the former, and in others as to the latter. The general rule, as stated, has been applied in Michigan, though with some reservation as to its soundness. It is recognized that it is the duty of the trial court to instruct the jury that evidence of wealth can be considered only in its bearing upon the actual damages the plaintiff has sustained, and that the wealth of the defendant is, of

158; *Farrand v. Aldrich*, 85 Mich. 593; *Botsford v. Chase*, 108 Mich. 432; *Loranger v. Loranger*, 115 Mich. 681; *Taylor v. Pullen*, 152 Mo. 434 (wealth of both defendants); *Steen v. Friend*, 20 Ohio C. C. 459; *Arnold v. Sayings Co.*, 76 Mo. App. 159. But see *Gallagher v. Singer Sewing Machine Co.*, 177 Ill. App. 198; *Myers v. Malcolm*, 6 Hill 292; *Palmer v. Haskins*, 28 Barb. 90; *Morris v. Barker*, 4 Harr. 520; *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Dain v. Wycoff*, 7 N. Y. 191; *Austin v. Bacon*, 49 Hun 386; *Enos v. Enos*, 58 Hun 45, and note 4 this section.

The wealth of the defendant is immaterial except so far as it affects vindictive damages. *Bradley v. Cramer*, 66 Wis. 297; *Buckstaff v. Hicks*, 94 Wis. 34; *Burekhalter v. Coward*, 16 S. C. 435 (*semble*); *Perrine v. Winter*, 73 Iowa 645; *Storey* Suth. Dam. Vol. IV.—55.

v. Early, 86 Ill. 461; *Western U. Tel. Co. v. Cashman*, 132 Fed. 805. In Nebraska punitive damages are not recognized and the wealth of the defendant is not a subject of proof to affect compensatory damages. *Rosewater v. Hoffman*, 24 Neb. 222. In Virginia the defendant's wealth is to be considered only in so far as it tends to show his rank and influence, not as affecting his ability to pay exemplary damages. *Harman v. Cundiff*, 82 Va. 239. This is the rule in North Carolina. *Reeves v. Winn*, 92 N. C. 246, 2 Am. St. 287. In Virginia if only compensatory damages are recoverable the standing of the defendant is immaterial. *Sun L. Assur. Co. v. Bailey*, 101 Va. 443.

⁸¹ *Downs v. Cassidy*, 47 Mont. 471; *Mauk v. Brundage*, 68 Ohio 89, 62 L.R.A. 477. Cases cited in first paragraph of preceding note.

itself, no element of damage.⁸² It has also been ruled there that evidence of the wealth of a corporation defendant in a libel suit is not admissible for any purpose. A corporation has no social rank or social influence to be augmented by its wealth or diminished by its poverty. It is not a member of society. Its libelous utterances will sting and injure according to the extent of its circulation, the character of the paper published, as it is known by its publications, and the character of the party assailed. A newspaper published by a corporation which is reputed to pay no dividends may have as extensive a circulation as one published by a corporation which is reputed to pay large dividends.⁸³ In California the value of the property owned by the defendant corporation may be proved if punitive damages are recoverable.⁸⁴

The right of the plaintiff to prove his rank and condition in society includes that of showing his good character at and before the time of the publication of the defamatory matter. But it is held in some jurisdictions that the law presumes good character; that the general issue admits the falsity of the imputation, and until the defendant has attacked it the plaintiff is not entitled to introduce any evidence on that subject. Thus in a Pennsylvania case Strong, J., said: "Evidence of his reputation is important only as affecting the measure of the compensation to which he is entitled. The injury is less when his character is bad. In a certain sense, therefore, the character (reputation) of the plaintiff in every such action may be said to be put in issue. The plaintiff offers it to the attack of the defendant. The law presumes that it is good, but the defendant may traverse this presumption. Such a traverse is presented when the defendant offers evidence to show that it is bad. But until then a plaintiff is not at liberty to adduce evidence that his character is good; for, until it is attacked,

⁸² *Brown v. Barnes*, 39 Mich. 214; *Farrand v. Aldrich*, 85 id. 593.

⁸³ *Randall v. Evening News Ass'n*, 97 Mich. 136.

An instruction concerning the wealth of the defendant should not

be given in the absence of evidence concerning it. *Beeson v. Gossard Co.*, 167 Ill. App. 561.

⁸⁴ *Tingley v. Times Mirror Co.*, 151 Cal. 1.

the law presumes, and the defendant admits, such to be the fact. Until then the defendant has refused to accept the issue tendered. This is an almost universal rule, not only in this state, but in England and in our sister states. Nor does the proof which, under the general issue, may be given of circumstances that may have awakened in the mind of the defendant a suspicion of the plaintiff's guilt open the door for testimony in support of his character. Evidence of such circumstances is received in mitigation of damages, not because it shows that injury inflicted upon the plaintiff's reputation is any the less, but because it tends to disprove the existence of malice in the defendant. It is, of course, no answer to this to prove that the plaintiff was of good repute. His reputation may have been untarnished and the circumstances under which the actionable words were spoken may have been such as to indicate that there was very little malice in the defendant. It is, therefore, only where evidence has been given directly attacking the character of the plaintiff that he is at liberty to introduce proof of his good reputation."⁸⁵

The plea of not guilty puts in issue the general reputation of the plaintiff. The amount of his recovery will be affected by any evidence which supports or disparages that reputation. It is presumptively good when the trial begins and until the presumption is overturned by proof. It is trite to say that what the law presumes, and so long as the presumption continues, need not be proved; but where proof may add to what the law presumes or make specific what the law presumes only in a general way, and such addition or particularity may legitimately increase damages it is admissible in the first instance; as is the case on the element of malice. As the reputation of the plaintiff is in issue by the very nature of the proceeding, if the jury can estimate the damages with a more intelligent

⁸⁵ Chubb v. Gsell, 34 Pa. 115. Compare Klumph v. Dunn, 66 Pa. 147, in which Judge Sharswood said: "The position in life, and the family of the plaintiff, are always important circumstances bear-

ing upon the question of damages, and have always been held admissible for that purpose." McAlmont v. McClelland, 14 S. & R. 359, is more strongly in favor of this rule.

appreciation of the injury after they have heard affirmative evidence of the plaintiff's reputation than if the case is submitted to them on the mere supposition which the law raises that it is good, it is reasonable and proper such evidence be received. In *Burton v. March*⁸⁶ it was held not error to receive it. Other cases recognize the propriety of the plaintiff showing affirmatively as part of his case his good reputation,⁸⁷ though there is not entire agreement on the subject.⁸⁸

§ 1211. **Same subject.** In cases of defamation character is the object of attack and in actions for that wrong the injury thereto is the *gravamen* complained of, and its vindication the object of the action.⁸⁹ It is said in a case in Connecticut⁹⁰ that the plaintiff's character is not made the subject of inquiry at the defendant's option and shut out of view or investigation as shall best subserve the defendant's pleasure and interest. To a rule so inequitable, for the want of mutuality, the courts there have never acceded; but they have recognized and acted on the principle that the final object of the plaintiff's suit is the vindication of his character; and that his reputation, of consequence, is put in issue by the nature of the proceeding itself; he may introduce evidence of his reputation, not only to sustain it from attack, but to prove its excellence. In a case in Wisconsin⁹¹ the court say: "In actions of slander it is well settled that the plaintiff's general character is involved in the issue; and the evidence showing what it is, and consequently its true value, may be offered on either side to affect the amount of damages."⁹² The rule thus stated has frequently received the

⁸⁶ 6 Jones 409.

⁸⁷ *Bennett v. Hyde*, 6 Conn. 24; § 1211; *Press P. Co. v. McDonald*, 11 C. C. A. 155, 63 Fed. 238, 26 L.R.A. 531; *Peltier v. Mict*, 50 Ill. 511; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455; *Romayne v. Duane*, 3 Wash. C. C. 246, Fed. Cas. No. 12,028.

⁸⁸ *Gandy v. Humphries*, 35 Ala. 617; *Wright v. Schraeder*, 2 Curt. 548, Fed. Cas. No. 18,191; *Prescott v. Tousey*, 50 N. Y. Super. Ct. 12;

Houston P. Co. v. Moulden, 15 Tex. Civ. App. 574; *Kovaes v. Mayoras*, 175 Mich. 582.

⁸⁹ *Bennett v. Hyde*, 6 Conn. 24.

⁹⁰ *Stow v. Converse*, 4 Conn. 42; *Johnson v. Featherstone*, 141 Ky. 793.

⁹¹ *Campbell v. Campbell*, 54 Wis. 97.

⁹² Citing 2 Greenl. Ev., § 275; *Earl of Leicester v. Walter*, 2 Camp. 251; *Larned v. Buxinton*, 3 Mass. 456, 3 Am. Dec. 185; *Stone v. Var-*

sanction of this court.”⁹³ But all cases recognize the right of the plaintiff to answer the defendant's evidence against his general reputation by proof to support it.⁹⁴ It was said that if the plaintiff has a well-established character so that there is less likelihood of the slander hurting him than there would be if he was a new man starting in the effort to build up a reputation, that fact may be proved and considered.⁹⁵ If this be the rule, taken in connection with the principle which allows damages to be mitigated if the plaintiff's character is bad, it leaves the recovery of substantial damages for slander to that class of people whose characters are neither good nor bad. There is, however, nothing in the doctrine of the case stated which is inconsistent with the fundamental principle of the law of damages—compensation for the injury suffered. The plaintiff need not produce evidence of loss of reputation if the charge against him was slanderous *per se*.⁹⁶ According to the many cases affirmative evidence of the plaintiff's good reputation in advance of any attack upon it is inadmissible.⁹⁷

ney, 7 Metc. (Mass.) 86, 39 Am. Dec. 762; Burnett v. Simpkins, 24 Ill. 264. To the same effect: Press P Co. v. McDonald, 26 L.R.A. 531, 11 C. C. A. 155, 63 Fed. 238, 26 L.R.A. 53; Morning Journal Ass'n v. Duke, 63 C. C. A. 459, 128 Fed. 657; Daley v. Lundin, 8 New South Wales St. Rep. 447; Williams v. Greenwade, 3 Dana 432.

⁹³ Maxwell v. Kennedy, 50 Wis. 645; Wilson v. Noonan, 27 Wis. 590; B ——— v. I ———, 22 id. 372; Haskins v. Lumsden, 10 id. 359. The court add: “Whether plaintiff in the first instance, and before his character had been assailed, can give evidence of his own good character, it is not necessary here to decide.”

⁹⁴ Harding v. Brooks, 5 Pick. 244; Byrket v. Monohon, 7 Blackf. 83, 41 Am. Dec. 212; Smith v. Lovelace, 1 Duv. 215; Waters v. Jones, 3 Port. 442, 29 Am. Dec. 261; Sey-

mour v. Merrills, 1 Root 459; Sheahan v. Collins, 20 Ill. 325, 71 Am. Dec. 271; Moyer v. Moyer, 49 Pa. 210; Cox v. Strickland, 101 Ga. 482.

⁹⁵ Broughton v. McGrew, 39 Fed. 672, 679, per Woods, J.

⁹⁶ Belo v. Fuller, 84 Tex. 450, 31 Am. St. 75; Rosenbaum v. Roche, 46 Tex. Civ. App. 237.

⁹⁷ Davis v. Hearst, 160 Cal. 143, citing Morgan v. Barnhill, 55 C. C. A. 7, 118 Fed. 24; Shipman v. Burroughs, 1 N. Y. Super. Ct. 442; Chubb v. Gsell, 34 Pa. 114; Blakeslee v. Hughes, 50 Ohio St. 490; Hitchcock v. Moore, 70 Mich. 112, 14 Am. St. 474; Miles v. Vanhorn, 17 Ind. 245, 79 Am. Dec. 477; Hall v. Dairy Co., 15 Wash. 542; Kennedy v. Holladay, 25 Mo. App. 503; Cooper v. Phipps, 24 Ore. 357, 22 L.R.A. 836; Mayo v. Samples, 18 Iowa 306; Houghtaling v. Kilderhouse, 1 N.

§ 1212. **Evidence of reputation.** The evidence in regard to the plaintiff's reputation must be directed to his general reputation, or to his general reputation in regard to the trait involved in the imputation; ⁹⁸ particular acts to affect it cannot be proved.⁹⁹ Where his reputation is consequentially attacked by proving the truth of the imputation he is not entitled to answer it by proving his good reputation; in other words, he is not entitled to prove his good reputation to countervail the evidence of the specific act or acts shown to establish the plea of justification. In criminal cases defendants are permitted to give evidence of general character to repel the charge upon the ground that a presumption of innocence arises from former conduct in society as evidenced by such character, since it is not probable that a person of known probity or humanity would commit a dishonest or outrageous act in the particular instance.¹ But this species of evidence is not available in civil actions for torts

Y. 530; *Wright v. Schroeder*, 2 Curt. 548, Fed. Cas. 18,091.

⁹⁸ *New York E. J. P. Co. v. Simon*, 77 C. C. A. 366, 147 Fed. 224; *Morning Journal Ass'n v. Duke*, *supra*; *Johnson v. Featherstone*, 141 Ky. 793; *Lambert v. Pharis*, 3 Head 622; *Maynard v. Beardsley*, 7 Wend. 560, 22 Am. Dec. 595; *B—— v. I——*, 22 Wis. 372; *Birchfield v. Russell*, 3 Cold. 228; *McAlexander v. Harris*, 6 Munf. 465; *Steinman v. McWilliams*, 6 Pa. 170; *Brunson v. Lynde*, 1 Root 354; *Sheahan v. Collins*, 20 Ill. 325, 71 Am. Dec. 271; *Burton v. March*, 6 Jones 409; *Moyer v. Moyer*, 49 Pa. 210; *Powers v. Presgroves*, 38 Miss. 227; *Bennett v. Matthews*, 64 Barb. 410; *Leonard v. Allen*, 11 Cush. 241; *Shilling v. Carson*, 27 Md. 175, 92 Am. Dec. 632; *Wright v. Schroeder*, 2 Curtis 548; *Fountain v. West*, 23 Iowa 9, 92 Am. Dec. 405; *Lamos v. Snell*, 6 N. H. 413, 25 Am. Dec. 468; *Warner v. Lockerby*, 31 Minn. 421; *Lowe v. Herald Co.*, 6 Utah 175

(holding that in an action for charging rape the defendant's reputation as a business man may be proved, as well as his reputation for chastity and virtue); *Drown v. Allen*, 91 Pa. 393; *Duval v. Davy*, 32 Ohio St. 604; *Sanford v. Rowley*, 93 Mich. 119; *Post P. Co. v. Hallam*, 8 C. C. A. 201, 59 Fed. 530.

"When a man is charged with selling his influence in a political convention the trait of his character which is attacked is his integrity—his general integrity." *Post P. Co. v. Hallam*, *supra*.

⁹⁹ *Calderin v. Herald Espanol*, 4 Porto Rico Fed. 376; *Andrews v. Vanduser*, 11 Johns. 38; *Swift v. Dickerman*, 31 Conn. 285; *Lamos v. Snell*, 6 N. H. 413, 25 Am. Dec. 468; *Burke v. Miller*, 6 Blackf. 155; *Parkhurst v. Ketchum*, 6 Allen 406, 83 Am. Dec. 639; *Hallowell v. Guntle*, 82 Ind. 554; *Indianapolis Journal N. Co. v. Pugh*, 6 Ind. App. 510, 516.

¹ 2 Stark. Ev. 365.

generally, nor to rebut evidence that alleged slanderous words were true.²

§ 1213. **Injuries to business.** Language may be actionable *per se* though it does not impute any crime. It is so if by it one is charged with having either of certain diseases.³ So if one is disparaged in his office, profession, trade or business in such manner as that by natural and proximate consequence he will be prevented from deriving therefrom that pecuniary reward which probably he might otherwise have obtained.⁴ The special character in respect of which such imputations will be actionable may be any lawful employment in which a livelihood may be gained or from which emoluments are derived.⁵ The language must be such as, if true, would disqualify or render him less fit to fulfill the duties of the special character he has assumed.⁶ To charge insolvency;⁷ the chief engineer of

² Davis v. Hearst, 160 Cal. 143; Matthews v. Huntley, 9 N. H. 146; Severance v. Hilton, 24 id. 147; Shipman v. Burrows, 1 Hall 399; Wright v. Schroeder, 2 Curt. 548; Stow v. Converse, 3 Conn. 325, 8 Am. Dec. 189; Bamfield v. Massey, 1 Camp. 460; Haun v. Wilson, 28 Ind. 296; Miles v. Van Horn, 17 id. 245; Rhodes v. Ijames, 7 Ala. 574, 42 Am. Dec. 604; Holley v. Burgess, 9 Ala. 728.

³ Townshend on Slander & L., § 175.

⁴ Lewis v. Hayes, 165 Cal. 527; First Nat. Bank v. Winters, 165 App. Div. (N. Y.) 726 (imputing dishonesty to a bank); Williams v. Hicks Printing Co., 159 Wis. 90; American Freehold L. M. Co. v. Brown, 54 Tex. Civ. App. 448; Russell v. Washington Post Co., 31 App. Cas. (D. C.) 277 (a minister and an author may show the size of his congregation, the extent of his writings and their circulation); Calderin v. Heraldo Espanol, 4 Porto Rico Fed. 376; Smith v. Hubbell, 151 Mich. 59; Foulger v. Newcomb, L. R. 2

Ex. 327; Babonneau v. Farrell, 15 C. B. 360; Pratt v. Pioneer Press Co., 35 Minn. 251; Missouri Pac. R. Co. v. Richmond, 73 Tex. 568, 15 Am. St. 794, 4 L.R.A. 280; Daisley v. Douglass, 119 Fed. 485; Hollenbeck v. Ristine, 114 Iowa 358; DePew v. Robinson, 95 Ind. 109; Henkel v. Schaub, 94 Mich. 542; Smedley v. Soule, 125 Mich. 192; Botsford v. Chase, 108 Mich. 432; Kahn v. Cincinnati Times-Star, 10 Ohio Dec. 599; Robinson v. Eau Claire B. & S. Co., 110 Wis. 369; Oliver v. Perkins, 92 Mich. 304; Parker v. Republican Co., 181 Mass. 392. See Crandall v. Greeves, 181 Mo. App. 235.

The plaintiff may testify as to the employments he was engaged in when the slander was uttered. Halley v. Gregg, 82 Iowa 622.

⁵ It is ruled in Flanders v. Daley, 120 Ga. 885, that it is not essential that a clergyman receive compensation for his services.

⁶ Townshend on Slander & L., § 190.

⁷ Titus v. Follett, 2 Hill 318; Min-

a fire department with being drunk at a fire;⁸ saying a school mistress is a dirty slut,⁹ insane,¹⁰ or wanting in chastity;¹¹ that a blacksmith keeps false books;¹² that a shop-keeper had nothing but rotten goods in his shop,¹³—is to utter actionable words. It is not enough that the language tends to injure the person in his office, profession or trade; it must be published of him in his official or business character.¹⁴ Where, however, one is in business words spoken of him in his private character may be actionable on account of their necessary effect to injure him in his business; as any words affecting the credit of a man who is a merchant, or who pursues any business in which pecuniary credit is important.¹⁵ The same rule governs as to a corporation engaged in any occupation in which credit may be material to its success.¹⁶ When the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability; when, from the nature of the business, great confidence must necessarily be reposed they are actionable, though not applied by the speaker to the profes-

ter v. Bradstreet Co., 174 Mo. 444; Wolkowsky v. Garfunkel, 65 Fla. 10, 44 L.R.A.(N.S.) 351.

⁸ Gottbeluet v. Hubachek, 36 Wis. 515.

⁹ Wilson v. Runyon, Wright 651.

¹⁰ Morgan v. Lingen, 8 L. T. Rep. (N.S.) 800.

¹¹ Bodwell v. Osgood, 3 Pick. 379.

¹² Burtch v. Nickerson, 17 Johns. 217, 8 Am. Dec. 390.

¹³ Burnett v. Wells, 12 Mod. 420. For other illustrations see Townsend on Slander & L., ch. 8.

¹⁴ Van Tassel v. Capron, 1 Denio 250, 43 Am. Dec. 667; Worten v. Searing, 1 Viet. L. R. 122; Redway v. Gray, 31 Vt. 292; Buck v. Hersey, 31 Me. 558; Doyley v. Roberts, 3 Bing. N. C. 835; Brayton v. Cleveland Special Police, 63 Ohio St. 83; McCallum v. Lambie, 145 Mass. 234;

Smedley v. Soule, 125 Mich. 192; Newell on Defamation, etc., p. 181. See Potter v. New York Evening Journal Ass'n, 68 App. Div. (N. Y.) 95.

¹⁵ Jones v. Littler, 7 M. & W. 423; Fowler v. Bowen, 30 N. Y. 23; Lewis v. Hawley, 2 Day 495, 2 Am. Dec. 121; Starr v. Gardner, 6 Up. Can. Q. B. (O. S.) 512; Hogg v. Dorrall, 2 Port. 22; Davis v. Ruff, 1 Cheves. 17, 34 Am. Dec. 584; Western U. Tel. Co. v. Pritchett, 108 Ga. 411; Mitchell v. Bradstreet Co., 116 Mo. 226, 38 Am. St. 592, 20 L.R.A. 138; Masters v. Lee, 39 Neb. 574; Bee P. Co. v. World P. Co., 59 Neb. 713; Dun v. Weintraub, 111 Ga. 146, 50 L.R.A. 670.

¹⁶ Arrow S. Co. v. Bennett, 73 Hun 81; Warner v. Ingersoll, 157 Fed. 311.

sion or occupation of the plaintiff; but when they convey an imputation upon his character equally injurious to every one of whom they might be spoken they are not actionable unless such application be made.¹⁷ In an action for libel the fact that the words used had reference to the profession or business of the plaintiff is not the substantive ground of the action; their actionable quality does not in any case depend upon that consideration. And the plaintiff in such a case is entitled to recover for damages to him in his profession by reason of the libel without specific proof in regard to them.¹⁸ In this respect, as has been remarked, there is a distinction between libel and verbal slander. The sole proprietor of a business conducted under a firm name and libeled thereunder so as to affect him personally may recover other damages than those resulting from injury to his business.¹⁹

Under an allegation of loss of business a general loss or decline of patronage may be shown without naming particular customers or proving that they have ceased to do business with the plaintiff;²⁰ but if the loss sued for grew out of the failure of customers of the plaintiff to enter into certain business engagements with him the names of the persons who were so induced by the libel must be given.²¹ If the cause of action is the general injury to the plaintiff's reputation as a dealer and contractor the jury may consider that a merchant in poor credit is ordinarily compelled to pay more for goods than one in good credit and that parties who have contracts to give are reluctant to give them to persons of doubtful financial reputa-

¹⁷ Sanderson v. Caldwell, 45 N. Y. 405, 6 Am. Rep. 105. See Ivey v. Pioneer S. & L. Co., 113 Ala. 349, 359.

¹⁸ Id. See Burr's Damascus T. Works v. Peninsular T. Mfg. Co., 142 Mich. 417; Smith v. Hubbell, 142 Mich. 637.

A physician charged with assaulting a female patient may show the amount of his professional income before and after the publication of the libel and the change in the con-

duct toward him of his patients and acquaintances. Parker v. Republican Co., 181 Mass. 392; Morse v. Times-R. P. Co., 124 Iowa 707.

¹⁹ Bohan v. Record P. Co., 1 Cal. App. 429.

²⁰ Bee P. Co. v. World P. Co., 59 Neb. 713; Wright v. Coules, 4 Cal. App. 343; Hubbard v. Allyn, 200 Mass. 166; Gates v. Little, 36 Pa. Super. Ct. 422.

²¹ Brinkmann v. Taylor, 103 Fed. 773.

tion.²² A charge of drunkenness against one who is a minister,²³ or a master mariner in command of a vessel,²⁴ or a female²⁵ is actionable. Similar in nature to slander of one respecting his calling or vocation is the refusal to give an employee a clearance card, the effect thereof amounting to a representation that the person to whom it is refused belongs to a class not to be employed, he in fact not belonging thereto. Where there is a mutual agreement among employers not to employ men who have been discharged from or may quit their service unless such a card is presented one entitled to such a card may recover damages for the refusal to furnish it if such refusal prevents him from obtaining employment.²⁶ The plaintiff may, as part of his affirmative case, show his standing in, and capacity to earn through, his profession, though these elements would have a large bearing upon the measure of his recovery.²⁷ Where a libelous article injuriously reflects upon the ability and character of an attorney of high standing in a community and no justification is shown substantial damages should be awarded.²⁸ The liability under his head does not extend to the fees paid by the plaintiff to his attorney.²⁹

§ 1214. **Mental suffering and physical incapacity.** For such actionable words spoken or libelous matter published the damages are left to the discretion of the jury upon the particular facts. Compensatory damages may properly include recompense for the loss of patronage,³⁰ including that which may in

²² *Daisley v. Dun*, 107 Fed. 218.

²³ *McMillen v. Birch*, 1 Bin. 178, 2 Am. Dec. 426; *Chaddock v. Briggs*, 13 Mass. 248. But see *Tighe v. Wicks*, 33 Up. Can. Q. B. 479.

²⁴ *Irwin v. Brandwood*, 2 H. & C. 960; *Norfolk & W. S. Co. v. Davis*, 12 App. Cas. (D. C.) 306.

²⁵ *Brown v. Nickerson*, 5 Gray 1.

²⁶ *New York, etc. R. Co. v. Schaffer*, 17 Ohio C. C. 77; *Mattison v. Lake Shore, etc. R. Co.*, 2 Ohio N. P. 276; *New Iberia E. Co. v. McIlhenny*, 132 La. 149.

²⁷ *Post P. Co. v. Peck*, 199 Fed. 6. Evidence that letters sent by the

managers of an accident insurance company notifying policy holders of the cancellation of plaintiff's agency and accusing him of withholding money collected were discussed by employees in the railroad shop where plaintiff worked and by others with whom he did business is admissible. *Bigley v. National Fidelity & Casualty Co.*, 94 Neb. 813, 50 L.R.A. (N.S.) 1040.

²⁸ *Williams v. Hicks Printing Co.*, 159 Wis. 90.

²⁹ *Warren v. Ray*, 155 Mich. 91, 130 Am. St. 566.

³⁰ *Weiss v. Whittemore*, 28 Mich.

the future arise from the publication of the libel;³¹ and where the imputation is actionable because of its necessary operation to cause such injury and is of a want of personal fitness, or of any necessary moral trait, or is an imputation of gross dereliction in professional practice injury to the feelings, mental anxiety and suffering must³² or may be taken into consideration.³³ In a Connecticut case³⁴ the defamatory words spoken of a practicing physician were such as to imply he was so ignorant and unskilful that most of his patients lost their lives by following his prescriptions; and upon this point Sanford, J., said: "It is true that the words spoken relate only to the

353; *Blumhardt v. Rohr*, 70 Md. 328; *Bergmann v. Jones*, 94 N. Y. 51. See *Oliver v. Perkins*, 92 Mich. 304, for facts which justified the recovery of the profits of a business which was broken up by a series of wrongs, including libel.

³¹ *Ingram v. Lawson*, 6 Bing. N. C. 212; *Tripp v. Thomas*, 3 B. & C. 427; *Norfolk & W. S. Co. v. Davis*, 12 App. Cas. (D. C.) 306.

³² *Nicholson v. Merritt*, 23 Ky. L. Rep. 2281; *Anderson v. Shockley*, 159 Mo. App. 334; *Osborn v. Leach*, 135 N. C. 628, 66 L.R.A. 648; *Starks v. Comer*, — Ala. —, 67 So. 440.

The award of damages where the communication is libelous *per se* and no proof is offered as to damages as a result of mental suffering or loss of reputation, is for actual damages and not for punishment merely, and while the jury in their discretion may limit the amount of their award even down to nominal damages they should not be instructed to do so. *Id.*

³³ *Bird v. Press Pub. Co.*, 154 App. Div. (N. Y.) 491; *Mills v. Flynn*, 157 Iowa 477; *Parker v. Republican Co.*, 181 Mass. 392; *McClure Co. v. Philipp*, 96 C. C. A. 86, 170 Fed. 910; *Washington Times Co. v. Downey*, 26 App. Cas. (D. C.) 258; *Town-*

ley v. Yentseh, 98 Ark. 312; *Davis v. Mohn*, 145 Iowa 417, overruling *Prime v. Eastwood*, 45 Iowa 640, and saying that case stood practically alone in holding that mental pain was not to be regarded; *Jozsa v. Moroney*, 125 La. 813, 27 L.R.A. (N.S.) 1041; *Levert v. Daily States P. Co.*, 123 La. 594, 23 L.R.A. (N.S.) 726, 131 Am. St. 356; *Neafie v. Hoboken P. & P. Co.*, 75 N. J. L. 564; *Fields v. Bynum*, 156 N. C. 413; *Phillips v. Le June*, 1 Ohio C. C. (N.S.) 616; *Calderin v. Heraldo Espanol*, 4 Porto Rico Fed. 376; *Cook v. Globe P. Co.*, 227 Mo. 471; *Ott v. Press P. Co.*, 40 Wash. 308; *Welker v. Butler*, 15 Ill. App. 209; *Stallings v. Whittaker*, 55 Ark. 494; *Norfolk & W. S. Co. v. Davis*, *supra*.

Under a statute mental suffering has been held an element of the damages, without proof of other damages, though the publication is not libelous *per se*. *Guisti v. Galveston Tribune*, 105 Tex. 497.

The lapse of time between the wrong and the trial should be given great weight in determining whether allowance should be made for future mental suffering. *Reding v. Reding*, 143 Mo. App. 659.

³⁴ *Swift v. Dickerman*, 31 Conn. 294.

plaintiff's professional character and are aimed especially at his pecuniary interest dependent upon his professional calling and employment. But the natural, if not the necessary, effect of professional degradation and disgrace is personal anxiety and suffering on account of it. And that anxiety and suffering were proper subjects for compensation to the plaintiff and ought to be atoned for by the defendant. There is and there ought to be no other rule upon the subject than that a tortfeasor shall be held responsible in damages for the full amount of all the immediate injury caused by his wrongful acts. This rule was adopted by the superior court and sanctioned by this court in the recent case of *Lawrence v. Housatonic R. R. Co.*,³⁵ in that of *Seger v. Barkhamsted*³⁶ and in many other cases. It is difficult to conceive how a member of either of the learned professions can be injured in his professional character without being at the same time subjected to anxiety and mental suffering,—suffering on account of professional dishonor, to be followed as it naturally and almost necessarily is and *always ought to be* by social degradation and disgrace, and the ultimate loss of professional employment with its honors and emoluments. Bodily pain comprises but a very small part of the suffering endured by rational beings, and the injuries which the calumniator inflicts act, often entirely and always immediately, upon the mental sensibilities of his victim. Mental suffering then constitutes an important element in the calculation of compensation to be made for such an injury." The mental suffering for which there may be a recovery is only such as the plaintiff naturally experiences as the direct, immediate and proximate effect of the libel; he cannot prove what third persons have said respecting the publication for the purpose of showing increased mental suffering;³⁷ nor the grief of others or its influence upon him.³⁸

Independently of injuries to business interests, there is no dissent from the proposition that mental suffering is an element

³⁵ 29 Conn. 390.

³⁶ 22 Conn. 290.

³⁷ *Turner v. Hearst*, 115 Cal. 394.

See *Raines v. New York Press Co.*,

92 Hun 515.

³⁸ *Dennison v. Daily News P. Co.*,

82 Neb. 675.

of damages in actions of this class.³⁹ Where the words employed are actionable *per se* damages for such suffering are not special.⁴⁰ This rule is not affected by a statute which provides that in actions for slander only actual damages to property, business or feelings are recoverable.⁴¹ Malice is not essential to the right to recover for mental distress.⁴² Wounded feelings, enfeebled health and incapacity to perform labor, if these result from words slanderously spoken, are elements which require

³⁹ *Ellis v. Brockton P. Co.*, 198 Mass. 538, 126 Am. St. 454.

⁴⁰ *Ott v. Murphy*, 160 Iowa 730; *Butler v. Barret*, 130 Fed. 944; *Graybill v. De Young*, 140 Cal. 323; *Lombard v. Leunox*, 155 Mass. 70, 31 Am. St. 528; *Finger v. Pollack*, 188 Mass. 208; *Schattler v. Daily Herald Co.*, 162 Mich. 115; *Carpenter v. Hamilton*, 185 Mo. 603; *Vanloon v. Vanloon*, 159 Mo. App. 255; *Gendron v. St. Pierre*, 73 N. H. 419; *Price v. Clapp*, 119 Tenn. 425, 123 Am. St. 730; *Clair v. Battle Creek Journal Co.*, 168 Mich. 467; *Chesley v. Tompson*, 137 Mass. 136; *Nicholson v. Rogers*, 129 Mo. 136; *Childers v. San Jose Mercury P. & P. Co.*, 105 Cal. 284, 45 Am. St. 40.

⁴¹ *Cribbs v. Yore*, 119 Mich. 237.

⁴² *Butler v. Hoboken P. & P. Co.*, 73 N. J. L. 45; *Osterheld v. Star Co.*, 146 App. Div. (N. Y.) 388; *Malloy v. Bennett*, 15 Fed. 371; *Shattue v. McArthur*, 29 id. 136; *Dufort v. Abadie*, 23 La. Ann. 280; *Lombard v. Leunox*, 155 Mass. 70, 31 Am. St. 528; *Warner v. Press P. Co.*, 132 N. Y. 181; *Cahill v. Murphy*, 94 Cal. 29, 28 Am. St. 88; *Lehrer v. Elmore*, 100 Ky. 56; *Long v. Tribune P. Co.*, 107 Mich. 207; *Baldwin v. Boulware*, 79 Mo. App. 5; *Brooks v. Harrison*, 91 N. Y. 83, 92; *Van Ingen v. Star Co.*, 1 App. Div. (N. Y.) 429, affirmed without opinion, 157 N. Y. 695; *Belo v. Fuller*, 84 Tex. 450,

31 Am. St. 75; *Houston P. Co. v. Moulden*, 15 Tex. Civ. App. 574; *Fenstermaker v. Tribune P. Co.*, 13 Utah 532, 35 L.R.A. 611; *Enquirer Co. v. Johnston*, 18 C. C. A. 628, 72 Fed. 443; *Washington G. L. Co. v. Lansden*, 9 App. Cas. (D. C.) 508; *Derham v. Derham*, 123 Mich. 451; *Palmer v. New York News P. Co.*, 31 App. Div. (N. Y.) 210, 215; *Republican P. Co. v. Mosman*, 15 Colo. 399.

Under a statute providing for the survival of causes of action for personal injuries not resulting in death, damages for mental suffering of the person libeled may, in an action for the libel by his representative, after the death of such person pending the action, be recovered. *Houston P. Co. v. Dement*, 18 Tex. Civ. App. 30.

A statute making the publication of a libel concerning a deceased person which tends to scandalize the surviving relatives of such person punishable criminally, does not give the mother of an adult deceased person a right of action for shame, humiliation and mental anguish suffered by her on account of the libel. *Bradt v. New Nonpareil Co.*, 108 Iowa 449, 45 L.R.A. 681. Such an action will not lie regardless of such a statute. *Sorenson v. Balaban*, 4 N. Y. Ann. Cas. 7; *Wellman v. Sun P. & P. Ass'n*, 66 Hun 331.

compensation.⁴³ But it is held in Vermont and New Jersey that loss of time, physical pain and expense do not constitute elements of damage, though they may be proved to show the severity of mental suffering.⁴⁴ The right to recover for such suffering is not dependent upon the existence of other damage as the result of the slander or libel;⁴⁵ nor upon the character or reputation of the plaintiff or the effect of the wrong.⁴⁶ There need not be direct evidence of mental suffering; it may be inferred by the jurors from the nature of the injury and their general knowledge.⁴⁷ The rule laid down in an action for the invasion of privacy is believed to be applicable here on the question of the measure of the recovery for mental anguish: The injury sustained by a person whose name or picture is unwarrantedly used for advertising purposes rests upon the humiliation, mortification or mental distress he endures. Hence the nature of the act in which he was represented as being engaged and his previous use of his name and reputation are matters to be considered in fixing compensatory damages.⁴⁸ As bearing upon the plaintiff's mental suffering it may be shown that the article in question was republished in newspapers owned and controlled by the defendant and sold as news to other papers.⁴⁹ The plaintiff may show, as bearing upon the extent of his mental suffering, that he has a wife and sister.⁵⁰ The effect of the libel upon members of the plaintiff's

⁴³ *Zeliff v. Jennings*, 61 Tex. 458; *Townsley v. Yentsch*, 98 Ark. 312 ("physical pain" construed as referring to the nervous shock resulting from the humiliation).

⁴⁴ *Butler v. Hoboken P. & P. Co.*, 73 N. J. L. 45 (except as to expense); *Rea v. Harrington*, 58 Vt. 181, 56 Am. Rep. 561. *Contra*, as to expense *Shattuc v. McArthur*, 29 Fed. 136.

⁴⁵ *Hacker v. Heiney*, 111 Wis. 313; *Smiddy v. Pearlstine*, 201 Mass. 246, 131 Am. St. 397; *Cook*

v. Globe P. Co., 227 Mo. 471; *Brown v. Knapp*, 213 Mo. 655.

⁴⁶ *McArthur v. Sault News P. Co.*, 148 Mich. 556.

⁴⁷ *Moore v. Maxey*, 152 Ill. App. 647; *Butler v. Barret*, 130 Fed. 944; *Smith v. Sun P. Ass'n*, 55 id. 240; *Bergmann v. Jones*, 94 N. Y. 51.

⁴⁸ *Binns v. Vitagraph Co.*, 71 N. Y. Misc. 203.

⁴⁹ *Hearst v. New Yorker Staats Zeitung*, 71 N. Y. Misc. 7.

⁵⁰ *Post P. Co. v. Peck*, 199 Fed. 6.

family, may be shown for the purpose of showing the extent of his mental suffering.⁵¹

§ 1215. **Special damages.** If the defamed party suffers a particular injury which the jury would not be entitled to consider as the necessary result of the actionable publication, but which is a natural and proximate consequence thereof, it may be made the subject of additional compensation.⁵² Consequential, as distinguished from direct and necessary, damages are generally special.⁵³ What are special damages distinctively is very clearly stated in a Maryland case,⁵⁴ in which the court held that whether the words in themselves are actionable or only become so because of some special damage no evidence of any particular loss or injury caused by the words spoken is admissible unless such loss or injury is particularly pleaded. In certain actions special damages for defamation are essential to be shown in order to their maintenance. This is the case in all actions where the language used was not actionable *per se*.⁵⁵ And the special damages which must be shown in such cases may be alleged and proved, besides the necessary or general damages in the class of cases which have been con-

⁵¹ Ott v. Murphy, 160 Iowa 730, citing several cases from other states, and disapproving Couch v. Mining Journal Co., 130 Mich. 294.

⁵² A claim for special damage must rest on the natural and reasonable consequences of the words used. * Ludlow v. Batson, 5 Ont. L. R. 309.

⁵³ §§ 417-420.

⁵⁴ Dicken v. Shepherd, 22 Md. 399.

⁵⁵ McIntire v. Cudahy P. Co., 179 Ala. 404; Holt v. Ashby, 150 Ky. 612; Twigger v. Ossining Printing & Publishing Co., 161 App. Div. (N. Y.) 718; DeWitt v. Scarlett, 113 Md. 47; Reporters' Ass'n v. Sun P. & P. Ass'n, 186 N. Y. 437.

If the words spoken are actionable *per se* and could have been under-

stood by those who heard them in no other sense, averment and proof of special damages are unnecessary. Michael v. Matheis, 77 Mo. App. 556, 562; Pokrok Zapadu P. Co. v. Zizkovsky, 42 Neb. 64; Louisville Courier-Journal Co. v. Pope, 15 Ky. L. Rep. 877, proceeds on the opposite theory so far as pleading is concerned.

Where the picture of one woman is innocently used as that of another who is represented in a newspaper as endeavoring to secure a pardon for her father who is a convicted murderer, the plaintiff is entitled to have the case considered by the jury on the question of damages, although no special damages are proved. Van Wiginton v. Pulitzer Pub. Co., 134 C. C. A. 483, 218 Fed. 795.

sidered, and they cannot otherwise be recovered.⁵⁶ If alleged and not proved the action may still be maintained and substantial damages recovered.⁵⁷ Special damages are not recoverable if the plaintiff is not entitled to recover a nominal sum as general damages;⁵⁸ nor are they recoverable if the loss sustained was because the plaintiff had been conducting an illegal business.⁵⁹

In Iowa the desertion of a husband by his wife is not such a natural and proximate consequence of a slander which accuses him of larceny and adultery as to entitle him to special damages therefor. It might be otherwise if the charge was made for the purpose of accomplishing that result.⁶⁰ The contrary and better view is declared in Nebraska and Missouri: The alienation of the affections of a husband or wife and the loss of home and support which are proved to result from the circulation of slanderous reports charging the injured party with adultery are the natural and probable consequences of such

⁵⁶ *Callfas v. World Pub. Co.*, 93 Neb. 108; *Houston Chronicle P. Co. v. McDavid* (Tex. Civ. App.), 157 S. W. 224; *Friedman v. Pulitzer P. Co.*, 102 Mo. App. 683; *Denney v. Northwestern C. Ass'n*, 55 Wash. 331, 25 L.R.A. (N.S.) 1021; *Dickens v. Shepherd*, 22 Md. 399; *Shipman v. Burrows*, 1 Hall 399; *Harcourt v. Harrison*, id. 474; *Servatius v. Pichel*, 34 Wis. 292; *Rummell v. Otis*, 60 Mo. 365; *Price v. Whitely*, 50 Mo. 439; *McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 22 Am. St. 673; *Dun v. Weintraub*, 111 Ga. 416, 50 L.R.A. 670; *Mudd v. Rogers*, 102 Ky. 280; *Hatt v. Evening News Ass'n*, 94 Mich. 119, quoting the text; *Roberts v. Breckon*, 31 App. Div. (N. Y.) 431; *O'Toole v. Post P. & P. Co.*, 179 Pa. 271; *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, citing the text; *Rembt v. Roehr Co.*, 71 App. Div. (N. Y.) 459; *Loftus v. Bennett*, 68 App.

Div. (N. Y.) 128; *Gambrill v. Schooley*, 95 Md. 260, 63 L.R.A. 427.

The plaintiff may show the income from his business up to the time of the publication and what it was immediately afterward. *Morse v. Times-R. P. Co.*, 124 Iowa 707.

If the plaintiff claims damages for loss of time, the fact that his employer made no deduction from his wages does not relieve the defendant. *Elmer v. Fessenden*, 154 Mass. 427.

Loss of customers generally or of profits is a general, not a special, damage where the words used are actionable *per se*. *Williams P. Co. v. Saunders*, 113 Va. 156.

⁵⁷ *Weiss v. Whittemore*, 28 Mich. 353; *Wier v. Allen*, 51 N. H. 181; *Smith v. Thomas*, 2 Bing. N. C. 380.

⁵⁸ *Kidd v. Ward*, 91 Iowa 371.

⁵⁹ *O'Neil v. Adams*, 144 Iowa 385.

⁶⁰ *Georgia v. Kepford*, 45 Iowa 48.

reports, and constitute elements of damage in favor of such party in an action against the slanderer.⁶¹ If the plaintiff is restricted in his recovery to the special damages pleaded and proved he cannot recover general damages for the loss of his reputation.⁶² One who is a member of a legislative body cannot recover for the expense incurred as the result of an investigation by the same of the libelous charge made against him unless it appears that the investigation was sought by the defendant; and so of the injury to the plaintiff's feelings as the result of the investigation.⁶³ If in consequence of false and unfounded statements concerning the business standing of the plaintiff his creditors, who were supplying him goods on credit, were induced to demand immediate payment of their claims upon which he would otherwise have been extended time, and, in consequence, he was compelled to pay a discount upon his notes in order to raise money with which to meet such indebtedness, the sums so paid as discount are recoverable as part of the actual damages. But it is otherwise as to profits alleged to have been lost because of the plaintiff's inability to buy goods to be sold. These are too remote and conjectural.⁶⁴ The plaintiff may show the loss of the employment he was engaged in when the publication was made.⁶⁵ It has been said that injury to the political prospects of the plaintiff and his opportunities to secure public offices are not too remote and uncertain,⁶⁶ a view which may be doubted with all due respect to the court.

§ 1216. Exemplary damages. Wherever such damages are recoverable at all for malicious wrongs they may be recovered for libel and slander.⁶⁷ Exemplary damages may be awarded

⁶¹ Case v. Case, 45 Neb. 493, approving the opinion of Lord Campbell in *Lynch v. Knight*, 9 H. of L. 577; *Reding v. Reding*, 143 Mo. App. 659.

⁶² *Albrecht v. Patterson*, 12 Vict. L. R. 821.

⁶³ *Raines v. New York Press Co.*, 92 Hun 515; *Robertson v. Same*, 2 App. Div. (N. Y.) 49.

Suth. Dam. Vol. IV.—56.

⁶⁴ *Bradstreet Co. v. Oswald*, 96 Ga. 396.

⁶⁵ *Morse v. Times-R. P. Co.*, 124 Iowa 707.

⁶⁶ *Galveston Tribune v. Johnson* (Tex. Civ. App.), 141 S. W. 302.

⁶⁷ *Argall v. Sutor*, 114 Minn. 371.

It is competent for the legislature to provide that only compensatory damages shall be recovered in ac-

where the words are actionable by statute without proof of actual pecuniary loss, as the law presumes that damages result from the utterance of insulting words, actionable by statute, just as it does where the words are actionable *per se*.⁶⁸ Whether they may be allowed where the damages are merely nominal is a question upon which the courts are not agreed. In Maine the legal signification of a verdict for nominal damages is, either that there was no actual and express malice entertained by the defendant or that, if there was, it did the plaintiff no injury. In such a case there is no room for punitive damages.⁶⁹ A New York case decided at a special term of the supreme court is in opposition to this view. Gaynor, J., said he did not think it the law. "A person may be of such high character that the grossest libel would damage him none; but that would be no reason for withdrawing his case from the wholesome, if not necessary, rule in respect of punitive damages. It is in such cases that the rule illustrates its chief value and necessity."⁷⁰ In Illinois such damages may be allowed where malice is implied in the absence of proof of actual damages.⁷¹ Under the statutes of Pennsylvania legal malice is ground for exemplary damages.⁷² In general to justify the finding of any sum beyond fair compensation for the injury, in order to punish the defendant, the nature of the defamation and circumstances of the case should be such as to satisfy the jury that there was actual malice or a recklessness equivalent thereto.⁷³ In New York recklessness or carelessness in the

tions for libel. *Goebeler v. Wilhelm*, 17 Pa. Super. Ct. 432.

⁶⁸ *Boyd v. Boyd*, 116 Va. 326.

⁶⁹ *Stacy v. Portland P. Co.*, 68 Me. 279.

⁷⁰ *Prince v. Brooklyn Daily Eagle*, 16 N. Y. Misc. 186, 189.

⁷¹ *Moore v. Maxey*, 152 Ill. App. 647, citing *McKee v. Ingalls*, 5 Ill. 30; *Schofield v. Baldwin*, 102 Ill. App. 560; *Gaines v. Gaines*, 109 id. 226.

⁷² *Binder v. Pottstown Daily News Co.*, 33 Pa. Super. Ct. 411.

⁷³ *Washington Herald Co. v. Berry*, 41 App. Cas. (D. C.) 322; *Hulbert v. Arnold*, 83 N. J. L. 114; *Ellis v. Garrison*, — Tex. Civ. App. —, 174 S. W. 962; *Houston Chronicle Pub. Co. v. McDavid*, — Tex. Civ. App. —, 173 S. W. 467; *Williams v. Hicks Printing Co.*, 159 Wis. 90; *Mann v. Dempster*, 104 C. C. A. 110, 181 Fed. 76; *Post P. Co. v. Butler*, 71 C. C. A. 309, 137 Fed. 723; *Murray v. Galbraith*, 95 Ark. 199; *Greer v. White*, 90 Ark. 117; *Davis v. Hearst*, 160 Cal. 143; *Don-*

publication of a libel is as good ground for awarding punitive

ahoe v. Star P. Co., 4 Pennew. (Del.) 166; Short v. Acton, 33 Ind. App. 361; Thompson v. Rake, 140 Iowa 232, 118 L.R.A.(N.S.) 921; Bingham v. Gaynor, 135 App. Div. (N. Y.) 426; Walker v. Best, 107 App. Div. (N. Y.) 304; Good v. Grit P. Co., 36 Pa. Super. Ct. 238; Pfister v. Milwaukee Free Press Co., 139 Wis. 627; Wood v. Custer, 86 Kan. 387, 38 L.R.A.(N.S.) 1176; Garvin v. Garvin, 87 Kan. 97; Tillotson v. Cheetham, 3 Johns. 56, 3 Am. Dec. 459; Taylor v. Church, 8 N. Y. 452; Symonds v. Carter, 32 N. H. 458; Cramer v. Noonan, 4 Wis. 231; Klinek v. Colby, 46 N. Y. 427, 7 Am. Rep. 360; Kendall v. Stone, 2 Sandf. 269; Gilreath v. Allen, 10 Ired. 67; Bonnin v. Elliott, 19 La. Ann. 322; Kinney v. Hosea, 3 Harr. 397; Montgomery v. Knox, 23 Fla. 595; De Pew v. Robinson, 95 Ind. 109; Newman v. Stein, 75 Mich. 402, 13 Am. St. 447; Lanius v. Druggist P. Co., 20 Mo. App. 12; Sowers v. Sowers, 87 N. C. 303; Reeves v. Winn, 97 id. 246, 2 Am. St. 287; Klewin v. Bauman, 53 Wis. 244; Shattuc v. McArthur, 29 Fed. 136; Orth v. Featherly, 87 Mich. 315; Schomberg v. Walker, 132 Cal. 224; Callahan v. Ingram, 122 Mo. 355, 43 Am. St. 583; Nicholson v. Rogers, 129 Mo. 136; Palmer v. Leader P. Co., 6 Pa. Dist. 182; Blackwell v. Landreth, 90 Va. 748; Folwell v. Providence Journal Co., 19 R. I. 551, 555; Taylor v. Hearst, 107 Cal. 262; Westerfield v. Scripps, 119 Cal. 607; Nailor v. Ponder, 1 Marvel 498; Blocker v. Schoff, 83 Iowa 265; Lehrer v. Elmore, 100 Ky. 56; Peterson v. Western U. Tel. Co., 72 Minn. 41, 71

Am. St. 461, 40 L.R.A. 661; Palmer v. New York News P. Co., 31 App. Div. (N. Y.) 210, 215; Smith v. Times Co., 4 Pa. Dist. 399; Becker v. Public Ledger, 6 id. 89; Thompson v. McCready, 194 Pa. 32; Tillinghast v. McLeod, 17 R. I. 208; Born v. Rosenow, 84 Wis. 620; Templeton v. Graves, 59 Wis. 95; Smith v. Sun P. & P. Ass'n, 5 C. C. A. 91, 55 Fed. 240; Press P. Co. v. McDonald, 11 C. C. A. 155, 63 Fed. 238, 26 L.R.A. 531 (failure to have dispatch made libelous by error in transmission repeated to insure accuracy, though added expense and loss of time would have resulted); Bennett v. Salisbury, 24 C. C. A. 329, 78 Fed. 769; Times P. Co. v. Carlisle, 36 C. C. A. 475, 94 Fed. 762; Tribune Ass'n v. Follwell, 46 C. C. A. 526, 107 Fed. 646; Hulbert v. New Nonpareil Co., 111 Iowa 490; Courier-Journal Co. v. Sallee, 104 Ky. 335.

The manifestation of spite and malice by the defendant's counsel in conducting the trial may sustain an award of exemplary damages. Lamb v. West, 15 New South Wales L. R. 120, 127.

Under the Alabama statute, Code of 1907, § 3750, the plaintiff may not recover punitive damages in addition to actual damages without having made a demand for retraction before suit. Fitzpatrick v. Age-Herald Pub. Co., 184 Ala. 510, 51 L.R.A.(N.S.) 401.

The mere failure to establish the truth of the charge is not cause for holding as matter of law that the plea was filed in bad faith or that the charge was maliciously made. Moore v. Beck, 71 N. J. L. 7.

damages as is the existence of personal ill-will,⁷⁴ and this is probably the general rule, as it might well be.⁷⁵ Generally, but not universally, the falsity of a publication which is libelous *per se* is sufficient proof of malice to sustain an award of exemplary damages;⁷⁶ and the question of whether they shall be

⁷⁴ *Bresslin v. Star Co.*, 166 App. Div. (N. Y.) 89; *Burkhardt v. Press Pub. Co.*, 130 App. Div. (N. Y.) 22; *Amory v. Vreeland*, 125 App. Div. (N. Y.) 850; *Butler v. Gazette Co.*, 119 App. Div. (N. Y.) 767; *Smith v. Matthews*, 152 N. Y. 152; *Warner v. Press P. Co.*, 132 N. Y. 181, 185; *Holmes v. Jones*, 121 N. Y. 461, 467, 147 N. Y. 59, 67, 49 Am. St. 646; *Weber v. Butler*, 81 Hun 244; *Grant v. Herald Co.*, 42 App. Div. (N. Y.) 354; *Payne v. Rouss*, 46 App. Div. (N. Y.) 315; *McMahon v. New York News P. Co.*, 51 App. Div. (N. Y.) 488; *Crane v. Bennett*, 77 App. Div. (N. Y.) 102.

Where the defendant published the article without making any inquiry concerning the truthfulness of its charges it was proper to say to the jury that it was published wantonly, recklessly, and with an utter disregard as to whether it was true or false. *Turton v. New York Recorder Co.*, 144 N. Y. 144; *Potter v. New York Evening Journal P. Co.*, 69 App. Div. (N. Y.) 95; *Butler v. Barret*, 130 Fed. 944.

⁷⁵ *Russell v. Washington Post Co.*, 31 App. Cas. (D. C.) 277.

⁷⁶ *Beeson v. Gossard Co.*, 167 Ill. App. 561; *Mills v. Flynn*, 149 Iowa 477; *Andreas v. Hinson*, 157 Iowa 43; *Bergmann v. Jones*, 94 N. Y. 51; *Samuels v. Evening Mail Ass'n*, 75 id. 604; *Warner v. Press P. Co.*, 132 id. 181; *Morning Journal Ass'n v. Rutherford*, 2 C. C. A. 354, 51 Fed. 513, 16 L.R.A. 803; *Nicholson v. Merritt*, 23 Ky. L. Rep. 2281;

Gambrill v. Schooley, 93 Md. 48; *Clark v. North American Co.*, 203 Pa. 346; *Childers v. San Jose Mercury P. & P. Co.*, 105 Cal. 284, 290, 45 Am. St. 40; *Evening News Ass'n v. Tryon*, 42 Mich. 549, 36 Am. Rep. 450; *Clements v. Maloney*, 55 Mo. 352; *Schmisseur v. Kreilich*, 92 Ill. 347; *Snyder v. Fulton*, 34 Md. 128, 6 Am. Rep. 314; *Nolan v. Traber*, 49 Md. 460, 33 Am. Rep. 277; *Colby v. McGee*, 48 Ill. App. 294; *Hintz v. Graupner*, 138 Ill. 158; *Walker v. Wickens*, 49 Kan. 42; *Callahan v. Ingram*, 122 Mo. 355, 43 Am. St. 583; *Ferguson v. Chronicle P. Co.*, 72 Mo. App. 462; *Arnold v. Savings Co.*, 76 id. 159; *Van Ingen v. Star Co.*, 1 App. Div. 429, affirmed without opinion, 157 N. Y. 695; *Gray v. Sampers*, 35 App. Div. 270; *Morrison v. Press P. Co.*, 59 N. Y. Super. 216; *Lee v. Crump*, 146 Ala. 655; *Tingley v. Times Mirror Co.*, 151 Cal. 1; *Conwisher v. Johnson*, 127 Ill. App. 602; *Pennsylvania I. W. Co. v. Vogt Mach. Co.*, 139 Ky. 528, 3 L.R.A. (N.S.) 348, 139 Am. St. 504; *Cairnes v. Pelton*, 103 Md. 40; *Shockey v. McCauley*, 101 Md. 461; *Brown v. Knapp*, 213 Mo. 655; *Carpenter v. Hamilton*, 185 Mo. 603; *Miller v. Dorsey*, 149 Mo. App. 24; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. 416; *Crane v. Bennett*, 177 N. Y. 106; *Saunders v. Post-S. P. Co.*, 107 App. Div. (N. Y.) 84. See *Stallings v. Whitaker*, 55 Ark. 494.

In Kentucky malice is implied where the words are actionable *per se* and punitive damages may be

given is not to be withdrawn from the jury because the defendant has given evidence tending to show that in fact he bore no malice.⁷⁷ The plaintiff may show that defendant was actuated by express malice.⁷⁸ Where the matter is of that character injury to the plaintiff's feelings may be considered in awarding such damages.⁷⁹ In Connecticut and Ohio the jury may allow such damages in view of the counsel fees the plaintiff has incurred on account of the wrong done him.⁸⁰ In New

awarded. *Reid v. Sun Pub. Co.*, 158 Ky. 727.

There cannot be a recovery of exemplary damages under the Colorado statute providing therefor unless the publication was libelous *per se* and was attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the plaintiff's rights. *Republican P. Co. v. Conroy*, 5 Colo. App. 262. A case decided by the St. Louis court of appeals proceeds on the same view, though no statute affected the decision. *Nelson v. Wallace*, 48 Mo. App. 193, 201. But this case seems to have been disapproved. *Fulkerston v. Murdock*, 53 Mo. App. 151.

In Texas express or implied malice must be shown. *Fessinger v. El Paso Times Co.* (Tex. Civ. App.), 154 S. W. 1171.

In Wisconsin, though malice is implied from the falsity of the words spoken, exemplary damages are not to be awarded unless there was special ill-will, bad intent or malevolence toward the plaintiff—express malice. *Templeton v. Graves*, 59 Wis. 95; *Eviston v. Cramer*, 57 Wis. 570; *Reed v. Keith*, 99 Wis. 672. Such seems to be the law in Arkansas. *Gaines v. Belding*, 56 Ark. 100.

Malice in fact is never presumed, but is always to be proved "and the utmost limit of the law is reached when it is declared that by

proof of the unprivileged character of a publication libelous *per se* the jury may infer the existence of this malice." *Davis v. Hearst*, 160 Cal. 143, correcting a statement in *Tingley v. Times Mirror Co.*, 151 Cal. 1.

Malice or gross carelessness must be shown. *Calderin v. Heraldo Espanol*, 4 Porto Rico Fed. 376.

The falsity of an unprivileged libel *per se* is presumed. *Hume v. Kusche*, 42 N. Y. Misc. 414.

A telegraph company is not liable for punitive damages unless other evidence of intent is shown than the transmission of a libelous message. *Western U. Tel. Co. v. Cashman*, 65 C. C. A. 607, 132 Fed. 805.

⁷⁷ *Beeson v. Gossard Co.*, 167 Ill. App. 561; *Morning Journal Ass'n v. Duke*, 63 C. C. A. 459, 128 Fed. 657; *Logan v. Hodges*, 146 N. C. 38; *Gray v. Sampers*, 35 App. Div. (N. Y.) 270, citing *Samuels v. Evening Mail Ass'n*, 9 Hun 288, the dissenting opinion in which was approved in 75 N. Y. 604.

⁷⁸ *Fields v. Bynum*, 156 N. C. 413; *Kloths v. Hess*, 126 Wis. 587; *Gambrell v. Schooley*, 95 Md. 260, 63 L.R.A. 427.

⁷⁹ *Brooks v. Harrison*, 91 N. Y. 83.

⁸⁰ *Wynne v. Parsons*, 57 Conn. 73, and cases cited, p. 84; *Kahn v. Cincinnati Times-Star*, 10 Ohio Dec. 599.

York a husband's liability for punitive damages, where he is a defendant simply because of his wife's wrong, is not so broad as that of an actual wrong-doer.⁸¹ In Tennessee no liability attaches to the husband for the acts of his wife in this regard.⁸² But in Texas husband and wife are equally liable for her torts, and a general judgment may be rendered against them both; it may, however, require that her separate estate be exhausted before resort can be had to their common property or that owned by the husband alone.⁸³ In a joint action against a publisher and a correspondent exemplary damages should not exceed the sum that ought to be assessed against the defendant who is least culpable, and if only one of the defendants is liable for such damages, none can be recovered.⁸⁴ "If two be sued the motive of one must not be allowed to aggravate the damages against the other. Nor should the improper motive of an agent be matter of aggravation against his principal."⁸⁵ The conduct of counsel in the course of the trial may be cause for awarding vindictive damages—as where he refused to state in answer to a question by the court whether dishonesty was attributed to the plaintiff, the plea being fair comment.⁸⁶ Where the verdict is not required to be for a specific sum and the awards for compensatory and punitive damages may be separate, specific amounts may be awarded against such of the defendants as were actuated by malice in fact, though others were not so actuated.⁸⁷ The circumstances under which the words complained of were spoken are material in determining whether exemplary damages should be allowed and the amount thereof.⁸⁸ It is not an insuperable objection to their recovery that the person libeled was but five years old. "His susceptibility to vexation and humiliation was at hand and his

⁸¹ *Upton v. Upton*, 51 Hun 184.

⁸² *Price v. Clapp*, 119 Tenn. 425, 123 Am. St. 730.

⁸³ *Zeliff v. Jennings*, 61 Tex. 458.

⁸⁴ *Hearne v. De Young*, 119 Cal. 670, 681.

⁸⁵ *Bigelow's Odgers on Libel & Slander* 296; *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. 317. But see

Clifford v. Press P. Co., 78 App. Div. (N. Y.) 79, and cases cited.

⁸⁶ *Swinburne v. Syme*, Vict. L. R. (1909) 550.

⁸⁷ *Davis v. Hearst*, 160 Cal. 143; *Mauk v. Brundage*, 68 Ohio St. 89, 62 L.R.A. 477.

⁸⁸ *Phillips v. Le June*, 25 Ohio C. C. 107.

appreciation of the outrage committed would grow in greater proportion than would the failure of memory in his associates."⁸⁹ In some states exemplary damages are not recoverable if the defendant may be criminally prosecuted for the wrong done;⁹⁰ nor unless they are specially claimed in the petition.⁹¹

The general rules governing the recovery of exemplary damages and the liability therefor of principals for the acts of their agents are elsewhere considered.⁹² It may be convenient to note here some cases bearing upon the liability of publishers for the malice and acts of their reporters and correspondents. A newspaper proprietor is not subject to vindictive damages because of the publication of libelous matter without his knowledge or consent unless proof is made from which his approval thereof may be legally inferred. The absence of proof of reproach administered to the employee who inserted the article, or of his discharge, does not establish a ratification of his act.⁹³ But if the answer of a corporation substantially reiterates the libel a finding that its publication was ratified will be sustained.⁹⁴ In the absence of negligence the owner of a newspaper is not chargeable with the express malice of an employee if he had no knowledge that the false accusation was to be made;⁹⁵ but if the employee stands in the place of the employer and has entire control of a newspaper or a portion of it he is thereby practically authorized to write and publish therein anything he may choose, and the latter cannot claim exemption from any of the legal consequences of the former's acts, whether they are the result of negligence or wilfulness.⁹⁶ In answer to the contention that a corporation was not subject to punitive damages on

⁸⁹ *Munden v. Harris*, 153 Mo. App. 652.

⁹⁰ *White v. Sun P. Co.*, 164 Ind. 426; *Tracy v. Hackett*, 19 Ind. App. 133, 65 Am. St. 398. See § 402. *Contra*, *Colbert v. Journal Pub. Co.*, 19 N. M. 156.

⁹¹ *Anderson v. Shockley*, 159 Mo. App. 334.

⁹² Ch. 9.

⁹³ *Haines v. Schultz*, 50 N. J. L.

481; *Neafie v. Hoboken P. & P. Co.*, 72 N. J. L. 340.

⁹⁴ *Tribune Ass'n v. Follwell*, 46 C. C. A. 526, 107 Fed. 646.

⁹⁵ *Detroit Post Co. v. McArthur*, 16 Mich. 447; *Scripps v. Reilly*, 38 id. 10; *Robertson v. Wyld*, 2 M. & R. 101 *Eviston v. Cramer*, 57 Wis. 570.

⁹⁶ *Davis v. Hearst*, 160 Cal. 143; *Crane v. Bennett*, 177 N. Y. 106;

account of the acts of its agents the court said: But the charges published were gathered and circulated in the course of the defendant's ordinary business by its agents who were acting within the scope of the authority given them, and for acts done by the agents of a corporation in the course of its business and of their employment a corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances.⁹⁷ In Michigan an award of exemplary damages has been sustained against a newspaper because its reporter was informed of the falsity of the statements published before publication was made.⁹⁸ In Kentucky the publication of a libel by an agent is ratified by the failure of the principal to disapprove or repudiate it after being informed of the fact.⁹⁹

§ 1217. **Damages in discretion of jury.** The amount of damages in these cases, both compensatory and exemplary, is in the discretion of the jury; and being so, the verdict must be palpably and grossly excessive or insufficient to induce the court to set it aside.¹ The mere fact that the appellate court, had it been

Rose v. Imperial E. Co., 127 App. Div. (N. Y.) 885; Pfister v. Milwaukee Free Press Co., 139 Wis. 627; Bruce v. Reed, 104 Pa. 408, 49 Am. Rep. 586; Malloy v. Bennett, 15 Fed. 371; Hoboken P. & P. Co. v. Kahn, 59 N. J. L. 218; McMahon v. Bennett, 31 App. Div. (N. Y.) 16. See Bennett v. Salisbury, 24 C. C. A. 329, 78 Fed. 769.

⁹⁷ Pennsylvania I. Works v. Vogt Mach. Co., 139 Ky. 497, 8 L.R.A. (N.S.) 1023, 139 Am. St. 504; St. Louis S. R. Co. v. McArthur, 31 Tex. Civ. App. 205; Times P. Co. v. Carlisle, 36 C. C. A. 475, 487, 94 Fed. 762.

⁹⁸ Hatt v. Evening News Ass'n, 94 Mich. 114.

⁹⁹ Pennsylvania I. W. Co. v. Vogt Mach. Co., *supra*.

¹ Wolfkowsky v. Garfunkel, 65 Fla. 10, 44 L.R.A. (N.S.) 351;

Reeves v. Roth, 179 Ill. App. 95; Emerson v. Miller, 115 Iowa 315 (especially if punitive damages are justified); Downs v. Cassidy, 47 Mont. 471; Bresslin v. Star Co., 148 N. Y. S. 295, affirmed in 166 App. Div. (N. Y.) 89 (verdict for \$6,000 not excessive where defendant sought to establish truth of libel by pleading justification and offering proof in support thereof); Hulbert v. Arnold, 83 N. J. L. 114; Boyd v. Boyd, 116 Va. 326; Butler v. Every Evening P. Co., 140 Fed. 934; Advertiser Co. v. Jones, 169 Ala. 196; Dahl v. Hansen, 152 Iowa 555; Burgess v. Patterson, 139 Ky. 547; Argall v. Sutor, 114 Minn. 371; Meriwether v. Knapp, 120 Mo. App. 354; Amory v. Vreeland, 125 App. Div. (N. Y.) 850; Saunders v. Post-S. P. Co., 107 App. Div. (N. Y.) 84; Mix v. North American Co.,

sitting as a jury, would have reached a different conclusion as to the extent of the plaintiff's injuries, is not, of itself, held

12 Pa. Dist. 446; *American Freehold L. M. Co. v. Brown*, 54 Tex. Civ. App. 448; *Coffman v. Spokane Chronicle P. Co.*, 65 Wash. 1; *Warren v. Kearney*, 63 Wash. 369; *Pfister v. Milwaukee Free Press Co.*, 139 Wis. 627; *Flannigan v. Stauss*, 131 Wis. 94; *Jones v. Greeley*, 25 Fla. 629, 645; *Blakeman v. Blakeman*, 31 Minn. 396; *Lanius v. Druggist P. Co.*, 20 Mo. App. 12; *Templeton v. Graves*, 59 Wis. 95; *Grace v. McArthur*, 76 Wis. 641; *Malloy v. Bennett*, 15 Fed. 371; *Shattuc v. McArthur*, 29 id. 136; *Praed v. Graham*, 24 Q. B. Div. 53; *Lowe v. Herald Co.*, 6 Utah 175; *Douglass v. Tousey*, 2 Wend. 352; *King v. Root*, 4 id. 113, 21 Am. Dec. 102; *Sanders v. Johnson*, 6 Blackf. 50, 36 Am. Dec. 564; *Bell v. Howard*, 4 Litt. 117; *Riley v. Nugent*, 1 A. K. Marsh. 431; *Ross v. Ross*, 5 B. Mon. 20, 30 Am. Dec. 669; *Blume v. Scheer*, 83 Minn. 409; *Gaines v. Belding*, 56 Ark. 100, 104; *Sherwood v. Kyle*, 125 Cal. 652; *McNally v. Burleigh*, 91 Me. 22; *Bishop v. Journal N. Co.*, 168 Mass. 327; *Manget v. O'Neill*, 51 Mo. App. 35; *Unterberger v. Scharff*, id. 102; *Arnold v. Sayings Co.*, 76 id. 159; *Holmes v. Jones*, 147 N. Y. 59, 49 Am. St. 646, 69 Hun 346; *Scott v. Sun P. & P. Ass'n*, 74 Hun 284; *Davey v. Davey*, 22 N. Y. Misc. 668; *Smith v. Times Co.*, 4 Pa. Dist. 399; *Palmer v. Leader P. Co.*, 7 Pa. Super. Ct. 594; *Luft v. Lingane*, 17 R. I. 420; *Turner v. Stevens*, 8 Utah 75; *Times P. Co. v. Carlisle*, 36 C. C. A. 475, 482, 94 Fed. 762; *Brown v. Vannaman*, 85 Wis. 451, 39 Am. St. 860; *Cooper v. Sun P. & P. Ass'n*, 57 Fed. 566; *Brown v. Syme*, 16 Vict. L. R. 392; *Clair v. Battle Creek Journal Co.*, 168 Mich. 467;

Astruc v. Star Co., 195 Fed. 349; *De Severinus v. Press P. Co.*, 147 App. Div. (N. Y.) 161; *Swinburne v. Syme*, Vict. L. R. (1909) 550.

A verdict for \$5000 was sustained where defendant was worth \$200,000 and called plaintiff a whore. *Williamson v. Eckhoff*, 185 Mo. App. 234.

A judgment for \$3000, entered after a remittitur of \$1000 in favor of a railroad shop employee who also sold accident insurance among his associates was upheld where he lost a monthly revenue of \$150 to \$200 per month as insurance agent as a result of letters sent by the insurance manager to policy holders in which notice was given of the cancellation of the agency and statements made as to plaintiff's dishonesty in not accounting for money collected. *Bigley v. National Fidelity & Casualty Co.*, 94 Neb. 813, 50 L.R.A.(N.S.) 1040.

In *Newell on Defamation*, pp. 912-927, is a collection of cases in which verdicts have been sustained or set aside because the damages awarded were not excessive or were so. See *Harris v. Arnott*, 26 L. R. Ir. 55.

Verdicts have been set aside because excessive in the following recent cases: *Libby v. Fowle*, 90 Me. 262; *Peterson v. Western U. Tel. Co.*, 65 Minn. 18, 33 L.R.A. 302, 75 Minn. 368; *Gray v. Times N. Co.*, 78 Minn. 323; *Bee P. Co. v. World P. Co.*, 59 Neb. 713; *White v. Newcomb*, 25 App. Div. (N.Y.) 397; *Bank v. Bowdre*, 92 Tenn. 723, 742; *Reed v. Keith*, 99 Wis. 672; *Crane v. Bennett*, 77 App. Div. (N. Y.) 102; *Mothersill v. Voliva*, 158 Ill. App. 16; *Bailey v. Kling*, 88 Neb. 699; *Riker v.*

to be a sufficient reason for either altering the verdict or directing a new trial. Exemplary damages should be proportioned to

Clopton, 83 App. Div. (N. Y.) 310; Daley v. Lundin, 8 New South Wales St. Rep. 447; McCormick v. Hawkins, 169 Mich. 641; Osterheld v. Star Co., 146 App. Div. (N. Y.) 388; Sotham v. Drovers' T. Co., 239 Mo. 606; Davis v. Starrett, 97 Me. 568; Cain v. Osler, 168 Iowa 59; Hagener v. Pulitzer Pub. Co., 172 Mo. App. 436.

In *First Nat. Bank of Waverly v. Winters*, 165 App. Div. (N. Y.) 726, it was held that a verdict for the defendant should be set aside where a bank is charged with dishonesty, as substantial damages should have been awarded.

In Louisiana if a verdict in favor of the plaintiff is worse than inadequate, as by being equivocal, it will be increased. *Mequet v. Silverman*, 52 La. Ann. 1369. The supreme court increased a verdict for one dollar to three hundred dollars. In *Simpson v. Robinson*, 104 La. 180, a verdict for twenty-five dollars was increased to five hundred dollars. In *Schwing v. Dunlap*, 130 La. 498, a verdict for \$50,000 was reduced to \$5,000.

In England a new trial will not be granted because the award is inadequate. *Kelly v. Sherlock*, L. R. 1 Q. B. 686. This seems to be the rule in Australia. *Davies v. Bond*, 13 Aust. Com. L. R. 518.

In *Blackwell v. Landreth*, 90 Va. 748, a verdict was set aside because it was inadequate.

In Indiana a verdict will not be set aside because of the inadequacy of the award. *White v. Sun, P. Co.*, 164 Ind. 426.

The result of adjudications in Michigan is thus stated in *Scripps v. Reilly*, 38 Mich. 23: "1. In any

injury entitling the party to redress, damages to the person, property and reputation, together with such special damage as may be shown are recoverable. 2. Where the act done is one which from its very nature must be expected to result in mischief, or where there is malice, or wilful or wanton misconduct, carelessness or negligence so great as to indicate a reckless disregard of the rights or safety of others, a new element of damages is allowed, viz.: for injury to the feelings of the plaintiff. 3. Damages for injuries to feelings are only allowed for those torts which consist of some voluntary act or very gross neglect, and depend in amount very much upon the degree of fault evinced by all the circumstances. 4. Where the tort consists of some voluntary act, but no element of malice is shown to have existed, but the wrong was done in spite of proper precaution, the damages to be awarded on account of injured feelings will be reduced to such sum as must inevitably have resulted from the wrong itself. 5. Where, however, the elements exist in a case entitling a party to recover damages for injured feelings, the amount to be allowed for shame, mental anxiety, insulted honor, and suffering and indignation consequent on the wrong, may be increased or aggravated by the vindictive feelings, or the degree of malice, recklessness, gross carelessness or negligence of the defendant, as the injury is much more serious where these elements, or either of them, are shown to have existed. 6. This increase of damages dependent upon the conduct of the defendant must be considered in

the degree of malice entertained by the defendant.² A grossly inadequate verdict will be set aside if there was error in the charge.³ As a test to determine whether the verdict is for a sum out of proportion to the extent of the injury sustained Lord Esher said: The first question is, what is the rule of conduct which should be followed by the court to which an application is made in an action for libel to set aside the verdict on the ground that the damages given by the jury are excessive?

this state as actual damages, although usually spoken of as exemplary, vindictive or punitive, and the amount thereof to be recovered, where recoverable at all, as they are incapable of ascertainment by any other known rule, must rest in the fair and deliberate judgment and discretion of the jury acting upon their own sense of justice in view of all the circumstances, both mitigating and aggravating, appearing in the case, and which can fairly be said to give color to or characterize the act, aided, however, by such instructions from the court as will tend to prevent the allowance of damages merely fanciful, or so remote as not fairly resulting from the injury. 7. So far as these damages are concerned, the fact that an indictment may or may not be pending or threatened for the same wrong is wholly immaterial, as they are allowed by way of remuneration for the injury sustained. If this allowance also operates by way of punishment, this is an indirect result equally applicable to damages allowed for injuries to person or property. 8. In cases of libel the publication is always considered a voluntary act, and is presumed to have proceeded from malicious motives. The actual motive may, however, be shown either in aggravation or reduction of damages to the feelings of the person injured. In other

words, the spirit and intention of the defendant in publishing the libel may be considered by the jury in estimating the injuries done to the plaintiff's feelings. 9. Want of proper precaution in the employment of agents or assistants, or of proper care in the conduct of the paper, or the retention of improper employees after ascertaining their incompetency, carelessness or negligence, may be shown to increase the damages to wounded feelings; but express malice in the employees would not be admissible for such purpose, where the act was done without the knowledge or consent of the defendant, when proper care had been exercised in their employment and retention. *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Welch v. Ware*, 32 Mich. 77, and authorities cited on p. 86; *Elliott v. Van Buren*, 33 Mich. 56, 20 Am. Rep. 668; *Livingston v. Burroughs*, 33 Mich. 511; *Friend v. Dunks*, 37 Mich. 25."

If an article is libelous the fact that it may not be believed does not require a verdict for nominal damages; they may be assessed by the jury. *Bishop v. Journal N. Co.*, *supra*.

² *Davis v. Hearst*, 160 Cal. 143.

³ *Lord v. New York Evening Journal P. Co.*, 130 App. Div. (N. Y.) 105.

I think that the rule of conduct is as near as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the court, having fully considered the whole circumstances of the case, come to this conclusion only: We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them, then they ought not to interfere with the verdict. If, on the other hand, the court thinks that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interfere with the verdict. If the authorities are looked at that will be found to be the rule of conduct which the judges have adopted.⁴

§ 1218. **Special damages when words not actionable per se.** Defamatory language from the false speaking or publication of which damage is not inferred may be the basis of an action if injury results.⁵ The injury must be of a pecuniary nature or cause detriment to important temporal interests, must have accrued when the suit was begun and must appear to be the natural and proximate consequence of the publication.⁶ This kind of slander is only actionable in respect of some special damage proceeding from it; such damage is the gist of the action and must be specially alleged and proved or the action will fail.⁷ There is some contrariety of decision as to what

⁴ Praed v. Graham, 24 Q. B. Div. 53; Hicks v. Gregory, 6 West Aust. L. R. 100.

⁵ Terwilliger v. Wands, 17 N. Y. 54.

⁶ Dun v. Weintraub, 111 Ga. 416, 420, 50 L.R.A. 670; Newell on Defamation, etc. 849, § 17.

⁷ Butler v. Hoboken P. & P. Co., 73 N. J. L. 45; Hume v. Kusche, 42 N. Y. Misc. 414; Cleveland Leader P. Co. v. Nethersole, 84 Ohio 118; Sherman Mach. Co. v. Dun, 28 Okla. 447; Weaver v. Phillips, 231 Pa. 325; Woodhouse v. Powles, 43 Wash. 617, 8 L.R.A.(N.S.) 783, 117 Am.

St. 1079; Achorn v. Piper, 66 Iowa 694; Woodruff v. Bradstreet Co., 35 Hun 16; Chamberlain v. Boyd, 11 Q. B. Div. 407; Dominion Tel. Co. v. Silver, 10 Can. Sup. Ct. 238; Dwyer v. Meehan, 18 L. R. Ir. 138; Keenholts v. Becker, 3 Denio 346; Terwilliger v. Wands, 17 N. Y. 61; Beach v. Ranney, 2 Hill 309; Hallock v. Miller, 2 Barb. 630; Herrick v. Lapham, 10 Johns. 281; Hersh v. Ringwalt, 3 Yeates 508, 2 Am. Dec. 392; Dun v. Weintraub, *supra*; Erwin v. Dezell, 64 Hun 391; Smid v. Bernard, 31 N. Y. Misc. 35; Langdon v. Shearer, 42 App. Div.

will constitute special damage sufficient to support an action. There is none, however, where the direct or necessary consequence is confessedly a pecuniary loss. Strong, J., in *Terwilliger v. Wands*,⁸ said: "The action for slander is given by law as a remedy for injuries affecting a man's reputation or good name by malicious, scandalous words, tending to his dam-

(N. Y.) 607; *Fry v. McCord*, 95 Tenn. 678, citing the text. See *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568, 576, 15 Am. St. 794, 4 L.R.A. 280.

In *Cook v. Cook*, 100 Mass. 194, the court say: "To sustain the action on this ground it is necessary that the declaration should set forth precisely in what way such special damages resulted from the words relied on. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that he has been put to great costs and expenses thereby. * * * It must be made to appear, by proper averments, how these special damages were occasioned by the words alleged to have been uttered falsely or maliciously." *Walker v. Tribune Co.*, 29 Fed. 827; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308.

An allegation that the words were spoken with the intent to destroy the plaintiff's business as a school teacher is not a sufficient averment of special damage. *Ledlie v. Wallen*, 17 Mont. 150.

Special damages are not well pleaded by allegations to the effect that there was an unsettled account against the plaintiff, that he was damaged in a specified sum, and that the purpose of the libel was to cause him to be suspected and believed to be without integrity and unworthy of credit or public confidence and social intercourse: that he was greatly injured in his good

name and credit, brought into public scandal, infamy and disgrace, and was prevented from procuring any of the necessities of life, has suffered great anxiety and pain of mind and become incapacitated for business. *Fry v. McCord*, 95 Tenn. 678.

It is said in *Cooley on Torts* (2nd ed.), p. 242, that besides the publications libelous *per se*, any untrue and malicious charge which is published in writing or print is libelous when damage is shown to have resulted as a natural and proximate consequence. The Iowa court regard this as a correct statement of the rule. "If it be conceded, however, that there cannot be an action for libel unless the words are defamatory, still the plaintiff may be entitled to relief under the allegations of his petition, although he may call it an action for libel. If one intentionally causes temporal loss or damage to another without justifiable cause and with malicious purpose to inflict it, the other may recover, in an action of tort, the damage he has sustained as a natural and proximate consequence of the wrong." *Hollenbeck v. Ristine*, 105 Iowa 488, 490, 61 Am. St. 306, citing *Walker v. Cronin*, 107 Mass. 555; *Lucke v. Clothing C. T. & T's. Assembly*, 77 Md. 396, 39 Am. St. 421, 19 L.R.A. 408; *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. 367.

⁸ 17 N. Y. 54.

age and derogation.⁹ It is injuries affecting the reputation only which are the subject of the action. In the case of slanderous words actionable *per se* the law, from their natural and immediate tendency to produce injury, adjudges them to be injurious, though no special loss or damage can be proved. But with regard to words that do not apparently, and upon the face of them, import such defamation as will of course be injurious it is necessary that the plaintiff should aver some particular damage to have happened.¹⁰ As to what constitutes special damage Starkie mentions the loss of a marriage, loss of hospitable gratuitous entertainment, preventing a servant or bailiff from getting a place, the loss of customers by a tradesman;¹¹ and says that, in general, whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient.¹² In *Olmsted v. Miller*¹³ it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in *Williams v. Hill*¹⁴ was the fact that the plaintiff was turned away from the house of her uncle and charged not to return until she had cleared up her character. So in *Beach v. Ranney*¹⁵ the circumstance that persons who had been in the habit of doing so refused longer to supply fuel,

⁹ 3 Black. Com. 123; Stark. on Slander, Prelim. Obs. 22-29; *id.* 17, 18.

¹⁰ 3 Black. Com. 124.

¹¹ Townshend on Slander & L., § 198. Special damage consists in, among other things, the loss of marriage, loss of *consortium* of husband and wife (*Lynch v. Knight*, 5 L. T. Rep. (N.S.) 291, 9 H. of L. Cas. 577; *Parkins v. Scott*, 6 L. T. Rep. (N.S.) 394, 1 Hurl. & C. 153; *Roberts v. Roberts*, 33 L. J. (Q. B.) 249, 5 B. & S. 384; and see *Pasman v. Fletcher*, Clayton 73); loss of emoluments, profits, customers, employment, gratuitous hospitality (*Moore v. Meagher*, 1 Taunt. 39; *Williams v. Hill*, 19 Wend. 305); or by being subjected to any other in-

convenience or annoyance occasioning or involving an actual or constructive pecuniary loss. *Woodbury v. Thompson*, 3 N. H. 194; *Kelly v. Partington*, 3 Nev. & M. 116; *Keenholts v. Becker*, 3 Denio 346; *Foulger v. Newcomb*, L. R. 2 Ex. 330; *Hartley v. Herring*, 8 T. R. 130. The special damage must be the loss of some material temporal advantage. Loss of *consortium vicinorum* is not sufficient. *Roberts v. Roberts*, 33 L. J. (Q. B.) 250; *Beach v. Ranney*, 2 Hill 309.

¹² Citing Stark. on Slander, 195, 202; *Cook's Law of Def.* 22-24.

¹³ 1 Wend. 506.

¹⁴ 19 Wend. 305.

¹⁵ 2 Hill 309.

clothing, etc.¹⁶ * * * It would be highly impolitic to hold all language wounding the feelings and affecting unfavorably the health and ability to labor of another a ground of action; for that would be to make the ground of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him and his physical strength and ability to bear them. Words which would make hardly an impression on most persons and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature and must in fact disparage the character, and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result.”¹⁷ It is therefore generally held that mere injury to the feelings, though resulting in sickness and inability to labor, is not such special damage as will support the action for defamatory words not actionable in themselves.¹⁸ Nor will the allegation that the plaintiff has fallen into disgrace, contempt and infamy and has lost his or her credit, reputation and peace of mind.¹⁹ Being shunned by neighbors and turned out of a moral reform society do not constitute special damages.²⁰

§ 1219. **Same subject.** The loss of a marriage to a party of either sex is sufficient special damage. If the words spoken

¹⁶ 2 Stark. on Slander, 872, 873.

¹⁷ See Field v. Colson, 93 Ky. 347.

¹⁸ Prime v. Eastwood, 45 Iowa 648; Wilson v. Goit, 17 N. Y. 442; Bedell v. Powell, 13 Barb. 183; Samuels v. Evening Mail Ass'n, 6 Hun 5; Allsop v. Allsop, 5 H. & N. 534. But see Olmsted v. Brown, 12 Barb. 657; Bradt v. Towsley, 13 Wend. 253; Fuller v. Fenner, 16 Barb. 333; Underhill v. Welton, 32

Vt. 40; McQueen v. Fulghan, 27 Tex. 463; Fry v. McCord, 95 Tenn. 678.

¹⁹ 1 Saund. 243, note 5; Beach v. Ranney, 2 Hill 309; Bassett v. Elmore, 48 N. Y. 561; Woodbury v. Thompson, 3 N. H. 194; Roberts v. Roberts, 5 B. & S. 384; Rea v. Harrington, 58 Vt. 181, 56 Am. Rep. 561; Fry v. McCord, *supra*.

²⁰ *Id.*; Williams v. Riddle, 145

were defamatory, as that a female plaintiff has had an illegitimate child or is wanting in chastity;²¹ or, if spoken of a man, that he is a whore-master or the like;²² or of one who is a widower that he had kept his wife basely and starved or denied her necessities;²³ or to say of one he is a bastard,²⁴ and it is shown to be followed with the loss of marriage as a consequence, the action will lie. But a loss of suitors is not special damage to a female.²⁵ The judges in England were not agreed in *Lynch v. Knight*²⁶ that a wife may maintain an action against a slanderer for words not actionable in themselves based on the loss of her husband's society as special damage, he having deserted her in consequence of the words spoken; but she was entitled to recover in respect of her loss of maintenance by him for such cause. Loss of employment, of customers or of any position from which the defamed party derived support or any substantial or pecuniary advantage is so manifestly special damage that it is unnecessary to state the cases in detail.²⁷ In such actions where loss of trade or customers is relied upon if the plaintiff intends to show particular instances he must allege them;²⁸ in other words, where he

Ky. 459, 36 L.R.A.(N.S.) 974. See *Casale v. Calderone*, 49 N. Y. Misc. 555.

²¹ *Restor v. Pomfreich*, Cro. Eliz. 639; *Shepard v. Wakeman*, 1 Sid. 79; *Davis v. Gardiner*, 4 Coke 16; *Matthews v. Cross*, Cro. Jac. 323.

²² *Matthews v. Cross*, Cro. Jac. 323; *Taylor v. Tully*, Palmer 385; *Southold v. Daunston*, Cro. Car. 269.

²³ *Wicks v. Shepherd*, Cro. Car. 155.

²⁴ *Nelson v. Staff*, Cro. Jac. 422.

²⁵ *Barnes v. Prudlin*, 1 Sid. 396.

²⁶ 9 H. of L. Cas. 577.

²⁷ *Campbell v. White*, 5 Ir. C. L. (N.S.) 312; *Coreoran v. Coreoran*, 2 id. 272; *Moore v. Meagher*, 1 Taunt. 39; *Hartley v. Herring*, 8 T. R. 130; *Peaks v. Oldham*, 1 Cowp. 277; *Bignell v. Buzzard*, 3 H. & N. 217; *Sterry v. Foreman*, 2 C. & P.

592; *Evans v. Harries*, 1 H. & N. 25; *Knight v. Gibbs*, 3 Nev. & M. 467, 1 Ad. & E. 43; *Shipman v. Burrows*, 1 Hall 399; *Williams v. Hill* 19 Wend. 305; *Wemhah v. Morgan*, 20 Q. B. Div. 635; *Hollenbeck v. Ristine*, 105 Iowa 488, 67 Am. St. 306; *Giacona v. Bradstreet Co.*, 48 La. Ann. 1191; *Weston v. Barnicoat*, 175 Mass. 454, 49 L.R.A. 612.

²⁸ *Rose v. Groves*, 5 M. & G. 618; *Trenton Mut. L. & F. Ins. Co. v. Perrine*, 23 N. J. L. 402, 57 Am. Dec. 400; *Moore v. Meagher*, 1 Taunt. 39; *Shipman v. Burrows*, 1 Hall 399; *Tobias v. Harland*, 4 Wend. 537; *Hallock v. Miller*, 2 Barb. 630; *Townshend on Slander & L.*, § 345; 1 Stark. on Slander, 203; *Hume v. Kuske*, 42 N. Y. Misc. 414.

alleges by way of special damages the loss of customers in the way of his trade, the loss of marriage or of service, the names of such customers, the name of the person with whom marriage would have been contracted or service performed should be stated.²⁹ But the rule is relaxed when the individuals may be supposed to be unknown to him, or it is impossible to specify them, or they are so numerous as to excuse a specific description on the score of inconvenience.³⁰

²⁹ *Id.*; *Bradstreet Co. v. Oswald*, 96 Ga. 396.

³⁰ *Trenton Mut. L. & F. Ins. Co. v. Perrine*, 23 N. J. L. 402, 57 Am. Dec. 400; *Hartley v. Herring*, 8 T. R. 130; *Hargrave v. Le Breton*, 4 Burr. 2422; *Westwood v. Cowne*, 1 Stark. 172; *Riding v. Smith*, 1 Ex. Div. 91. See *Hewit v. Mason*, 24 How. Pr. 366.

In *Weiss v. Whittemore*, 28 Mich. 373, the publication was actionable *per se*, and had reference to the plaintiff in his business as a dealer in Steinway pianos. The declaration alleged that prior to the time of the publication he had been and was carrying on the business of the agency, "and had in the way of his aforesaid trade and business, as agent for the sale of the Steinway pianos, acquired great gains and profits, and was up to that time daily and honestly acquiring great gains and profits to himself, as such agent in the sale thereof." It was further alleged that by means of the publication the plaintiff had been and is greatly injured in his said trade and business, and has lost and been deprived of divers great gains and profits in his said business, which would but for such publication have arisen and accrued to him. It was objected that these allegations were too general; that the plaintiff should have shown how he had suffered the damage, the par-

Suth. Dam. Vol. IV.—57.

ticular amount, and the particular sales the publication had prevented him from making. But the court, by *Christiancy, J.*, said: "The case is not like that of *Shipman v. Burrows*, upon which the defendants rely, where the plaintiff, a shipmaster, alleged generally that in consequence of the publication, etc., certain insurance companies refused to insure any vessel commanded by him, or any goods on board, etc., without setting forth any particular application to or refusal by any such company. In that case, whether correctly decided or not, the plaintiff must have known and could therefore easily have set forth the particular instance of refusal. But how could the plaintiff thus know and specify the particular instances here where parties simply omitted to call for the purchase of these pianos? Had he been in the habit of carrying them around to supply customers, perhaps the case might have been analogous to that of the shipmaster; but this does not appear. Nor is this like the loss of trade from such a cause in many other cases, where the same customers are in the habit of resorting to the same shop for dry goods or groceries frequently needed; pianos are not bought at frequent but at very distant intervals by the same person. Almost every customer must, in the nature of things, be a

§ 1220. **Same subject; injury to feelings.** There ought to be no difference, and in principle there is none, between words actionable in themselves and other defamatory words followed by actual injury beyond the change in the burden of proof. In the former case the injury is presumed; in the latter it must be alleged and proved. The intrinsic nature of the wrong and injury is the same in both cases. What the jury may take into consideration without proof in the one case in the assessment of damages ought, when proved in the other, to sustain the action and be considered in the award thereof.³¹ Where the words relate to persons, and not exclusively to things, and impute a crime involving moral turpitude or punishment they are in themselves actionable. The law conclusively presumes damage if they are false and the publication was not privileged. This damage is assessable by a jury, and no legal standard for measuring it exists. This, however, does not imply, nor is it true, that the law does not define the nature of the injury and decide what elements may enter into compensation for it. The injury is a malicious one to reputation³² and pecuniary loss, in theory at least, the gist of the action for its redress.³³ This loss is presumed; and also injury to the feelings because the dissemination of the scandal has a tendency, more or less strong according to the nature of the imputation and the standing and influence of the traducer, to exclude the person to whom it refers from society and the confidence and respect of the community; there is in fact and by implication of law mental suffering at once upon knowledge of the defamatory publication.

new one. And yet when the injury complained of is a loss of trade, in ordinary cases, from slander or a libel, it seems to be settled upon authority, and we think upon sound principle, that the names of the customers driven away or lost need not be mentioned; but the general loss of trade is sufficient, and the declaration may be supported by evidence of such general loss. See *Evans v. Harries*, 38 Eng. L. & Eq. 347; *Hartley v. Herring*, 8 T. R.

130; *Ashley v. Harrison*, 1 Esp. 48; *Trenton, etc. Ins. Co. v. Perrine*, 23 N. J. L. 402, 57 Am. Dec. 400;" § 1223.

³¹ The text is quoted with approval in *Turner v. Stevens*, 8 Utah 75.

³² *Terwilliger v. Wands*, 17 N. Y. 54; *Osborn v. Leach*, 135 N. C. 628, 66 L.R.A. 648.

³³ *Townshend on Slander & L.*, § 57.

The law authorizes the jury to consider upon their knowledge of the general experience that the false and malicious imputation, however, limited the publication, causes injury of which mental suffering is an ingredient; that suffering ensues from the shock of the disparagement to the mental sensibilities of one who has a consciousness of innocence, and from the natural apprehension that his reputation will suffer by a popular belief or suspicion that the imputation is true. This injury to the feelings is not the principal ingredient for which the law affords redress; it is incidental to and dependent on other phases of the wrong; it is generally rather an aggravation than a substantive and independent ground of recovery. If the law would sustain an action and allow the recovery of damages for every word or act which in fact causes injury to feelings it would thereby, in the language of Crompton, J.,³⁴ "encourage actions which ought not to be brought." Therefore, in actions for words not actionable in themselves special damage of a nature corresponding to the damages which are presumed to result principally from language actionable *per se* must be alleged and proved; and it is only when, in addition to such loss, the words are of such a nature as to injure reputation that injury to the feelings or mental suffering may be incidentally considered.³⁵ A mere apprehension of loss or of ill consequences will not constitute special damages to support an action for slanderous words not actionable. It is insufficient to allege that in consequence of the words discord happened between husband and wife and that plaintiff was in danger of being divorced; or

³⁴ Roberts v. Roberts, 5 B. & S. 384.

³⁵ Falsely and maliciously to impute in the coarsest terms, and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honor, cannot be made the foundation of any proceeding civil or criminal; whereas an action may be main-

tained for saying that a cobbler is unskilful in mending shoes, or that one has held up his hand in a threatening posture to another. Report of committee of house of lords on defamation and libel, July, 1843; Townshend on Slander & L., § 57.

If portions of the language used are actionable *per se* the plaintiff may testify that its publication caused him mental suffering. Laing v. Nelson, 40 Neb. 252.

that the words exposed the plaintiff to the displeasure of her parents and she was in danger of being put out of their house.³⁶

§ 1221. **Same subject; natural consequence.** The special damage must be the natural as well as the proximate consequence of the defamatory publication. As was well said by Mullett, J.:³⁷ "It is a rule equally consistent with good sense, good logic and good law that a person who would recover damages for an injury occasioned by the conduct of another must show, as an essential part of his case, the relation of cause and effect between the conduct complained of and the injury sustained."³⁸ This subject has been treated at large in another place.³⁹ The injury must be such as, according to the usual course of things or the general experience of mankind, was likely to ensue from the publication complained of. It is not deemed natural for a parent to withhold favors in the way of instruction and dress to his minor child in consequence of a charge of self-pollution which he disbelieves.⁴⁰ Grover, J., said: "I do not think special damages can be predicated upon the act of any one who wholly disbelieves the truth of the story. It is inducing acts injurious to the plaintiff, caused by a belief of the truth of the charge made by the defendant, that constitutes the damage

³⁶ Folkard's Stark. on Slander, § 385; Barnes v. Strudd, 1 Lev. 261; Townshend on Slander & L., § 200.

³⁷ Olmsted v. Brown, 12 Barb. 652.

³⁸ Kersting v. White, 107 Mo. App. 265, quoting the text; Potter v. Batt, 72 N. J. L. 470.

³⁹ § 29; Speake v. Hughes (1904), 1 K. B. 138.

⁴⁰ Anonymous, 60 N. Y. 262, 19 Am. Rep. 174.

In Lynch v. Knight, 9 H. of L. Cas. 577, the wife brought the action, joining the husband for conformity, against A. for slander uttered by him to her husband, imputing to her that she had been "all but seduced by B. before her marriage, and that her husband ought

not to suffer B. to visit his house." The special damage alleged was that in consequences of the slander the husband had compelled her to leave his house and return to her father, whereby she lost the *consortium* of her husband. It was held that the cause of complaint thus set forth would not sustain the action, inasmuch as the special damage relied upon did not arise from the natural and probable effect of the words spoken by the defendant, but from the precipitation or idiosyncrasy of the husband in dismissing his wife from his house when he was only cautioned not to let her mix in society. Folkard's Stark. on Slander, § 383.

which the law redresses." When, however, the charge made, independently of belief of its truth, has caused the person to whom it was published or addressed to act upon it and to turn out of employment a servant to whom the charge referred, the disbelief, or testimony of it, has been held immaterial.⁴¹ "It may often happen," say the court, "that a person may not believe what is told, and yet not have courage to keep the individual who labors under the imputation." Park, J., observed: "It is said that the witness would have turned the plaintiff away on the defendant's wish to that effect being intimated although no slanderous words had been used. But it is clear that if the words in question had not been used the plaintiff would not have been dismissed; and it is sufficient for this action to show that she was turned out in consequence of such words of the defendant. The effect of the evidence may be that the witness would have turned the plaintiff away if different words had been used; but different words were not used, and she was sent away in consequence of these." The loss of a seat in the legislature and the emoluments of the office by reason of the libel of a candidate therefor is too remote, uncertain and speculative to be a ground of damage;⁴² and so of the loss of profits a prospective partnership might have realized.⁴³ The expense of an official investigation is too remote, a voluntary act having intervened.⁴⁴ The scope of liability may extend beyond the natural and apprehended consequence where a libel, actionable *per se*, is intentional, willfull and malicious. In such a case the defamed person may recover for mental distress and physical suffering, and when that person is a wife there may be a recovery by her husband for the loss of her society and services resulting from such distress and suffering.⁴⁵

In many cases the special injury results from the action of one to whom the slanderous charge has been repeated by the person to whom the defendant published it. And it has been held that the defendant is not liable for the damage resulting

⁴¹ Knight v. Gibbs, 1 Ad. & E. 43.

⁴² Field v. Colson, 93 Ky. 347.

⁴³ Hume v. Kusche, 42 N. Y. Misc.
414, it seems.

⁴⁴ Lanston M. Mach. Co. v. Merchanthaler L. Co., 147 Fed. 871.

⁴⁵ Garrison v. Sun P. & P. Ass'n,
207 N. Y. 1, 45 L.R.A.(N.S.) 766.

from such repetition unless he authorized it or it was a privileged communication. Thus it is said by Strong, J., in *Terwilliger v. Wands*,⁴⁶ that "where words are spoken to one person, and he repeats them to another, in consequence of which the party of whom they are spoken suffers damage, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition, and the party who repeats them is alone liable for the damages."⁴⁷

⁴⁶ 17 N. Y. 57.

⁴⁷ Citing *Ward v. Weeks*, 7 Bing. 211; *Hasting v. Palmer*, 20 Wend. 225; *Keenholts v. Becker*, 3 Denio 346; *Stevens v. Hartwell*, 11 Metc. (Mass.) 542.

In *Olmsted v. Brown*, 12 Barb. 662, Mullett, J., said: "A man may be justly held responsible for the necessary or ordinary legitimate consequences of his own acts. And such consequences may be included in the chain of causes which connect the original act with the final effect. But he cannot be made accountable for the unauthorized illegal acts of other persons, although his own conduct may have indirectly induced or incited the commission of the acts." *Vicars v. Wilcocks*, 8 East 1; *Moody v. Baker*, 5 Cow. 357; *Beach v. Ranney*, 2 Hill 314; *McPherson v. Daniels*, 10 B. & C. 263; *Dole v. Lyon*, 10 Johns. 447, 6 Am. Dec. 346. He adds: "These decisions, and the reasons upon which they are founded, most clearly and fully establish the doctrine that the repetition of slander is unlawful, unless made with justifiable intentions and upon a justifiable occasion. And the conclusion

is inevitable, that, when so unlawful, it is not an ordinary or necessary legitimate consequence of the defendant's original unlawful act, and cannot be used to make out the relation of cause and effect between the defendant's original slander and the injury attributed to it, and which might not have happened but for the unjustifiable and illegal interference of another. This rule presupposes what the law plainly declares, that there may be intentions and occasions which will justify the repetition of slanderous words. And those who duly appreciate the rights of the social, domestic, religious, and mere business relations of civilized life will find no difficulty in judging when these occasions occur. Where they do occur, the repetition of slanderous words, with the proper intentions, may be considered the ordinary or necessary and legitimate consequences of the uttering by the first slanderer, and render him accountable for all the injuries occasioned by such legitimate repetition."

The text is sustained by *Prime v. Eastwood*, 45 Iowa 640; *Clifford v. Cochrane*, 10 Ill. App. 570; *Burkett*

§ 1222. **Criticism of the doctrine last stated.** It appears to the writer that this doctrine, though advanced by very able jurists and sanctioned by courts of distinguished learning and influence, is unsound. If the liability of the party first uttering the defamatory words for the damages resulting from a culpable repetition of them were denied on the ground that such repetition was not a natural or probable consequence of the first publication the conclusion would harmonize with the principle which fixes the limit of responsibility generally for the consequences of torts.⁴⁸ An error in holding that the repetition of a scandal is not so likely to occur as that the utterer should be held to contemplate it is of minor consequence; if that holding were true the exemption from liability could be rested safely on that ground. The damages would then be rejected as too remote. But it is not true, probably, that when one utters a scandal he expects it to have no further circulation; that a subsequent repetition by his hearer is a consequence so contrary to the general experience that he cannot be reasonably held responsible for it. The relation of cause and effect is a matter which cannot always be actually ascertained; but if in the ordinary course of events a certain result usually follows from a given cause the immediate relation of one to the other may be considered to be established.⁴⁹ The cases from the doctrine of which we dissent do not hold that the damages suffered from such repetition are remote within this rule, though in many cases particular losses may be so; they hold that such damages do not naturally and legitimately proceed from the first speaking, and that if the repetition occurs under

v. Griffith, 90 Cal. 532, 13 L.R.A. 707, 25 Am. St. 151; Hastings v. Stetson, 126 Mass. 329, 30 Am. Rep. 683; Gough v. Goldsmith, 44 Wis. 262, 28 Am. Rep. 579; Burt v. Advertiser N. Co., 154 Mass. 238, 247, 13 L.R.A. 97; Austin v. Bacon, 49 Hun 386; Parker v. Republican Co., 181 Mass. 392; Schulze v. Jalonick, 18 Tex. Civ. App. 296; Morse v.

Times-R. P. Co., 124 Iowa 707; Mills v. Flynn, 149 Iowa 477.

⁴⁸ There cannot be a recovery for the damages resulting from a particular republication, nor can damages be enhanced by the general probability of unlawful republications. Burt v. Advertiser N. Co., 154 Mass. 238, 247, 13 L.R.A. 97.

⁴⁹ Ionides v. Universal Ins. Co., 14 C. B. (N.S.) 259.

such circumstances that the person who repeats the scandal incurs no liability the damages resulting therefrom may be charged to the first speaker and are not remote. It is possible to suppose that the first utterer of the imputation might reasonably be held to anticipate an injurious privileged repetition, though not a wrongful one; but to hold him liable for the former on that ground, and not for the latter, would be to make his liability depend on a subtle and shadowy distinction. Whether a repetition was likely to ensue under the particular circumstances of a given case is often, and perhaps generally, a proper question for the jury, as whether alleged consequences were antecedently probable in other cases of tort. Whether a particular special injury sought to be made an element of damage is a natural and proximate consequence of a repetition of the slanderous charge is a question of law. But the doctrine that where the repetition is unlawful and the person repeating the defamatory words is liable therefor, no recourse can be had to an earlier publisher of the scandal and that redress must be sought exclusively against the person who is the more immediate cause of the injury is unsound. Each is liable for the natural and proximate consequences of his acts; neither is relieved from this responsibility because the other is the more immediate agent to produce those consequences, and acted tortiously and illegally in doing so. Many illustrations of such double liability might be mentioned.⁵⁰ Where a marriage promise is broken in consequence of one of the parties being traduced there is a right of action for such breach of the promise; but this has never been supposed to preclude an action against the slanderer who induced that breach. The loss of the marriage is a recognized element of damages in the latter action, though it is the very loss to be compensated in the other.⁵¹ It has been well said by Gilfillan, C. J., that although one who publishes a libel is not to be held responsible for an independent wrong

⁵⁰ See §§ 29, 39, 41, 42.

⁵¹ Folkard's *Stark. on Slander*, § 386, and note (a); Townshend on *Slander & L.*, § 201; *Lumley v. Gye*, 2 El. & B. 216; *Green v. Button*, 2

Cr., M. & R. 707; *Toms v. Whitney*, 35 Up. Can. Q. B. 195; *Miller v. Butler*, 6 Cush. 71, 52 Am. Dec. 768; *Chapman v. Thornburgh*, 17 Cal. 87, 76 Am. Dec. 571.

done by a third person, though connected with the libel, he is responsible for the natural consequences of his own wrong act although the wrongful act of a third person may concur in bringing about such consequences. If it were a natural consequence of the defendant's publication through the newspaper that some evil-disposed person should send a copy of the paper, or the item cut from the paper, to some one whom the defendant had not thought of its reaching he would be liable for it as the consequences of his own wrong.⁵² It was for the jury to say whether sending the postal card by a third person was a natural consequence of the defendant's publication in the newspaper.⁵³ An allegation that the defendant knew that the words published would be, as they were, repeated and published in other editions of the same newspaper, is not open to objection; it might be proved on the trial.⁵⁴

§ 1223. **Slander of title.** Defamatory language maliciously spoken of things is actionable only when it naturally and proximately causes damage to the owner.⁵⁵ The language must be false, spoken without legal excuse, and occasion pecuniary damage.⁵⁶ The malice which gives a right of action is legal as contradistinguished from personal malice, and may consist in

⁵² Citing *Townshend on S. & L.*, § 158; *Miller v. Butler*, 6 Cush. 71.

⁵³ *Zier v. Hofflin*, 33 Minn. 66, 53 Am. Rep. 9. This view is approved in *Merchants' Ins. Co. v. Buckner*, 39 C. C. A. 19, 98 Fed. 222. To the same effect is *Davis v. Starrett*, 97 Me. 568, in which it is said: We think it may be said with reason that the repetition of the slander by those to whom it was uttered, and after that by others, may be regarded as fairly within the contemplation of the original slander, and a consequence for which the defendant may be held responsible; *Merchants' Ins. Co. v. Buckner*, 39 C. C. A. 9, 98 Fed. 222.

It has been said that if the defendant is to be held for repetitions of the slanderous statements, he

should be allowed to show that others, without knowing of his statements, uttered the slander both before and after he spoke the words. In other words, he should be permitted to show that he was not responsible for the reports or for the entire damage; that others were equally guilty with him. *Mills v. Flynn*, 149 Iowa 477.

⁵⁴ *Whitney v. Morgnard*, 24 Q. B. Div. 630.

⁵⁵ *Swan v. Tappan*, 5 Cush. 104; *Malachy v. Soper*, 3 Bing. N. C. 371; *Ingram v. Lawson*, 6 id. 212; *Evans v. Harlow*, 5 Q. B. 624.

⁵⁶ *Id.*; *Halsey v. Brotherhood*, 19 Ch. Div. 386; *Burkett v. Griffith*, 90 Cal. 532, 25 Am. St. 151, 13 L.R.A. 707; *May v. Anderson*, 14 Ind. App. 251; *Andrew v. Deshler*,

uttering false statements either with a direct intention to injure another or in a reckless disregard of his rights and of the consequences that may result to him.⁵⁷ Misrepresentations by which a business is intentionally injured constitute a tort for which the law affords redress. Such torts are akin to slander and libel; but they are remediable within the broad principles which govern the action on the case. It lies for all wrongful acts unaccompanied by force from which injury ensues.⁵⁸ Slander of title falls within its scope. The publication must be malicious; the language must be false and must occasion, as a natural and proximate consequence, a pecuniary loss—a special damage.⁵⁹ The allegation of damages must be special.⁶⁰ If the defamation is committed in the execution of a deed all who join therein are jointly liable for the consequences, and it may be shown that after its execution they, or any of them, asserted title to the premises. Such testimony tends to show the slander and the wilfulness and maliciousness of the claim made in asserting title to the property. If the claim was made with knowledge that it was baseless the person injured may recover, in addition to the taxable costs, any other reasonable outlay made by him in removing the cloud cast upon his title by

45 N. J. L. 167; *Cardon v. McConnell*, 120 N. C. 461.

⁵⁷ *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322; *May v. Anderson*, *supra*; *Linville v. Rhoades*, 73 Mo. App. 217; *Hopkins v. Drowne*, 21 R. I. 20; *Manitoba Free Press Co. v. Nagy*, 39 Can. Sup. Ct. 340.

⁵⁸ *Snow v. Judson*, 38 Barb. 212; *Wren v. Weild*, L. R. 4 Q. B. 213; *White v. Merritt*, 7 N. Y. 352, 57 Am. Dec. 527; *Gallagher v. Brunel*, 6 Cow. 346; *Wier v. Allen*, 51 N. H. 177; *Pitt v. Donovan*, 1 M. & S. 639; *Cousins v. Merrill*, 16 Up. Can. C. P. 114; *West Counties M. Co. v. Lower C. M. Co.*, L. R. 9 Ex. 218.

⁵⁹ *Townshend on Slander & L.*, §§ 206–206c; *Kendall v. Stone*, 5 N. Y. 14; *Like v. McKinstry*, 41 Barb. 186, 4 Keyes 397; *Smith v. Spooner*,

3 Taunt. 246; *Hill v. Ward*, 13 Ala. 310; *Bailey v. Dean*, 5 Barb. 297; *Linden v. Graham*, 1 Duer 670; *Paull v. Halferty*, 63 Pa. 46, 3 Am. Rep. 518; *Re Madison Ave. Baptist Church*, 26 How. Pr. 72; *Burkett v. Griffith*, 90 Cal. 533, 25 Am. St. 151, 13 L.R.A. 707.

⁶⁰ *Wittemann Bros. v. Wittemann Co.*, 88 N. Y. Misc. 266, affirmed without opinion in 168 App. Div. (N. Y.) 930; *McGuinness v. Har-giss*, 56 Wash. 162; *Ashford v. Choate*, 20 Up. Can. C. P. 471; *Malachy v. Soper*, 3 Bing. N. C. 371; *Delegall v. Highley*, 8 C. & P. 444; *Kendall v. Stone*, 5 N. Y. 14; *Like v. McKinstry*, 41 Barb. 186; *Wilson v. Dubois*, 35 Minn. 471, 59 Am. Rep. 335. See *Le Massena v. Storm*, 62 App. Div. (N. Y.) 150.

the recitals in the deed.⁶¹ Depreciation in the value of the property, loss of rent, injury to business and expenses incurred in consequence of the slander are elements of damage.⁶² But expenses do not include non-taxable attorney fees.⁶³ The jury may award punitive damages.⁶⁴ A well-considered English case lays down the rule that in an action for words not actionable *per se*, but constituting an untrue statement concerning the plaintiff's business, and which were maliciously published, which statement is intended or reasonably likely to produce, and in the ordinary course of things does produce, a general loss of business as distinct from the loss of particular known customers, evidence may be given of such general loss of business and it is sufficient to support the action.⁶⁵ Damages may include those resulting from the loss of the sale of the property and for injury done it by crowds who resorted to it because of the libel.⁶⁶

SECTION 2.

THE DEFENSE.

§ 1224. **Failure of plea of justification.** A plea of justification puts upon record a repetition of the defamatory charge and includes a deliberate averment of its truth. Where such a plea is made, with no intention to support it by proof or without reasonable ground for believing that the charge is true and can be proved, it is generally regarded as evidence of malice in the original speaking, as an aggravation of the wrong complained of, which may be considered by the jury for the enhancement of damages.⁶⁷ In *Fero v. Roscoe*,⁶⁸ Bronson,

⁶¹ *Chesebro v. Powers*, 78 Mich. 472.

⁶² *Manitoba Free Press Co. v. Nagy*, *supra*; *Ryan v. Burger & H. B. Co.*, 13 N. Y. Supp. 660.

⁶³ *McGuinness v. Hargiss*, *supra*.

⁶⁴ *Hopkins v. Drowne*, *supra*; *Long v. Rucker*, 166 Mo. App. 472.

⁶⁵ *Ratliffe v. Evans*, [1892] 2 Q.

B. 524; *Landon v. Watkins*, 61 Minn. 137.

⁶⁶ *Nagy v. Manitoba Free Press Co.*, 16 Manitoba 619.

⁶⁷ *Dauphiny v. Buhne*, 153 Cal. 757, 126 Am. St. 136; *Moore v. Maxey*, 152 Ill. App. 647; *Raynolds v. Vinier*, 125 App. Div. (N. Y.) 18; *Pfister v. Milwaukee Free Press Co.*,

C. J., said: "When one who is sued for defamation deliberately reaffirms the slander and puts it on the records of the court by way of justification, if he fails to establish the truth of his plea he has done the plaintiff a new injury, which may properly be regarded as an aggravation of the original wrong. It is said that the attempt to justify may be made in good faith, or in the honest belief that the plaintiff is guilty of the matter laid to his charge. That may be so; but the injury to the plaintiff is not diminished by the mistaken belief of the defendant. And when a man is called into court for charging another with a crime he ought to pause and examine before he repeats the charge and places it on record; and if he makes a mistake in such a matter it should be at his peril, and not at the peril of the injured party."

In New York and some other states pleading and failing to establish a justification has been held conclusive evidence of malice, and to preclude any mitigating effect from the evidence given in support of the plea, as well as to deprive the defendant of other mitigations.⁶⁹ In other states such a plea is not necessarily evidence of express malice. If the defendant, having reasonable cause and good grounds to believe the

139 Wis. 627; *Henderson v. Fox*, 83 Ga. 233; *Coffin v. Brown*, 94 Md. 190, 55 L.R.A. 732; *Lowe v. Herald Co.*, 6 Utah 175; *Walker v. Wickens*, 49 Kan. 42; *Jackson v. Stetson*, 15 Mass. 48; *Alderman v. French*, 1 Pick. 1; *Lea v. Robertson*, 1 Stew. 138; *Updegrove v. Zimmerman*, 13 Pa. 619; *Gorman v. Sutton*, 32 id. 247; *Gilman v. Lowell*, 8 Wend. 573; *Shartle v. Hutchinson*, 3 Ore. 337; *Robinson v. Drummond*, 24 Ala. 174; *Pool v. Devers*, 30 Ala. 672; *Beasley v. Meigs*, 26 Ill. 139; *Spencer v. McMasters*, id. 405; *Doss v. Jones*, 5 How. (Miss.) 158; *Wilson v. Nations*, 5 Yerg. 211; *Fancitt v. Booth*, 31 Up. Can. Q. B. 263; *Wilson v. Robinson*, 14 L. J. (Q. B.) 196; *Smith v. Times Co.*, 4 Pa. Dist. 399; *Tilling-*

hast v. McLeod, 17 R. I. 208; *Sun P. & P. Ass'n v. Schenck*, 40 C. C. A. 163, 98 Fed. 925. See *Caulfield v. Whitworth*, 18 L. T. (N.S.) 527. 68 4 N. Y. 165.

69 Id.; *Van Benschoten v. Yaple*, 13 How. Pr. 97; *Shelton v. Simmons*, 12 Ala. 466; *Root v. King*, 7 Cow. 613; *Mapes v. Weeks*, 4 Wend. 659; *Bisbey v. Shaw*, 12 N. Y. 72.

It was said in *Larned v. Buffinton*, 3 Mass. 546, 3 Am. Dec. 185, that "when through the fault of the plaintiff the defendant, as well at the time of the speaking the words as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff to mitigate the damages."

plaintiff guilty on evidence creating a strong presumption of guilt, pleads a justification for the purpose of getting these circumstances in evidence, and not for the purpose of repeating the slander, such plea is not evidence of express malice.⁷⁰ If he fails to make good such a plea it is in itself a circumstance which the jury may consider in fixing the damages as an aggravation of the tort;⁷¹ but the jury is not bound in all cases so to consider it. On the contrary, if the defendant shows strong grounds in support of the charge he has made, though he does not wholly support his plea, the jury may, if they see fit, consider these grounds as mitigating circumstances and reduce the damages accordingly.⁷² So it has been held that where the plea of justification was so defectively drawn that judgment could not be rendered upon it,⁷³ or was withdrawn before trial,⁷⁴ or before a second trial, although an effort was made to prove its truth on the first trial,⁷⁵ it is not to be considered in aggrava-

⁷⁰ *Webb v. Gray*, 181 Ala. 408, overruling cases to the contrary; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *Geringer v. Novak*, 117 Ill. App. 160; *Yager v. Bruce*, 116 Mo. App. 473; *Parke v. Blackiston*, 3 Harr. 373; *Thomas v. Fischer*, 71 Ill. 576; *Ransone v. Christian*, 49 Ga. 491; *Sloan v. Petrie*, 15 Ill. 425; *Thomas v. Dunaway*, 30 id. 373; *Pallet v. Sargent*, 36 N. H. 496; *Rayner v. Kinney*, 14 Ohio St. 283; *Huson v. Dale*, 19 Mich. 17, 2 Am. Rep. 66; *Wilson v. Robinson*, 7 Q. B. 68.

In Nebraska evidence of express malice is not admissible to affect the damages, they being confined to such as are compensatory. But if a plea of justification is made evidence of such malice may be received to disprove the claim that the libel was published in good faith, from proper motives and for justifiable ends. *Bee P. Co. v. World P. Co.*, 59 Neb. 713.

⁷¹ *Robinson v. Drummond*, 24 Ala.

174; *Dewit v. Greenfield*, 5 Ohio 225; *Cavanaugh v. Austin*, 42 Vt. 576; *Wilson v. Nations*, 5 Yerg. 211; *Burekhalter v. Coward*, 16 S. C. 435; *Corridan v. Wilkinson*, 20 Ont. App. 184; *Smith v. Suechting*, 156 Iowa 712; *Krulic v. Petcoff*, 122 Minn. 517.

⁷² *Krulic v. Petcoff*, *supra* (in mitigation of punitive damages); *Fodor v. Fuchs*, 79 N. J. L. 529; *Keller v. American Bottler's P. Co.*, 140 App. Div. (N. Y.) 311; *Ferber v. Gazette & B. P. Ass'n*, 212 Pa. 367; *Ransone v. Christian*, 49 Ga. 491; *Henderson v. Fox*, 83 Ga. 233; *Byrket v. Monohon*, 7 Blackf. 83, 41 Am. Dec. 212; *Landis v. Shanklin*, 1 Ind. 92; *Shank v. Case*, id. 170; *West v. Walker*, 2 Swan 32; *Kennedy v. Holbern*, 16 Wis. 457.

⁷³ *Braden v. Walker*, 8 Humph. 34.

⁷⁴ *Gilmore v. Borders*, 2 How. (Miss.) 824.

⁷⁵ *Morris v. Lachman*, 68 Cal. 109.

tion of damages. In Illinois the withdrawal of the plea on the trial may be considered by the jury on the question of damages.⁷⁶ It has been ruled otherwise in Michigan.⁷⁷

§ 1225. **Same subject; effect of statutes.** Now in New York and in other states, by statute, the plea of justification, put in in good faith, though unsustained by proof, is no longer evidence of malice to be considered by the jury for the enhancement of damages.⁷⁸ In *Distin v. Rose*,⁷⁹ *Church, C. J.*, said: "The code has made this change in the law as it previously stood, that although the justification is not sustained, yet the facts adduced for that purpose may be used in mitigation of damages if they tend to show good faith or a belief in the truth of the words uttered. But when there is a total failure of proof tending in this direction and the circumstances evince malice in reiterating the slander in the pleadings it is allowable for the jury to take that circumstance into consideration."⁸⁰ I see no difference in principle whether the action be for breach of promise or slander. If a defendant in the former case takes advantage of his position as a party to maliciously invent a slander and spread it upon the record, or in the latter to repeat one already invented, it makes no difference. The law will not justify either. This rule should be applied with care and moderation, and I think should be confined to cases of bad faith in incorporating the justification in the pleading, and this can scarcely be said to be true under the code when the facts proved ought legitimately to go in mitigation of damages, because it seems incongruous to say that a failure to establish a justification may enhance the damages, and yet the facts proved under it may mitigate them."⁸¹ The rule as stated in *Distin*

⁷⁶ *Beasley v. Meigs*, 16 Ill. 139; *Spencer v. McMasters*, id. 405.

⁷⁷ *Evening News Ass'n v. Tryon*, 42 Mich. 549, 36 Am. Rep. 450. See *Simpson v. Robinson*, 12 Q. B. 513; *Warwick v. Foulkes*, 12 M. & W. 507; *Shirley v. Keathy*, 4 Cold. 29.

⁷⁸ *Whittaker v. McQueen*, 128 Ky. 260; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; § 153.

⁷⁹ 69 N. Y. 122.

⁸⁰ *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Cruikshank v. Gordon*, 118 N. Y. 178; *Distin v. Rose*, 69 N. Y. 122; *Marx v. Press P. Co.*, 134 N. Y. 561; *Holmes v. Jones*, 121 N. Y. 461; *Kansas City Star Co. v. Carlisle*, 47 C. C. A. 384, 393, 108 Fed. 344; *Browning v. Powers* (Mo.), 38 S. W. 943; *Davis v. Hearst*, 160 Cal. 143.

⁸¹ *Doe v. Roe*, 32 Hun 628; *Aird*

v. Rose has been followed in Oregon, the statute there being similar to that of New York.⁸²

It is said in a late case that from the cases last referred to and others which might be cited the rule seems to be well settled that before the jury can award the plaintiff additional damages because the defendant pleaded a justification which he has failed to establish, they must find that the justification was pleaded in bad faith; that in interposing such a defense the defendant was actuated by a wanton desire to further injure the plaintiff, and that unless such fact first be found, then the plea of justification is no evidence of malice and cannot be considered upon the question of exemplary damages; but if such fact be found, then it may be considered in aggravation of the damages.⁸³ The failure to sustain the plea of justification need not be total in order that bad faith may be inferred.⁸⁴ In Massachusetts it is provided by statute that if the defendant fails to establish such plea it shall not of itself be proof of malice, but the jury shall decide the whole case, whether such plea was or was not made with malicious intent.⁸⁵ The Michigan statute provides that if the defendant shall give notice in his justification that the words spoken or published were true, such notice, though not maintained by the evidence, shall not in any case be of itself proof of the malice charged in the declaration.⁸⁶ This does not bar the jury from considering whether an unsustained notice of justification may not be evidence tending to show malice, when taken in connection with other facts. But before using the fact that such notice was unsustained as evidence of malice they ought to find that there was bad faith in giving the notice.⁸⁷

v. Fireman's Journal Co., 10 Daly 254.

⁸² Upton v. Hume, 24 Ore. 420, 436, 21 L.R.A. 493, 41 Am. St. 863.

⁸³ Yager v. Bruce, 116 Mo. App. 473; Willard v. Press P. Co., 52 App. Div. (N. Y.) 448. See Potter v. New York Evening Journal P. Co., 68 App. Div. (N. Y.) 95, 103.

⁸⁴ Potter v. New York Evening Journal P. Co., *supra*.

⁸⁵ St. 1826, ch. 107, § 2; Pub. Stats. 1882, ch. 167, § 79. The Illinois statute is similar. Geringer v. Novak, 117 Ill. App. 160.

⁸⁶ 2 Howell's Stats., § 7776.

⁸⁷ Jastrzembski v. Marxhausen, 120 Mich. 677.

§ 1226. Evidence in mitigation; plaintiff's bad character; his conduct and declarations. The defendant is entitled to offer, under the general issue, evidence of the plaintiff's general bad character at and before the time when the libel or slander was published although he has filed a plea of justification.⁸⁸ The plaintiff's⁸⁹ character is in issue in such actions. It is presumed by the law to be good, though it is generally so averred in the complaint or declaration.⁹⁰ Such an averment is unnecessary and requires no denial in an answer under the code to let in disparaging proof; nor was it traversable at common law.⁹¹ If denied, the denial will not have the effect of an unsupported plea of justification if no attempt is made to support the denial by proof, so as to aggravate the injury and authorize the jury to add to the amount of damages.⁹² Evidence of the plaintiff's bad character is admitted for the reason that a person of disparaged fame or bad character does not suffer the same injury and is

⁸⁸ *Krulic v. Peteoff*, 122 Minn. 517; *Yager v. Bruce*, 116 Mo. App. 473; *Earley v. Winn*, 129 Wis. 291; *Mahoney v. Belford*, 132 Mass. 393; *Stone v. Varney*, 7 Mete. (Mass.) 86, 39 Am. Dec. 762; *Henry v. Norwood*, 4 Watts 347; *Powers v. Presgroves*, 38 Miss. 227; *Root v. King*, 7 Cow. 613; *Pope v. Welsh*, 18 Ala. 631; *Anonymous*, 8 How. Pr. 434; *Young v. Bennett*, 5 Ill. 43; *Burton v. March*, 6 Jones 409; *Moyer v. Moyer*, 49 Pa. 210; *Georgia v. Bond*, 114 Mich. 196; *Siekra v. Small*, 87 Me. 493, 47 Am. St. 344, citing the text; *Wuensch v. Morning Journal Ass'n*, 4 App. Div. (N. Y.) 110; *Candrian v. Miller*, 98 Wis. 164. But see *Myers v. Curry*, 22 Up. Can. Q. B. 470; *Smith v. Shumway*, 2 Tyler 74; *Jones v. Stevens*, 11 Price 235. And see, generally, §§ 152, 153.

Where a tenant is accused of stealing property of the landlord and of retaining a portion of a sum given him by the landlord for the purchase of a team of mules the

character of the plaintiff as well as any and all business transactions between him and the landlord and transaction with other parties affecting the rights of the landlord may be considered in mitigation of damages, even though they do not justify the accusation. *Burkhisier v. Lyons*, — Tex. Civ. App. —, 167 S. W. 244.

⁸⁹ But not that of his family, at least where the plaintiff's reputation is unblemished. *Fenstermaker v. Tribune P. Co.*, 12 Utah 439, 474, 35 L.R.A. 611.

⁹⁰ *Shilling v. Carson*, 27 Md. 175, 92 Am. Dec. 632.

⁹¹ *Ayres v. Covill*, 18 Barb. 260; *Bennett v. Matthews*, 64 Barb. 410; *Pink v. Catanich*, 51 Cal. 420; *Sayre v. Sayre*, 25 N. J. L. 235; *Parkhurst v. Ketchum*, 6 Allen, 406, 83 Am. Dec. 639. See *Halley v. Gregg*, 82 Iowa 622, 626; *Dodge v. Gilman*, 122 Minn. 177, 47 L.R.A. (N.S.) 1098.

⁹² *Pink v. Catanich*, 51 Cal. 420.

not entitled to the same measure of reparation as one whose character is unblemished.⁹³ The inquiry for this purpose must be confined to general character or reputation.⁹⁴ Particular acts or instances of misconduct cannot be proved;⁹⁵ nor rumors and reports unless they are so common and prevalent that they have affected the general character.⁹⁶ The admissibility of this evidence is not, as has just been stated, affected by the fact

⁹³ *Best v. Kessler*, 64 C. C. A. 392, 130 Fed. 24; *Corning v. Dollmeyer*, 123 Ill. App. 188; *Bailey v. Kling*, 88 Neb. 699; *Good v. Grit P. Co.*, 36 Pa. Super. Ct. 238; *Redfearn v. Thompson*, 10 Ga. App. 550; *Watson v. Christie*, 2 B. & P. 224; *Sayre v. Sayre*, 25 N. J. L. 235; *Ayres v. Covill*, 18 Barb. 260; *Root v. King*, 7 Cow. 634; *Hamer v. McFarlin*, 4 Denio 509; *Campbell v. Campbell*, 54 Wis. 97; *Stone v. Varney*, 7 Mete. (Mass.) 86, 39 Am. Dec. 762; *Case v. Marks*, 20 Conn. 251; *Hallowell v. Guntle*, 82 Ind. 554; *Scott v. Sampson*, 8 Q. B. Div. 491; *Traey v. Hackett*, 19 Ind. App. 133, 65 Am. St. 398; *Nellis v. Cramer*, 86 Wis. 337; *Edwards v. Kansas City Times Co.*, 32 Fed. 813.

⁹⁴ *Piester v. Milwaukee Free Press Co.*, 139 Wis. 627; *Vick v. Whitfield*, Mart. & Hayw. 396; *Powers v. Presgroves*, 38 Miss. 227; *Bell v. Farnsworth*, 11 Humph. 608; *Pease v. Shippen*, 80 Pa. 513, 21 Am. Rep. 116; *Dewit v. Greenfield*, 5 Ohio 225; *Fisher v. Patterson*, 14 id. 418; *Parkhurst v. Ketchum*, 6 Allen 406, 83 Am. Dec. 639; *McLaughlin v. Cowley*, 131 Mass. 70; *Shilling v. Carson*, *supra*; *Fuller v. Dean*, 31 Ala. 654; *Sayre v. Sayre*, 25 N. J. L. 235; *Clark v. Brown*, 116 Mass. 504; *Lamos v. Snell*, 6 N. H. 413, 25 Am. Dec. 468; *Leonard v. Allen*, 11 Cush. 241; *Buckley v. Knapp*, 48 Mo. 152; *Hawkins v. Globe P. Co.*, 10 Mo. App. 174; *Folwell v. Providence Journal Co.*, 19 R. I. 551, 558, quoting the text.

dence Journal Co., 19 R. I. 551; *Iles v. Inter Ocean Newspaper Co.*, 184 Ill. App. 63.

⁹⁵ *Iles v. Inter Ocean Newspaper Co.*, *supra*; *Schwing v. Dunlap*, 130 La. 498; *Krulic v. Petcoff*, 122 Minn. 517; *McLaughlin v. Cowley*, 131 Mass. 70; *Mahoney v. Belford*, 132 id. 393; *Hallowell v. Guntle*, 82 Ind. 554; *Scott v. Sampson*, 8 Q. B. Div. 491; *Buckley v. Knapp*, 48 Mo. 152; *Wuensch v. Morning Journal Ass'n*, 4 App. Div. (N. Y.) 110; *Duval v. Davey*, 32 Ohio St. 604; *Corning v. Dollmeyer*, 123 Ill. App. 188; *Wells v. Toogood*, 165 Mich. 677; *Lydiard v. Daily News Co.*, 110 Minn. 140; *Davis v. Hamilton*, 88 Minn. 64; *Vanloon v. Vanloon*, 159 Mo. App. 255; *Yager v. Bruce*, 116 Mo. App. 473; *Fodor v. Fuchs*, 79 N. J. L. 529; *Pier v. Speer*, 73 N. J. L. 633; *Bergstrom v. Ridgway Co.*, 138 App. Div. (N. Y.) 178; *Dinkelspiel v. New York Evening Journal P. Co.*, 42 N. Y. Misc. 74; *Earley v. Winn*, *infra*. Compare *Woolley v. Plaindealer Pub. Co.*, 47 Ore. 619, 5 L.R.A.(N.S.) 498.

Dismissed indictments against the plaintiff are not admissible for any purpose. *Davis v. Hamilton*, 88 Minn. 64.

⁹⁶ *Webb v. Gray*, 181 Ala. 408; *Mills v. Flynn*, 149 Iowa 477, quoting the text; *Bowen v. Hall*, 20 Vt. 232; *Inman v. Foster*, 8 Wend. 602; *Folwell v. Providence Journal Co.*, 19 R. I. 551, 558, quoting the text.

that there is a plea of justification. But if the justification pleaded is special and specific acts tend to establish the truth of the charge they may be proved.⁹⁷ It should, however, not be allowed to have any effect upon the issue formed upon that plea, but be confined to the question of damages.⁹⁸ In some states the inquiry may be as to the plaintiff's general character in respect to the trait involved in the imputation.⁹⁹ But such evidence is only admissible if it is shown that the plaintiff had knowledge of such acts when the wrong complained of was done.¹ In other states the inquiry may be as to the plaintiff's general reputation without respect to such trait.² If the libel includes several charges evidence of the plaintiff's bad character

⁹⁷ *Krulic v. Petcoff*, 122 Minn. 517.

⁹⁸ *Bowen v. Hall*, 20 Vt. 232.

⁹⁹ *Id.*; *Warner v. Lockerby*, 31 Minn. 421; *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156; *Bell v. Farnsworth*, 11 Humph. 608; *Dewit v. Greenfield*, 5 Ohio 225; *Wright v. Schroeder*, 2 Curtis 548; *Bridgman v. Hopkins*, 34 Vt. 532; *Conroe v. Conroe*, 47 Pa. 198; *McNutt v. Young*, 8 Leigh 542; *Shilling v. Carson*, 27 Md. 175, 92 Am. Dec. 632; *Lambert v. Pharis*, 3 Head 622; *Drown v. Allen*, 91 Pa. 393; *Sickra v. Small*, 87 Me. 493, 47 Am. St. 344; *Finley v. Widner*, 112 Mich. 230; *Brewer v. Chase*, 121 Mich. 526, 46 L.R.A. 397; *Hilbrant v. Simmons*, 18 Ohio C. C. 123; *Duval v. Davey*, 32 Ohio St. 604, overruling *Dewit v. Greenfield*, 5 Ohio 225; *Schulze v. Jalonick*, 18 Tex. Civ. App. 296; *Morning Journal Ass'n v. Duke*, 93 C. C. A. 459, 128 Fed. 657; *Earley v. Winn*, 129 Wis. 291.

In *Clark v. Brown*, 116 Mass. 504, it was held that the defendant might introduce evidence in mitigation that the plaintiff's general reputation was bad or show that his gen-

eral reputation was bad in respect to the charge made by the alleged slanderous words.

¹ *Mills v. Flynn*, *supra*; *Butler v. Barret*, 130 Fed. 944; *Vanloon v. Vanloon*, *Dinkelspiel v. New York Evening Journal P. Co.*, *supra*; *Edwards v. San Jose P. & P. Soc.*, 99 Cal. 431, 439, 37 Am. St. 70; *Hatfield v. Lasher*, 81 N. Y. 246; *Morey v. Morning Journal Ass'n*, 123 N. Y. 207, 9 L.R.A. 621, 20 Am. St. 730; *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528; *Palmer v. Matthews*, 162 N. Y. 100; *Gray v. Brooklyn Union P. Co.*, 35 App. Div. (N. Y.) 286. *Bue compare Schulze v. Jalonick*, *supra*.

² *Goodbread v. Ledbetter*, 1 Dev. & Bat. L. 12; *Paddock v. Salisbury*, 2 Cow. 811; *Andrews v. Vanduzer*, 11 Johns. 38; — *v. Moor*, 1 M. & S. 284; *Leicester v. Walter*, 2 Camp. 251; *Rodrigues v. Tadmire*, 2 Esp. 720; *Sheahan v. Collins*, 20 Ill. 325, 71 Am. Dec. 271; *Bailey v. Hyde*, 3 Conn. 463, 8 Am. Dec. 202; *Van Benschoten v. Yaple*, 13 How. Pr. 97; *Stiles v. Comstock*, 9 id. 48; *Richardson v. Northrup*, 56 Barb. 105, 29 Am. Dec. 266, note; *Sayre v. Sayre*, 25 N. J. L. 239.

as to any of them is admissible under a general denial.³ It is not to be denied that there are some cases which favor the admission of evidence to affect the plaintiff's character of common rumor and suspicions that he has been guilty of the acts imputed to him in the alleged slanderous words,⁴ if the rumor and suspicions had come to the ears of the plaintiff before the libel was published.⁵ Where specific acts are alleged it may be shown that other such acts were committed by the plaintiff with other persons.⁶ The character evidence offered by the plaintiff must be limited to places in which the libelous publication is alleged to have circulated.⁷ The effect of the plaintiff's conduct upon the belief of the defendant respecting the matter charged may be shown.⁸ It may be shown that the plaintiff had declared that he was not injured by the slander.⁹

§ 1227. **Same subject; evidence of common reports as to plaintiff's guilt.** If only not guilty is pleaded the defendant

In *Jones v. Stevenson*, 11 Price 235, the court of exchequer held that in actions for libel general evidence of the plaintiff's bad character was irrelevant and inadmissible either to contradict the averments of good character contained in the declaration or in mitigation of damages. Graham, B., said: "On the present occasion there is a full concurrence of opinion amongst the whole court that such general evidence of bad character, whether offered on the general issue or in proof of matter pleaded by way of justification, is not admissible, and principally on the ground that a party cannot be expected to be prepared to rebut it; and that if it were received any man might fall a victim to a combination made to ruin his reputation and good name even by means of the very action which he should bring to free himself from the effects of the malicious slander." It is observed of this case in *Scott v. Sampson*, 8 Q. B. Div. 491, 500, that it

was an action for a libel on the plaintiff in the way of his profession as an attorney. Looking at the reasons given by the learned judges, it would almost appear that they regarded the evidence tendered in that case as evidence of particular facts tending to show the plaintiff's disposition. Although this case was decided by a court *in banc* in 1822, it does not appear to have been cited in cases ruled soon after. It has, however, been followed in the case referred to. See § 1227.

³ *Candrian v. Miller*, 98 Wis. 164.

⁴ *Case v. Marks*, 20 Conn. 248; *Leicester v. Walter*, 2 Camp. 251; — *v. Moor*, 1 M. & S. 284; *Ott v. Murphy*, 160 Iowa 730.

⁵ *Brewer v. Chase*, 121 Mich. 526, 46 L.R.A. 397; *Wolff v. Smith*, 112 Mich. 359.

⁶ *Osterhold v. Star Co.*, 146 App. Div. (N. Y.) 388.

⁷ *O'Neil v. Adams*, 144 Iowa 385.

⁸ *Moore v. Mank*, 3 Ill. App. 114.

⁹ *Richardson v. Barker*, 7 Ind. 567.

has been allowed in some jurisdictions to show, solely in mitigation of damages by rebutting in some degree the presumption of malice, that before the alleged speaking of the words it was a common rumor in the neighborhood that the plaintiff had been guilty of the specific offense charged.¹⁰ In *Shilling v. Carson*¹¹ the court said that whether the defendant will be permitted under the general issue to give such evidence is not universally agreed. But where the evidence goes to prove that the defendant did not act wantonly and under the influence of actual malice, or it is offered solely to show the real character and degree of malice which the law implied from the falsity of the charge, all intention of proving the truth being disclaimed, it may be admitted and considered by the jury.¹² The admissi-

¹⁰ *Stuart v. News P. Co.*, 67 N. J. L. 317; *Edgar v. Newall*, 24 Up. Can. Q. B. 215; *Skinner v. Powers*, 1 Wend. 451; *Wetherbee v. Marsh*, 20 N. H. 561, 51 Am. Dec. 244; *Cook v. Barkley*, 2 N. J. L. 169, 2 Am. Dec. 343; *Hess v. Gansz*, 90 Mo. App. 439; *Fuller v. Dean*, 31 Ala. 654; *Calloway v. Middleton*, 2 A. K. Marsh, 372, 12 Am. Dec. 409; *Van Derveer v. Sutphin*, 5 Ohio St. 293; *Galloway v. Courtney*, 10 Rich. 414; *Bridgman v. Hopkins*, 34 Vt. 532; *Kennedy v. Gregory*, 1 Bin. 85; *Henson v. Veatch*, 1 Blackf. 369; *Morris v. Barker*, 4 Harr. 520; *Fletcher v. Burrows*, 10 Iowa 557; *Foot v. Tracy*, 1 Johns. 45; *Nelson v. Evans*, 1 Dev. 9; *Hinkle v. Davenport*, 38 Iowa 355; *Jones v. Townsend*, 21 Fla. 431; *Montgomery v. Knox*, 23 id. 595; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178, 23 Am. Rep. 680; *Saunders v. Mills*, 6 Bing. 213; *Patten v. Belo*, 79 Tex. 41; *McIntyre v. Bransford* (Ky.), 17 S. W. 359 (under statute permitting defendant to show mitigating circumstances to reduce damages); *Hay v. Reid*, 85 Mich. 296; *Nailor v. Ponder*, 1 Marvel 408; *Blickenstaff v. Perrin*, 27 Ind. 527; *Fowler v.*

Fowler, 113 Mich. 575; *Nelson v. Wallace*, 48 Mo. App. 194; *Hoboken P. & P. Co. v. Kahn*, 58 N. J. L. 359, (it was held defendant might show that the calumnious statement had been received in the way of common gossip: the court of errors divided five to six); *Upton v. Hume*, 24 Ore. 420, 434, 21 L.R.A. 493, 41 Am. St. 863; *Wood v. Custer*, 86 Kan. 387, 38 L.R.A.(N.S.) 1176; *Macintosh v. Dun*, 7 New South Wales St. Rep. 8; *Donahue v. Star P. Co.*, 4 Pennew. (Del.) 166; *Bennett v. Crumpton*, 1 Ga. App. 476 (it seems); *Miller v. Brown S. Co.*, 89 S. C. 530; *Davis v. Hamilton*, 88 Minn. 64 (it seems); *Morgan v. Lexington Herald Co.*, 138 Ky. 637. See *Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 532, and generally, §§ 152, 153.

In Indiana matters "currently circulated and reported" are not provable; it is otherwise with general rumors and suspicions as to the plaintiff's guilt of the acts charged. *Gray v. Elzroth*, 10 Ind. App. 587, 53 Am. St. 400.

¹¹ 27 Md. 175, 92 Am. Dec. 632.

¹² See *Lambert v. Pharis*, 3 Head 622.

bility of such evidence is forcibly contended for by Pennington, J., in *Cook v. Barkley*.¹³ The weight of authority it is believed is opposed to its admission either on a plea of justification or in mitigation.¹⁴ In *Wilson v. Fitch*,¹⁵ Crockett, J., said: "It has often been decided that it is not admissible to prove in mitigation that prior and up to the time of the publication the plaintiff had been generally reported and suspected to have been guilty of the acts imputed to him in the libel. Some of the earlier cases hold such proof to be admissible. But the current of modern authorities is to the contrary. These decisions proceed on the theory that public policy, the good order and repose of society and a due regard for the protection of private character demand that no one should be permitted to excuse or palliate the offense of defaming the reputation of another on so slight a ground as public rumor or general suspicion, which are often unfounded and the result of malice or misapprehension. If the defendant had offered to prove in mitigation that the plaintiff was commonly reported and generally believed to have been guilty of the acts imputed to him in the alleged libel, I think the proof would not have been admissible in mitigation of damages under the rule established by

The jury may, but is not bound, to consider such evidence. *Gill v. Ruggles*, 95 S. C. 90.

¹³ 2 N. J. L. 169, 2 Am. Dec. 343.

¹⁴ *Davis v. Hearst*, 160 Cal. 143; *Bohan v. Record P. Co.*, 1 Cal. App. 429 (if publication libelous *per se*); *Yager v. Bruce*, 116 Mo. App. 473; *Earley v. Winn*, 129 Wis. 291; *Storey v. Early*, 86 Ill. 461; *Peterson v. Morgan*, 116 Mass. 350; *Clark v. Munsell*, 6 Mete. (Mass.) 373; *Alderman v. French*, 1 Pick. 1; *Wolcott v. Hall*, 6 Mass. 514, 4 Am. Dec. 173; *Inman v. Foster*, 8 Wend. 602; *Wilson v. Fitch*, 41 Cal. 363; *Chamberlin v. Vance*, 51 id. 75; *Beardsley v. Bridgman*, 17 Iowa 290; *Fisher v. Patterson*, 14 Ohio 418; *Kenney v. McLaughlin*, 5 Gray 3, 66 Am. Dec. 345; *Bodwell v. Swan*, 3

Pick. 376; *Watson v. Moore*, 2 Cush. 133, 141; *Anthony v. Stephens*, 1 Mo. 254, 13 Am. Dec. 497; *Dame v. Kenney*, 25 N. H. 323; *Moberly v. Preston*, 8 Mo. 466; *Scott v. McKinnish*, 15 Ala. 664; *Pallet v. Sargent*, 36 N. H. 496; *Bowen v. Hall*, 20 Vt. 232; *Sheahan v. Collins*, 20 Ill. 325, 71 Am. Dec. 271; *Mills v. Spencer*, 1 Holt 535, 3 Eng. C. L. 177; *Collins v. Stephenson*, 8 Gray 438; *Mapes v. Weeks*, 4 Wend. 659; *Matson v. Buck*, 5 Cow. 499; *Preston v. Frey*, 91 Cal. 107; *Baldwin v. Boulware*, 79 Mo. App. 5; *Sun P. & P. Ass'n v. Schenck*, 40 C. C. A. 163, 98 Fed. 925; *Tribune Ass'n v. Follwell*, 46 C. C. A. 526, 107 Fed. 646; *Cox v. Strickland*, 101 Ga. 482; *Siekra v. Small*, 87 Me. 493, 47 Am. St. 344. 15 41 Cal. 363.

the almost unbroken current of modern decisions.”¹⁶ Savage, C. J., in *Gilman v. Lowell*,¹⁷ thus forcibly states the objections to such evidence: “That reports of a similar character were prevalent in the neighborhood might show a less degree of malice in the defendant; but they have a tendency to prove the truth and are therefore inadmissible; not that reports are testimony to convict of a crime, but they destroy reputation and have in fact the same effect as proof. It often happens that reports prejudicial to the plaintiff have prevailed extensively before he commences a suit, and the fact that his character is suffering from these reports unmerited opprobrium drives him to a prosecution. If then he is to be met by these reports and only allowed a nominal verdict, which is about equal to a verdict against him, ‘he had better,’ in the language of Chief Justice Parsons,¹⁸ which I have before quoted in *Matson v. Buck*,¹⁹ ‘sink privately under the weight of unmerited calumny, lest by attempting his vindication he give notoriety to slanders which before had been circulated only in whispers.’”

In a recent case *Cave, J.*, after reviewing the previous cases ruled in the various English courts, says that evidence of rumors and suspicions to the same effect as the defamatory matter complained of is inadmissible on principle, as only indirectly tending to affect the plaintiff's reputation. “If these

¹⁶ In 13 Am. Dec. 500, the annotator says: “The correct doctrine, it is conceived, is that laid down in *Bowen v. Hall*, 20 Vt. 232, that reports or suspicions of the plaintiff's guilt are inadmissible unless they have become so general as to affect the reputation or character. Of course, the defendant ought not to be held responsible for damage done to the plaintiff's character by the slander before he (the defendant) took any part in circulating it. But, on the other hand, it is certainly the sounder as well as the safer rule to require every person who assists in giving currency to a defamatory report concerning another to take

upon himself the risk of its being false, unless he repeats the report not merely from an honest belief in its truth, but also for justifiable ends. The mere tattler and scandal-monger should be held to a strict accountability, whether he is the originator of the slander or only aids in its circulation. Every individual who wantonly or negligently contributes to the perpetration of the injury should be responsible for its consequences.”

¹⁷ 8 Wend. 579.

¹⁸ *Wolcott v. Hall*, 6 Mass. 518, 4 Am. Dec. 173.

¹⁹ 5 Cow. 500.

rumors and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it they are not relevant to the issue. To admit evidence of rumors and suspicions is to give any one who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading through the means of the publicity attending judicial proceedings what he may have picked upon from the most disreputable sources and what no man of sense, who knows the plaintiff's character, would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence, for all those who know him best can say is that they have not heard anything of these rumors. Moreover, it may be the defendant himself who has started them."²⁰ In an action for words imputing unchastity to a woman it was held no defense to show that the defendant spoke them to her and was led to do so by her general conduct, and especially by her deportment with a particular man, believing the imputation to be true. Evidence of particular instances was not admissible.²¹ Rumors and reports

²⁰ *Scott v. Sampson*, 8 Q. B. Div. 491, 503. Continuing, the judge said: "Turning to the authorities, it will be seen that while such evidence appears to have been admitted by Lord Ellenborough, C. J., in *Eamer v. Merle* (not reported), and by Cresswell, J., with the approbation of Wightman, J., in *Richards v. Richards* (2 M. & Rob. 557), and while its admissibility was supported by Pigot, C. B., in *Bell v. Parke* (11 Ir. C. L. Rep. 413), it was doubted by Abbott, C. J., in *Waithman v. Weaver* (11 Price 257, n.), and by Coleridge, J., in *Nye v. Thompson* (16 Q. B. 175), and it was held inadmissible by Fitzgerald and Hughes, BB., in *Bell v. Parke* (11 Ir. C. L. Rep. 413), and by the whole court of exchequer in *Jones v. Stevens* (11 Price 235). In *Lei-*

ster v. Walter (2 Camp. 251), evidence of rumors and suspicions was admitted by Sir James Mansfield against his own judgment; but in that case it was proposed to prove that the plaintiff's relations and former acquaintances had ceased to visit him, on account of these rumors and suspicions, so that the evidence would seem really to have amounted to evidence of general reputation. Upon the whole, both the weight of authority and principle seem against the admission of such evidence."

²¹ *Parkhurst v. Ketchum*, 6 Allen 406, 83 Am. Dec. 639; *McLaughlin v. Cowley*, 131 Mass. 70; *Fitzgerald v. Stewart*, 53 Pa. 343; *Dewit v. Greenfield*, 5 Ohio 225; *Vick v. Whitfield*, 2 Hayw. 222; *R— v. M—*, 21 Wis. 50; *Watson v. Moore*, 2 Cush.

short of general reputation are inadmissible because they are generally held not to afford any extenuation of the wrong of aiding to continue the scandal,²² and facts which might lead to a suspicion and reasonable belief of the truth of the imputation are excluded under the rule that requires a plea of justification to let in proof tending to show the truth of the words.²³ But under the statutes, now general in this country, allowing facts and circumstances alleged either in justification or in mitigation to be considered in mitigation, where the justification, pleaded in good faith, is not established, all such as were known to the defendant at the time of speaking the words, and calculated to induce a belief in their truth may be proved and considered.²⁴ In addition to knowledge of such rumors when the words were used the defendant is required to show that he believed them, otherwise the question of his malice could not be affected by them.²⁵ A defendant who publishes a libel as of his own knowledge may not prove rumors or reports of the truth of the charge to negative malice.²⁶

§ 1228. **Same subject; proof of truth of words.** To prevent surprise to the plaintiff on the trial it has been usually held since *Underwood v. Parks*²⁷ that the defendant shall not introduce evidence of the truth of the imputation unless he has specially pleaded that the words were true by way of justification.²⁸ In the absence of such a plea evidence tending to

133. See *Lawler v. Earle*, 5 Allen 22; *Shoulty v. Miller*, 1 Ind. 544.

²² *Proctor v. Houghtaling*, 37 Mich. 41; *Bush v. Prosser*, 11 N. Y. 347; *Willover v. Hill*, 72 id. 36; *Siekra v. Small*, 87 Me. 493, 47 Am. St. 344; *Watson v. Moore*, 2 Cush. 134; *Stepp v. Croft*, 18 Pa. Super. Ct. 101.

²³ *Brickett v. Davis*, 21 Pick. 407.

²⁴ *Bush v. Prosser*, 11 N. Y. 347; *Hatfield v. Lasher*, 81 id. 246; *Distin v. Rose*, 69 id. 127; *Davis v. Hearst*, 160 Cal. 143.

The defendant may show that the charges he made were heard by him at a church trial and that he be-

lieved them to be true. *Harms v. Proehl*, 104 Minn. 303.

²⁵ *Mills v. Flynn*, 157 Iowa 477.

²⁶ *Ott v. Murphy*, 160 Iowa 730.

²⁷ 2 Str. 1200.

²⁸ *Ferdon v. Dickens*, 161 Ala. 181; *Davis v. Hearst*, *supra*; *Williams P. Co. v. Saunders*, 113 Va. 156; *Townsend on Slander & L.* 682; *Bodwell v. Swan*, 3 Pick. 376; *Watson v. Moore*, 2 Cush. 133; *Root v. King*, 7 Cow. 613; *Pallet v. Sargent*, 36 N. H. 496; *Young v. Bennett*, 5 Ill. 43; *Beardsley v. Bridgman*, 17 Iowa 290; *Ridley v. Perry*, 16 Me. 21; *Minesinger v. Kerr*, 9 Pa. 312; *Porter v. Botkins*, 59 Pa. 484,

establish the truth of the charge is generally held inadmissible for the purpose of mitigation.²⁹ But the defendant may prove under the general issue the circumstances which induced him erroneously to make the charge.³⁰ Particular facts which might form links in the chain of circumstantial evidence against the plaintiff cannot be proved. Accordingly, it was held that proof that he was in possession of the property alleged to have been stolen and returned it to the owner about the time of the prosecution of another person for the stealing of other property alleged to have been taken at the same time was inadmissible on that ground.³¹ The defendant may prove any facts in the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language complained of, tending to excuse the uttering of the words, provided the facts do not tend to prove the truth of the charge, but in fact relieve the plaintiff from the imputation.³² Thus, when a party charged one against whom a justice's judgment had been obtained, with false swearing in making oath that he was a free-

11 Am. Dec. 130, note; Fenstermaker v. Tribune P. Co., 12 Utah 439, 461, 35 L.R.A. 611; Murten v. Garbe, 93 Neb. 589, 141 N. W. 146; § 152.

In Illinois under the constitution and statutes truth is a complete defense regardless of motives. Tilton v. Maley, 186 Ill. App. 307.

²⁹ Id.; Cook v. Globe P. Co., 227 Mo. 471; Sheibley v. Nelson, 84 Neb. 393; Starks v. Comer, — Ala. —, 67 So. 440 (by statute limited only to mitigation of damages).

³⁰ Id.; Ferdon v. Dickens, *supra*; Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156; Eagan v. Gault, 1 McMull 468; Dewit v. Greenfield, 5 Ohio 225; Bailey v. Hyde, 3 Conn. 463, 8 Am. Dec. 202; Fero v. Ruscoe, 4 N. Y. 162; Warmouth v. Cramer, 3 Wend. 395, 20 Am. Dec. 706; Van Ankin v. Westfall, 14 Johns. 232; Shepard v. Merrill, 13 id. 475; Matson v. Buck, 5 Cow. 499; Laine

v. Wells, 7 Wend. 175; Samuel v. Bond, Litt. Sel. Cas. 158; Shirley v. Keothy, 4 Cold. 29; McCampbell v. Thornburgh, 3 Head. 109; Bourland v. Eidson, 8 Gratt. 27; Thompson v. Bowen, 1 Doug. 321, overruled in Farr v. Rasco, 9 Mich. 353, 80 Am. Dec. 88; Parke v. Blackiston, 3 Harr. 373; Bisbey v. Shaw, 12 N. Y. 67; Hutchinson v. Wheeler, 35 Vt. 330; Haywood v. Foster, 16 Ohio 88; Wilson v. Apple, 3 id. 270; Hawkins v. Globe P. Co., 10 Mo. App. 174; Warner v. Lockerby, 31 Minn. 421; Folwell v. Providence Journal Co., 19 R. I. 551; Edwards v. Kansas City Times Co., 32 Fed. 813.

³¹ Warmouth v. Cramer, 3 Wend. 395, 20 Am. Dec. 706.

³² Bourland v. Eidson, 8 Gratt. 27; Purple v. Horton, 13 Wend. 9, 27 Am. Dec. 167; Mosier v. Stoll, 119 Ind. 244.

holder, he was allowed to show that, on search for the deed in the proper office where by law it was required to be recorded it was not found owing to a mistake of the recording officer in indexing the records.³³

A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge; it is unnecessary to repeat and justify every word of the alleged defamatory matter if the substance of the charge be justified. If the substantial imputations be proved true a slight inaccuracy in the details will not prevent a judgment for the defendant if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than would the actual truth.³⁴ If, however, the alleged libelous article is indivisible and the facts asserted are dependent on each other to impute the defamatory charge, then each material allegation must be justified or the plaintiff will be entitled to recover to the extent that he has been damaged by the unjustified portion.³⁵ If a material part of the plea fails the whole of it is bad.³⁶ In Pennsylvania liability may be mitigated by the plaintiff's

³³ *Gilman v. Lowell*, 8 Wend. 573; *Chestwood v. Mayo*, 5 Munf. 16.

In *Hutchinson v. Wheeler*, 35 Vt. 330, under the general issue, it was held competent for the defendant to show in mitigation, as tending to evince his belief in the words charged,—which were that the plaintiff had poisoned his cow,—that his cow had been poisoned; that for some time previous to the loss there had been a bitter, hostile feeling on the part of the plaintiff towards the defendant; that the defendant having poisoned the plaintiff's dog, the plaintiff had several times threatened to pay the defendant in his own coin; that the defendant had attempted to instigate a prosecution against the plaintiff, and that shortly before the defendant's cow was poisoned a new quarrel had broken out between the parties.

³⁴ *Odgers on Libel*, etc., 170, citing *Alexander v. Railway Co.*, 34 L. J. (Q. B.) 152; *Stockdale v. Tarte*, 4 Ad. & E. 1016; *Blake v. Stevens*, 4 F. & F. 239. To the same effect are *Sullings v. Shakespeare*, 46 Mich. 413, 41 Am. Rep. 166; *Hearne v. De Young*, 119 Cal. 670, 674, quoting the text; *Farbenfabriken of Elberfeld Co. v. Beringer*, 86 C. C. A. 62, 158 Fed. 802.

³⁵ *Weaver v. Lloyd*, 1 C. & P. 295; *Ingram v. Lawson*, 5 Bing. N. C. 218; *Holmes v. Jones*, 147 N. Y. 59, 49 Am. St. 646; *McAllister v. Free Press Co.*, 85 Mich. 453, 95 Mich. 164; *Hay v. Reid*, 85 Mich. 296; *Kovaes v. Mayoras*, 175 Mich. 582; *Spencer v. Minnick*, 41 Okla. 613.

³⁶ *Saunders v. Post-S. P. Co.*, 107 App. Div. (N. Y.) 84; *Sotham v. Drovers' T. Co.*, 239 Mo. 606; *Cox v. Strickland*, 101 Ga. 482, 493.

proof of the truth of a particular, severable statement, especially if it was proper for the information of the public.³⁷

§ 1229. **Same subject.** In estimating the damages the degree of the defendant's malice is always to be considered; therefore, any circumstances, consistent with an admission of the falsity of the words spoken, tending to show that he uttered them under a mistaken belief that they were true may be proved under the general issue in mitigation.³⁸ In the nature of things the scope of this evidence is very limited, and the manifest hardship of compelling a defendant to plead justification, with the hazard of aggravating the damage if it be not established, or of depriving him of the privilege of proving a state of facts which, though tending to prove the words true, and, therefore, of an extenuating nature, were insufficient for that purpose have led to some diversities of decision. Some courts have applied the rule with more liberality than others. In *Bush v. Prosser*,³⁹ Selden, J., said: "The courts in England, under a sense of the admitted right [of the defendant to mitigate damages by showing the absence of malice], have in a number of cases decided that facts and circumstances falling short of proving, although tending to prove, the truth of the charge might be received in mitigation."⁴⁰ But the courts in this state and in Massachusetts, with less justice but better logic, have uniformly held that a rule which excluded proof of the truth of the charge must necessarily exclude evidence tending to prove it. But it is a little surprising to observe how often judges have asserted in the same paragraph both the right to mitigate by disproving malice and the rule which effectually precluded the exercise of the right without any apparent consciousness of the conflict between the two. I will refer to a few only out of the many instances. In the

³⁷ *Binder v. Pottstown Daily News P. Co.*, 33 Pa. Super. Ct. 411.

³⁸ *Dodge v. Gilman*, 122 Minn. 177, 47 L.R.A.(N.S.) 1098; *Mosier v. Stoll*, 119 Ind. 244; *Wilson v. Apple*, 3 Ohio 270. See *Ott v. Press*

Pub. Co., 40 Wash. 308; *Spencer v. Minnick*, 41 Okla. 613.

³⁹ 11 N. Y. 347.

⁴⁰ *Knobell v. Fuller, Norris' Peake*, Append. 130; *Chalmers v. Shackell*, 6 C. & P. 475; *Leicester v. Walter*, 2 Camp. 251.

case of *King v. Root*,⁴¹ Judge Savage says that the defendant 'may show in evidence under the general issue, by way of excuse, anything short of a justification which does not necessarily imply the truth of the charge or tend to prove it true, but which repels the presumption of malice arising from the fact of publication.' The same judge, in *Purple v. Horton*,⁴² says: 'Facts and circumstances may be shown in mitigation when they disprove malice, and do not tend to prove the charge or form a link in the chain of evidence to prove a justification.' Again, Judge Bronson in *Cooper v. Barber*⁴³ says: 'Facts and circumstances which tend to disprove malice by showing that the defendant, though mistaken, believed the charge true when it was made may be given in evidence in mitigation of damages.' It does not appear to have occurred to either of these eminent judges that there was any incongruity between the two branches of the proposition thus asserted by them. But it is certainly difficult to comprehend how a defendant is to disprove malice by showing 'that he believed the charge true when it was made' without giving evidence tending to establish its truth, since a belief based on information derived from others cannot be shown." In Michigan the doctrine of this narrow privilege of mitigation has been rejected; there facts tending to establish the truth of the words may be shown; the plea of the general issue, without notice of justification, is treated as a conclusive admission of their falsity, and that such facts merely disprove malice by showing that the defendant at the time he uttered the words mistakenly believed them to be true.⁴⁴ A rule nearly as liberal is recognized in Ohio.⁴⁵

§ 1230. **Same subject; effect of statutes.** It is very generally provided by statute, and especially in states which have adopted the code, that the defendant may in his plea or answer allege both the truth of the matter charged as defamatory and

⁴¹ 7 Cow. 613.

⁴² 13 Wend. 9, 27 Am. Dec. 167.

⁴³ 24 Wend. 105.

⁴⁴ *Huson v. Dale*, 19 Mich. 17, 2 Am. Rep. 66.

⁴⁵ *Haywood v. Foster*, 16 Ohio 88; *Dewit v. Greenfield*, 5 id. 225; *Wilson v. Apple*, 3 id. 270; *Reynolds v. Tucker*, 6 Ohio St. 516, 67 Am. Dec. 353.

any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not he may give in evidence the mitigating circumstances. Under such statutes matters in mitigation may and probably should be specially stated in the answer; this is implied by their permissive language.⁴⁶ For this purpose facts and circumstances may be set up which tend to prove the truth of the charge to show an absence of malice, by proper averments that the defendant was, by such facts, induced to believe the defamatory matter to be true at the time of the publication.⁴⁷ The defendant may in his answer allege the truth of the matters charged and mitigating circumstances, or either. It is not necessary to plead the former in order to aver and have the benefit of the latter. All matters receivable in evidence in mitigation may be pleaded for that purpose either with or without justification.⁴⁸ Although the evidence fails to prove the justification when the truth of the words is pleaded both for that purpose and in mitigation, he is still entitled to have such evidence, as has been adduced tending to establish the truth, considered by the jury for the purpose of mitigation.⁴⁹ The facts shown in mitigation affect

⁴⁶ *Rocky Mt. News v. Fridborn*, 46 Colo. 440, 24 L.R.A.(N.S.) 891; *Ladwig v. Heyer*, 136 Iowa 196; *Pfister v. Milwaukee Free Press Co.*, 139 Wis. 627; *McKyring v. Bull*, 16 N. Y. 297; § 166; *Willover v. Hill*, 72 N. Y. 36, 38; *Spooner v. Keeler*, 51 id. 527; *Bower v. Derideker*, 37 Iowa 418; *Fenstermaker v. Tribune P. Co.*, 12 Utah 439, 464, 13 Utah 532, 35 L.R.A. 611; *Mielenz v. Quasdorf*, 68 Iowa 726. It is optional in Indiana. *O'Connor v. O'Connor*, 27 Ind. 69.

In Delaware whatever is admissible in mitigation may be proved under the general issue; it cannot be specially pleaded. *Donahoe v. Star Pub. Co.*, 4 Pennw. (Del.) 166.

⁴⁷ *Advertiser Co. v. Jones*, 169 Ala. 196; *Bennett v. Matthews*, 64 Barb. 410; *Bush v. Prosser*, 11 N. Y. 347; *McKyring v. Bull*, 16 id. 297;

Stiles v. Comstock, 9 How. Pr. 48; *Heaton v. Wright*, 10 id. 79; *Bisbey v. Shaw*, 12 N. Y. 67; *Dolevin v. Wilder*, 7 Robert 319; *Van Benschoten v. Yapple*, 13 How. Pr. 97; *Wachter v. Quenzer*, 29 N. Y. 547; *Willover v. Hill*, 72 id. 36; *Adamson v. Raymer*, 94 Wis. 242.

⁴⁸ *Id.*; *Graham v. Stone*, 6 How. Pr. 15; *Brown v. Orvis*, id. 376; *Follett v. Jewett*, 1 Am. L. Reg. 600, 11 N. Y. Leg. Obs. 193; *Anderson v. Shockley*, 159 Mo. App. 334.

Under a statute allowing under the plea of general issue the introduction, in defense, of "matter of law or fact whatever," evidence of the truth of the alleged defamatory matter is admissible under such a plea though justification be not pleaded. *Gomez v. Hawaiian Gazette Co.*, 10 Hawaii 108.

⁴⁹ *Yager v. Bruce*, 116 Mo. App.

liability only as to the charge they meet; if two statements are made against the plaintiff, mitigating matter as to one of them does not necessarily affect the recovery for the other.⁵⁰ In the absence of any evidence to support the facts pleaded in mitigation, if they were alleged maliciously and without probable cause, the jury may consider the imputations in aggravation of the damages.⁵¹

§ 1231. **Evidence in mitigation generally.** The defendant is always entitled to show, under proper pleading, the particular circumstances under which the alleged defamatory matter was published for the purpose of showing the nature and character of the publication⁵² as well as the occasion and motive of it.⁵³ Evidence for this purpose to disprove malice, by showing facts and circumstances which caused the defendant to believe the charge true when he made it, must be such as would reasonably induce in the mind of a person of ordinary intelligence a belief in the truth of the charge, and it must also appear that

473; *Bisbey v. Shaw*, 12 N. Y. 67; *Spooner v. Keeler*, 51 id. 529; *Kinyon v. Palmer*, 18 Iowa 377; *Kennedy v. Holborn*, 16 Wis. 457; *Distin v. Rose*, 69 N. Y. 127; *Sharpe v. Larson*, 74 Minn. 323.

⁵⁰ *Greesman v. Morning Journal Ass'n*, 197 N. Y. 474.

⁵¹ *Cruikshank v. Gordon*, 118 N. Y. 178; *Sun P. & P. Ass'n v. Schenck*, 40 C. C. A. 163, 98 Fed. 925.

⁵² *Jeffras v. McKillop*, 2 Hun 351. See *Storey v. Early*, 86 Ill. 461.

It may be shown that a forged letter was published in good faith. *Foster-M. Co. v. Chinn*, 134 Ky. 424, 34 L.R.A.(N.S.) 1137, 135 Am. St. 417.

⁵³ *Fredon v. Dickens*, 161 Ala. 181; *Rocky Mt. News v. Fridborn*, 46 Colo. 440, 24 L.R.A.(N.S.) 891; *Levert v. Daily States P. Co.*, 123 La. 594, 131 Am. St. 356; *Paxton v. Woodward*, 31 Mont 195, 107 Am. St. 416; *Osterheld v. Star Co.*, 146

App. Div. (N. Y.) 388; *Hearst v. New Yorker Staats Zeitung*, 71 N. Y. Misc. 7; *Logan v. Hodges*, 146 N. C. 38; *Morris v. Lachman*, 68 Cal. 109; *Jones v. Murray*, 167 Mo. 25; *Collis v. Press P. Co.*, 68 App. Div. (N. Y.) 38; *Welker v. Butler*, 15 Ill. App. 209; *Bruce v. Reed*, 104 Pa. 408; *Larned v. Buffinton*, 3 Mass. 546, 3 Am. Dec. 185; *Abrams v. Smith*, 8 Blackf. 95; *Root v. King*, 7 Cow. 613; *Lewis v. Walter*, 4 B. & Ald. 605; *Haynes v. Leland*, 29 Me. 233; *Haines v. Welling*, 7 Ohio 253; *Blocker v. Schoff*, 83 Iowa 265; *Evening Post Co. v. Hunter*, 18 Ky. L. Rep. 726; *Upton v. Times-Democrat P. Co.*, 104 La. 141; *Davis v. Marxhausen*, 103 Mich. 315; *Callahan v. Ingram*, 122 Mo. 355, 43 Am. St. 583; *Henn v. Horn*, 56 Ohio St. 442, 448; *Adamson v. Raymer*, 94 Wis. 243; *Beaton v. Intelligencer P. & P. Co.*, 22 Ont. App. 97.

he was thereby brought to believe in its truth.⁵⁴ Therefore, it should appear that at the time the defendant made the charge he knew the facts upon which he relies for mitigation, and he should aver that such facts induced a belief in its truth at the time he made it; or they should be of such a character as to raise a reasonable presumption of such belief.⁵⁵ Merely believing the charge to be true, however sincere the belief may be, will not excuse either slander or libel;⁵⁶ but a belief reasonably induced by facts which the law permits to be proved as likely to produce it will mitigate the damages. If specific charges have been made and these were coupled with general charges

⁵⁴ *Hearst v. New Yorker Staats Zeitung, supra*; *Dolevin v. Wilder*, 7 Robert 319, 34 How. Pr. 488; *Webb v. Gray*, 181 Ala. 408.

⁵⁵ *Id.*; *Hatfield v. Lasher*, 81 N. Y. 246; *Reynolds v. Tucker*, 6 Ohio St. 516, 67 Am. Dec. 353; *Whitney v. Janesville Gazette*, 5 Biss. 330; *Swift v. Dickerman*, 31 Conn. 285; *Morning Journal Ass'n v. Duke*, 63 C. C. A. 459, 128 Fed. 657; *Tingley v. Times Mirror*, 151 Cal. 1; *Calderin v. Herald Espanol*, 4 Porto Rico Fed. 376; *Bush v. Prosser*, 11 N. Y. 347; *Willower v. Hill*, 72 id. 36; *Morey v. Morning Journal Ass'n*, 123 id. 207, 9 L.R.A. 621, 20 Am. St. 730; *Larrabee v. Minnesota Tribune Co.*, 36 Minn. 141; *Pratt v. Pioneer Press Co.*, 35 Minn. 251; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307; *Kinney v. Roberts*, 26 Hun 166; *Wolff v. Smith*, 112 Mich. 359; *Lewis v. Humphries*, 64 Mo. App. 466; *Fenstermaker v. Tribune P. Co.*, 12 Utah 439, 465, 35 L.R.A. 611; *Peterson v. Morgan*, 116 Mass. 350; *Marker v. Dunn*, 68 Iowa 720; *Huffer v. Miller*, 74 Md. 454; *Sum P. & P. Ass'n v. Schenck*, 40 C. C. A. 163, 98 Fed. 925; *Hulbert v. New*

Nonpareil Co., 111 Iowa 490; *Hagener v. Pulitzer Pub. Co.*, 172 Mo. App. 436.

Good faith and absence of malice are not a defense when the words are actionable *per se* but may be urged in mitigation of damages. *Ivie v. King*, 167 N. C. 174, rehearing denied, 85 S. E. 413.

The belief of the defendant's informant in its truth is not available in mitigation. *Hawkins v. Globe P. Co.*, 10 Mo. App. 174.

⁵⁶ *Sans v. Joeris*, 14 Wis. 663; *Burt v. Advertiser N. Co.*, 154 Mass. 238, 13 L.R.A. 97; *Blocker v. Schoff*, 83 Iowa 265; *Austin v. Hyndman*, 119 Mich. 615; *Brewer v. Chase*, 121 Mich. 526, 46 L.R.A. 397; *Holmes v. Jones*, 147 N. Y. 59, 49 Am. St. 646; *Williams v. Hicks Printing Co.*, 159 Wis. 90.

Where the picture of one woman is used as that of another who was represented in a newspaper as endeavoring to save her convicted father from the gallows by an appeal to the governor, the lack of knowledge and bad intent is not a full defense, but bears upon the measure of damages. *Van Wington v. Pulitzer Pub. Co.*, 134 C. C. A. 483, 218 Fed. 795.

it is not permissible to plead in mitigation other and different charges, based upon information received from others.⁵⁷

There is considerable contrariety of decision with respect to the facts which may be shown in mitigation as having a tendency to create an honest belief of the truth of the imputation. The matter relied upon must be such as by the well-established principles of law may be proved for mitigation.⁵⁸ The defendant may show that he was drunk when he uttered the words, as such proof may tend to rebut malice.⁵⁹ But where it appeared that he repeated the charge both when drunk and when sober, on public and private occasions, his being drunk at the particular time alleged is no reason for abating the damages.⁶⁰ He may show he was insane;⁶¹ that the publication was confidential.⁶² Evidence of facts occurring more than two years after the publication of an alleged libel is not admissible in mitigation of damages.⁶³ Inasmuch as the absence of specific malice is relevant on the issue of exemplary damages,⁶⁴ the author of a libel may testify to the absence of ill will toward

⁵⁷ *Hess v. New York Press Co.*, 26 App. Div. (N. Y.) 73.

⁵⁸ *Graham v. Stone*, 6 How. Pr. 15; *Bergstrom v. Ridgway Co.*, 138 App. Div. (N. Y.) 178.

Where incompetency was charged against an attorney the defendant sought to set up in mitigation an impending election of village trustees; that the plaintiff had been an officer of the village and during his incumbency great extravagance had prevailed; judgments had been obtained against the village while the plaintiff was its attorney; that the charge was but part of a circular distributed to the taxpayers arraigning the plaintiff and other officials and criticising the general conduct of affairs, published for the purpose of arousing public attention to these matters, and that the defendant was a resident taxpayer of the village. These facts did not tend to disprove malice by showing

that the words were spoken in the honest belief of their truth, or that there was the least reason for such belief; they had no natural tendency to induce belief that the plaintiff was incompetent or that the defendant had reasonable foundation for that belief arising from those facts, or even that he had such belief at all. *Mattice v. Wilcox*, 147 N. Y. 624, 634; *Adamson v. Raymer*, 94 Wis. 243, 248.

⁵⁹ *Alderson v. Kahle*, 73 W. Va. 690, 51 L.R.A. (N.S.) 1198; *Howell v. Howell*, 10 Ired. 84. *Contra*, *Mix v. McCoy*, 22 Mo. App. 488.

⁶⁰ *Id.*

⁶¹ *Yeates v. Reed*, 4 Blackf. 463, 32 Am. Dec. 43.

⁶² *Jellras v. McKillop*, 2 Hun 351.

⁶³ *Hes v. Inter Ocean Newspaper Co.*, 184 Ill. App. 63.

⁶⁴ *Neafie v. Hoboken P. & P. Co.*, 75 N. J. L. 564.

the plaintiff.⁶⁵ Evidence that the defendant was in the habit of talking much about persons and things and that what he said was not regarded by the community as worthy of notice and seldom occasioned remark is not admissible in mitigation.⁶⁶ Where by statute the imputation of a want of chastity against a female is made actionable *per se* the repetition of it is not wholly excused by a protest at the time of disbelief, or by showing that those who heard the slander did not believe it to be true. Such conduct is actionable, and the question of the extent of responsibility is for the jury and is not to be solved by a presumption of harmlessness.⁶⁷ Where a female was charged with unchastity in connection with the man she subsequently married it was competent to prove allegations in the answer to the effect that he had been divorced from his wife and that the plaintiff had obtained a divorce from her former husband, and that both actions for divorce were fraudulent and collusive, which facts were known to the defendant prior to the publication of the article complained of.⁶⁸ An imputation of perjury in a certain bill in chancery cannot be extenuated by proof that at the time of the publication the defendant supposed and believed the plaintiff had sworn to it, when in fact it had been sworn to by another person.⁶⁹ The impressions of witnesses as to the effect of the slander upon the plaintiff may not be shown.⁷⁰

⁶⁵ *Friedman v. Pulitzer P. Co.*, 102 Mo. App. 683.

⁶⁶ *Howe v. Perry*, 15 Pick. 506. See *Bishop v. Journal N. Co.*, 168 Mass. 327.

But in *Richardson v. Barker*, 7 Ind. 567, it is ruled that testimony of those who heard the slanderous words that they did not believe them is not admissible. "We do not know whether this offer was based upon the defendant's bad, or the plaintiff's good character. If the former, we know of no rule that would authorize a defendant to prove that he was unworthy of belief to mitigate the force of a false and malicious
Suth. Dam. Vol. IV.—59.

charge. If the latter, we are as little disposed to establish a rule that a man's exalted character and moral worth shall be the occasion of permitting every one to slander him with impunity merely because such false and malicious charges will not be believed."

⁶⁷ *Burt v. McBain*, 29 Mich. 260; *Markham v. Russell*, 12 Allen, 573, 90 Am. Dec. 169.

⁶⁸ *Morse v. Press P. Co.*, 63 App. Div. (N. Y.) 61.

⁶⁹ *Owen v. McKean*, 14 Ill. 459.

⁷⁰ *Linehan v. Nelson*, 197 N. Y. 482, 35 L.R.A. (N.S.) 1119.

A retraction made so promptly as to become a part of the *res gesta* and freed from all suspicion that it was made by the defendant more for his own protection than for reparation to the victim of his calumny is provable in mitigation.⁷¹ A retraction to be available for this purpose should contain a full and unqualified withdrawal of the charge, unaccompanied with other offensive or libelous matter, and thus evince the intention of making some atonement for the injury done. Allowing such evidence properly gives the defendant a *locus penitentie*, and he should have the benefit of it when he evinces an honest endeavor to make atonement to as great an extent as is within his power. But hesitation, lurking insinuation, an attempted perversion of the plain import of the language used in the libelous article, or the substitution of one calumny for another, only aggravates the original offense and shows a consciousness of the wrong done without the manliness or magnanimity to repair it.⁷² A retraction of a libelous article published after a suit has been brought for the libel it is held in Michigan, cannot be considered in mitigation;⁷³ but the weight of authority and the better reasons are in opposition.⁷⁴ An offer made by the publisher of a newspaper, pending a suit against him for libel, to publish any explanation or statement the plaintiff wished to make, is of no avail.⁷⁵ An apology for a slander

⁷¹ *Advertiser Co. v. Jones*, 169 Ala. 196; *Townsley v. Yentsch*, 98 Ark. 312; *White v. Sun P. Co.*, 164 Ind. 426; *Ellis v. Brockton P. Co.*, 198 Mass. 538, 126 Am. St. 454; *De Severinus v. Press P. Co.*, 147 App. Div. (N. Y.) 161; *Taylor v. Hearst*, 107 Cal. 262; *Turner v. Hearst*, 115 Cal. 394, 402; *Upton v. Times-Democrat P. Co.*, 104 La. 141; *Storey v. Wallace*, 60 Ill. 51; *Davis v. Marxhausen*, 103 Mich. 315; *Turton v. New York Recorder Co.*, 144 N. Y. 144.

⁷² *Cook v. Globe P. Co.*, 227 Mo. 471; *Hotchkiss v. Oliphant*, 2 Hill 510.

The plaintiff may testify as to the state of his feelings on reading the

original article and also on reading the one claimed to be a retraction, as tending to show whether the latter lessened the injury. *McClure Co. v. Philipp*, 96 C. C. A. 86, 170 Fed. 910.

⁷³ *Evening News Ass'n v. Tryon*, 42 Mich. 549, 36 Am. Rep. 450. See *Shirley v. Keathy*, 4 Cold. 29.

⁷⁴ *Turner v. Hearst*, 115 Cal. 394, 402; *Smith v. Harrison*, 1 F. & F. 565; *Turton v. New York Recorder Co.*, 144 N. Y. 144; *Dinkelspiel v. New York Evening Journal P. Co.*, 42 N. Y. Misc. 74. See as to the Massachusetts statute, *Ellis v. Brockton P. Co.*, 198 Mass. 538, 126 Am. St. 454.

⁷⁵ *Constitution Pub. Co. v. Way*,

made on request mitigates liability,⁷⁶ and the publication before suit of a correction made by the plaintiff is competent to rebut the inference of malice.⁷⁷ A retraction in Ohio is operative only when demanded by the plaintiff; the effect to be given a voluntary one is for the jury.⁷⁸ The plaintiff is not bound to request the publication of a retraction or any other statement concerning himself.⁷⁹

It is a matter in aggravation rather than in mitigation of damages where prior to the commencement of the action the defendant, a newspaper, offers to publish a retraction of any statement contained in the alleged libelous article upon plaintiff producing proof of its incorrectness but suggests greater humiliation if suit is commenced, and also offers to publish any signed article furnished by the plaintiff, subject to such comments, as the defendant sees fit to make.⁸⁰ It is an aggravation, rather than a mitigation, of damages that the libelous matter was published as an advertisement for pecuniary compensation;⁸¹ and that a mother was charged with being a thief in the presence of her family only.⁸² A person cannot shield himself from liability for full damages for a libelous publication in a newspaper owned or conducted by him by absenting himself when the publication is made, or by establishing rules for the governance of his employees unless such rules are enforced.⁸³ Compensatory damages are not affected because the publication was made without the knowledge of the defendant,⁸⁴ or in good faith.⁸⁵ The elimination of libelous

94 Ga. 120; *Turton v. New York Recorder Co.*, *supra*. See *Dalziel v. Press P. Co.*, 52 N. Y. Misc. 207.

⁷⁶ *Dixie F. Ins. Co. v. Betty*, 101 Miss. 880.

⁷⁷ *Fessinger v. El Paso Times Co.* (Tex. Civ. App.), 154 S. W. 1171.

⁷⁸ *Post P. Co. v. Butler*, 71 C. C. A. 309, 137 Fed. 723.

⁷⁹ *Coffman v. Spokane Chronicle P. Co.*, 65 Wash. 1.

⁸⁰ *Williams v. Hicks Printing Co.*, 159 Wis. 90.

⁸¹ *Cox v. Strickland*, 101 Ga. 482.

⁸² *Fatjo v. Seidel*, 109 La. 699.

⁸³ *Morgan v. Bennett*, 44 App. Div. (N. Y.) 323; *Bennett v. Salisbury*, 24 C. C. A. 329, 78 Fed. 769.

Mitigating circumstances may be proved to aid the jury in fixing the damages, but not to reduce them after they have been ascertained. The evidence in mitigation is to be weighed with all the other evidence. *Keller v. American Bottlers' P. Co.*, 140 App. Div. (N. Y.) 311.

⁸⁴ *Williams v. Fuller*, 68 Neb. 354.

⁸⁵ *Comer v. Advertiser Co.*, 172 Ala. 613.

portions of an article prior to its publication does not tend to show the absence of malice in publishing other portions of it which were libelous.⁸⁶ Another article in the same issue of the paper as the one complained of is not admissible.⁸⁷

Under a statute making good faith on the part of the publisher of a libelous article and the publication of a full and fair retraction a defense against all except actual damages, the burden is upon him to establish such defense. The question of good faith and whether the falsity of the article was due to mistake of the facts is for the jury, unless the evidence to establish the defense is undisputed. To constitute "good faith" the publication must have been honestly made in the belief of its truth, and upon reasonable grounds for the belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances.⁸⁸ Whether the retraction is full and fair is a question of law. In order to be so it must clearly refer to and admit the publication of the article complained of and directly, fully and fairly, without uncertainty, evasion or subterfuge, retract the alleged false defamatory statements therein.⁸⁹

§ 1232. *Same subject.* The defendant may show for the purpose of rebutting malice and reducing damages that the words spoken were in anger, if the anger was induced by the plaintiff immediately before the publication⁹⁰ or under

⁸⁶ *Tingley v. Times Mirror Co.*, 151 Cal. 1.

⁸⁷ *Quinn v. Review P. Co.*, 55 Wash. 69, 133 Am. St. 1016.

⁸⁸ *Allen v. Pioneer Press Co.*, 40 Minn. 117, 12 Am. St. 707, 3 L.R.A. 532.

⁸⁹ *Gray v. Times N. Co.*, 74 Minn. 452, 73 Am. St. 363; *Gray v. Minnesota Tribune Co.*, 81 Minn. 333; *Calderin v. Herald Espanol*, 4 Porto Rico Fed. 376.

⁹⁰ *Emerson v. Miller*, 115 Iowa 315; *Alderson v. Kahle*, 73 W. Va. 690, 51 L.R.A.(N.S.) 1198; *Shockey v. McCauley*, 101 Md. 461; *Miller v. Dorsey*, 149 Mo. App. 24; *Israel*

v. Israel, 109 Mo. App. 366; *Andrus v. Harris*, 126 App. Div. (N. Y.) 564; *Phillips v. Le June*, 1 Ohio C. C. (N. S.) 616; *Flannigan v. Stauss*, 131 Wis. 94; *Zurawski v. Reichmann*, 116 Iowa 388; *Newman v. Stein*, 75 Mich. 402, 13 Am. St. 447; *Ritchie v. Stenius*, 73 Mich. 563; *Robinson v. Keyser*, 22 N. H. 323; *Pierson v. Steortz*, Morris 136; *Warner v. Lockerby*, 31 Minn. 421; *Jauch v. Jauch*, 50 Ind. 135. See *Haws v. Stanford*, 1 Tenn. Cas. 80, *Thompson's Cas.* 137. In Louisiana the interchange of opprobrious epithets and mutual vituperation and abuse will justify a

mental distress growing out of the plaintiff's conduct at the time the alleged wrong was done.⁹¹ Evidence of a previous publication by the plaintiff will not be received in mitigation on the ground of provocation unless not only the connection between the publications be manifest, but also that the provocation is so recent as to induce a fair presumption that the injury complained of was inflicted during the continuance of the feelings and passion excited by the provocation.⁹² A dis-

judge in approving a verdict for the defendant although the slanderous words were proved; a verdict so rendered will not be disturbed on appeal. *Fulda v. Caldwell*, 9 La. Ann. 358; *Goldberg v. Dobbertine*, 46 La. Ann. 1303, 1308, 28 L.R.A. 721. This view is said to be exceptional. *Brewer v. Chase*, 121 Mich. 526, 538, 46 L.R.A. 397; *Patton v. Cruce*, 72 Ark. 421, 105 Am. St. 46, 65 L.R.A. 937.

⁹¹ *McDougald v. Coward*, 95 N. C. 368. See §§ 152, 153.

⁹² *Keller v. American Bottlers' P. Co.*, 140 App. Div. (N. Y.) 311; *Fish v. St. Louis County P. & P. Co.*, 102 Mo. App. 6; *Maynard v. Beardsley*, 7 Wend 560, 22 Am. Dec. 595; *May v. Brown*, 3 B. & C. 113; *Goodbread v. Ledbetter*, 1 Dev. & Bat. 12; *Child v. Homer*, 13 Pick. 503.

There can be no set-off of one libel against another; but in estimating the damages the jury may fairly consider the conduct of the plaintiff and the degree of respect which he himself has shown for the feelings of others. *Folkard's Starkie on Slander*, § 722; per *Blackburn, J.*, in *Kelly v. Sherlock*, L. R. 1 Q. B. 698; *Seely v. Cole*, *Wright (Ohio)*, 681; *Patton v. Cruce*, *supra*.

It has been observed of the remark quoted from *Blackburn, J.*, that if it was to be regarded as law it might on a trial for libel involve

this strange condition: the defendant in the action might, as showing the plaintiff's conduct and the degree of respect he had for the feelings of others, set up that he had libeled A., B., C., and D., and if he did the plaintiff could both justify and reply as to each of the parties that he (the plaintiff) had been first attacked and he had merely rebutted the charges made by each of the persons named. There would thus be involved the trial of four actions before the jury could be satisfied that the plaintiff had improperly attacked the characters and reputations of those others. The law never was in that condition. *Downey v. Stirton*, 1 Ont. L. R. 186.

There can be no counter-claim in an action for defamation. *Fellerman v. Dolan*, 7 Abb. Pr. 395, note; *Richardson v. Northrup*, 56 Barb. 105. See *MacDougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98.

Upon the cross-examination of the defendant certain subsequent articles in his newspaper were introduced upon the question of malice; these were written and their publication paid for by C. The defendant offered to show that enmity existed between the plaintiff and C., and that the plaintiff had published libels concerning C. which provoked these articles. Such testimony was not admissible because such enmity was not known to the defendant,

tinnet and independent libel published by the defendant is not a mitigation; but, as just stated, if the publication by the plaintiff was so recent as to afford a reasonable presumption that the libel by the defendant was published under the influence of the passions excited by it, or where it is explanatory of the meaning of or of the occasion of writing the libel complained of, it may be given in evidence for that purpose. To render such evidence admissible, however, it is necessary that the article complained of should on its face refer, and profess to be a reply, to the libel published by the plaintiff and that such appear to be its nature and purpose on a comparison of the publications.⁹³ The libels themselves ought to be strictly proven and identified as the cause,⁹⁴ and that the plaintiff's publication came to the defendant's knowledge before he published the libel complained of.⁹⁵ The jury is to determine whether the

and C. had not instigated the libel in suit. *Norton v. Livingston*, 64 Vt. 473.

⁹³ *Knott v. Burwell*, 96 N. C. 272; *Child v. Homer*, 13 Pick. 503; *Gould v. Weed*, 12 Wend. 12; *May v. Brown*, 3 B. & C. 113; *Stirton v. Gummer*, 31 Ont. 236; *Downey v. Stirton*, 1 Ont. L. R. 186, 190. See *Underhill v. Taylor*, 2 Barb. 348; *Hotchkiss v. Lathrop*, 1 Johns. 286; *Bourland v. Eidson*, 8 Gratt. 27; *Brewer v. Chase*, 121 Mich. 526, 46 L.R.A. 397.

In *Richardson v. Northrup*, 56 Barb. 105, it was held that the defendant should be allowed to prove any circumstances which, at the time the words charged were spoken, were calculated to irritate and excite and provoke him to the utterance of the words complained of; but that it was no answer to the plaintiff's claim of damages for slander that he has said or done anything, whether actionable or not, for the purpose of reducing the damages, unless such act or declaration actually excited the defendant to use the words

charged. The defendant, it was also held, might prove a series of provocations on the part of the plaintiff, commencing long anterior to the speaking of the words charged, provided they were continued from time to time down to and at the time the words were spoken. In such a case each successive repetition of the provocation must necessarily become more annoying and exciting; and though there be no motive or spirit of revenge on the part of the defendant, the excitement of such repetition of the provocation becomes more intense and unbearable, and presents a much stronger case of mitigation than when the actionable words are spoken upon the first provocation. *Shefill v. Van Deusen*, 15 Gray 485, 77 Am. Dec. 377; *Porter v. Henderson*, 11 Mich. 20; 82 Am. Dec. 59; *Lister v. Wright*, 2 Hill 320.

⁹⁴ *Tarpley v. Blabey*, 2 Bing. N. C. 437.

⁹⁵ *Watts v. Fraser*, 7 Ad. & E. 223; *Andrus v. Harris*, 126 App. Div. (N. Y.) 564.

language employed by the defendant was used because of the plaintiff's abuse, and they may consider for this purpose the declarations of the defendant.⁹⁶ Where the defamatory publication is shown to have resulted immediately from a provocation given by the plaintiff in a defamatory charge against the defendant only nominal damages in general should be given.⁹⁷ If the words complained of were spoken in the presence of the plaintiff his reply may be proved by the defendant.⁹⁸ But a subsequent publication cannot be given in evidence to determine whether a publication is libelous or not.⁹⁹ If the evidence shows that the defamatory words were spoken immediately after the trial of a law suit between the parties and that they were occasioned by it, it will be competent for the defendant to show the facts and circumstances occurring on, and the conduct of the parties during, the trial; and if the words were spoken in the heat of passion thus excited that will go in mitigation.¹ The defendant may mitigate damages by showing the plaintiff to be a common libeler; but it must be shown in the same way as general reputation is proved; publications of the plaintiff cannot be resorted to for that purpose.² If the plaintiff was referred to by an erroneous name the mistake may be considered upon the question of publicity and the amount of the damages;³ and if the parties to whom the libelous matter has been communicated are forbidden by law from communicating it that fact is material.⁴ The motive which prompted the plaintiff to bring the action does not affect the amount of the recovery.⁵

§ 1233. **Same subject.** It is competent for the defendant under the general issue to show that the charge was occasioned

⁹⁶ Botelar v. Bell, 1 Mo. 173.

⁹⁷ Pugh v. McCarty, 40 Ga. 444; Davis v. Griffith, 4 Gill & J. 342. See Hackett v. Brown, 2 Heisk. 264; Ransone v. Christian, 56 Ga. 351.

⁹⁸ Bradley v. Gardner, 10 Cal. 371.

⁹⁹ Usher v. Severance, 20 Me. 9, 37 Am. Dec. 33; Downey v. Stirton, 1 Ont. L. R. 186; Downey v. Armstrong, id. 237.

¹ Powers v. Presgroves, 38 Miss. 227.

² Maynard v. Beardsley, 7 Wend. 560, 22 Am. Dec. 595.

³ Pellardis v. Journal P. Co., 99 Wis. 156.

⁴ Western U. Tel Co. v. Cashman, 9 L.R.A. (N.S.) 140, 81 C. C. A. 5, 149 Fed. 367.

⁵ Manget v. O'Neill, 51 Mo. App. 35; Garrison v. Robinson, 81 N. J. L. 497.

by the misconduct of the plaintiff either in attempting to commit the alleged crime or in leading the defendant to believe him guilty.⁶ But acts and declarations of third persons are inadmissible to show provocation.⁷ Facts in the conduct of the plaintiff calculated to create a belief that the charge is true are doubtless provable in mitigation where under the pleadings the defendant is allowed to give evidence tending to show for this purpose that it is true.⁸ Evidence of the moral or intellectual character of a person in whose hearing or to whose understanding the slanderous words were spoken is immaterial on the question of damages.⁹ In an action against husband and wife for words spoken by her proof is not admissible in mitigation that the husband endeavored to prevent the circulation of the slander.¹⁰ It has been held that the wrong of a publication of rumors in a newspaper may be mitigated by proof that such rumors existed,¹¹ and that a defendant may show that he copied the statement complained of as libelous from another newspaper.¹² But in another case it was held that the defendant should not be permitted to show that the charge was copied from another newspaper from the proprietor of which damages had been recovered, though the defendant might prove that he had stricken out many parts of the article which reflected on the plaintiff.¹³ The fact that the article complained of was copied

⁶ *West v. Walker*, 2 Swan 32. See *Edgar v. Newell*, 24 Up. Can. Q. B. 215; *McC Campbell v. Thornburg*, 3 Head 109.

⁷ *Underhill v. Taylor*, 2 Barb. 348.

⁸ *Reynolds v. Tucker*, 6 Ohio St. 516, 67 Am. Dec. 353; *Hatfield v. Lasher*, 81 N. Y. 246; *Voorhees v. Toney*, 32 Okla. 570; *Miller v. Brown S. Co.*, 89 S. C. 530.

⁹ *Sheffill v. Van Deusen*, 15 Gray 485, 77 Am. Dec. 377.

¹⁰ *Yeates v. Reed*, 4 Blackf. 463, 32 Am. Dec. 43.

¹¹ *Skinner v. Powers*, 1 Wend. 451; *Huron v. Dale*, 19 Mich. 17, 2 Am. Rep. 66.

¹² *Saunders v. Mills*, 6 Bing. 213;

Morse v. Times-R. P. Co., 124 Iowa 707. See *Arnott v. Standard Ass'n*, 57 Conn. 87, 3 L.R.A. 69, ruled under a statute.

¹³ *Creevy v. Carr*, 7 C. & P. 64; *Hoey v. Fletcher*, 39 Fla. 325; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178, 23 Am. Rep. 680; *Fenstermaker v. Tribune P. Co.*, 13 Utah 532, 35 L.R.A. 611 (though the article did not state the sources of the defendant's information, citing *Wilson v. Fitch*, 41 Cal. 363; *Newell on Defamation*, p. 884, n. 18, p. 895; *Henkle v. Davenport*, 38 Iowa 35; *Galloway v. Courtney*, 10 Rich. 414, and modifying s. c., 12 Utah 439, 35 L.R.A. 611); *McCom-*

from and credited to another newspaper than that published by the defendant does not necessarily mitigate the damages. The effect to be given to a publication so made depends upon the circumstances of the case.¹⁴ As an illustration of facts which may properly have the effect of negating the benefit the defendant might be entitled to because of having copied the matter take the case of the publication of a retraction by the paper from which it was taken in time for the defendant to have seen it before he gave it further currency.¹⁵ It may be shown that the publication complained of professes on its face to be based on other publications which are referred to, as on reports of investigations made concerning the character of a public officer.¹⁶ Wallace, C. J., of the circuit court of appeals, second circuit,¹⁷ has announced that "evidence of previous publications by others of the libelous matters charged by the defendant [plaintiff] is, upon principle, clearly inadmissible in reduction, or, standing alone, in mitigation, of damages; and it was so held in *Tucker v. Lawson*,¹⁸ and *Gray v. Publishing Co.*¹⁹ It is inadmissible even when coupled with evidence that on such former occasion the plaintiff did not sue the publisher or take any steps to contradict the charges against him."²⁰ The defendant may not show other libelous publications by him concerning the plaintiff and that the plaintiff did not seek redress because of them.²¹ The publication of matter as of the knowledge of the defendant precludes him from showing that it was either copied or communicated.²²

In actions for libel the defendant is entitled to read the entire

bie v. Bennett, 7 New South Wales L. R. (law) 157.

¹⁴ *Sheibley v. Huse*, 75 Neb. 811; *Bronson v. Bruce*, 59 Mich. 467, 476, 60 Am. Rep. 307; *Burt v. Advertiser N. Co.*, 154 Mass. 238, 13 L.R.A. 97.

¹⁵ *Butler v. Barret*, 130 Fed. 944.

¹⁶ *Burt v. Advertiser N. Co.*, 154 Mass. 238, 13 L.R.A. 97.

¹⁷ *Sun P. & P. Co. v. Schenck*, 40 C. C. A. 163, 98 Fed. 925.

¹⁸ 2 Times L. Rep. 593.

¹⁹ 89 N. Y. St. Rep. 35. *Contra*, *Dalziel v. Press Pub. Co.*, 52 N. Y. Misc. 207.

²⁰ *Rex v. Holt*, 5 T. R. 436; *Ingram v. Lawson*, 9 C. & P. 333; *Schattler v. Daily Herald Co.*, 162 Mich. 115.

²¹ *Davis v. Hamilton*, 88 Minn. 64.

²² *Berger v. Freeman Tribune P. Co.*, 132 Iowa 290; *Good v. Grit P. Co.*, 36 Pa. Super. Ct. 238; *Dorn v. Cooper*, 139 Iowa 742.

article in which is contained the alleged libel.²³ But distinct or separate libels not declared on cannot be introduced in evidence and relied on either by the plaintiff or defendant to show malice and aggravate or to mitigate damages.²⁴ When exemplary damages are sought for libel the defendant may prove, in Michigan, any circumstances tending to show that he acted in good faith and with all proper precautions, and had good cause to believe that the statement complained of was true.²⁵ Where it appears that the libel was published with no intent to injure the person libeled and that all proper precautions were observed in publishing it the recovery of damages will be limited to the actual injury.²⁶ If the alleged libelous article is one of a series relating to a matter of public concern the defendant may introduce them all to show good faith on his part.²⁷ All papers referred to in a libel may be admitted for the purpose of explanation and interpretation.²⁸ A defendant cannot mitigate damages by proving his own bad character²⁹ or poverty;³⁰ nor is it any mitigation that he spoke the words in apparent good humor.³¹ The defendant cannot prove that the plaintiff has recovered judgment against another party for the publication

²³ *Osterheld v. Star Co.*, 146 App. Div. (N. Y.) 388; *Graves v. Waller*, 19 Conn. 90.

²⁴ *Fisher v. Patterson*, 14 Ohio 418.

²⁵ *Scripps v. Foster*, 41 Mich. 742; *Butler v. Gazette Co.*, 119 App. Div. (N. Y.) 767.

²⁶ *Evening News Ass'n v. Tryon*, 42 Mich. 549, 36 Am. Rep. 450; *Scripps v. Reilly*, 38 Mich. 23; *Detroit Daily Post Co. v. McArthur*, 16 id. 451.

²⁷ *Scripps v. Foster*, *supra*.

In *Bailey v. Kalamazoo P. Co.*, 40 Mich. 257, *Campbell, C. J.*, said: "The public are interested in knowing the character of candidates for congress; and while no one can lawfully destroy the reputation of a candidate by falsehood, yet if an honest mistake is made (as in mis-

naming an offense of which the plaintiff has been guilty) in an honest attempt to enlighten the public, it must reduce the damages to a minimum, if the fault is not serious, and there should be no unreasonable responsibility where there is no actual malice." *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307. See *Smith v. Scott*, 2 C. & K. 580.

²⁸ *Nash v. Benedict*, 25 Wend. 645; *Gould v. Weed*, 12 id. 12.

²⁹ *Hastings v. Stetson*, 130 Mass. 76.

³⁰ *Harter v. Whitebread*, 38 Pa. Super. Ct. 10 (if the plaintiff has not introduced evidence on the subject); *Meyers v. Malcolm*, 6 Hill 295; *Palmer v. Haskins*, 28 Barb. 90.

³¹ *Weaver v. Hendrick*, 30 Mo. 502.

of the same libel,³² or that the same article was published by other papers and suit had been brought against the publishers thereof.³³

In some early cases of slander, both in England and in this country, it was held that giving the name of the author at the time of speaking the defamatory words was a full excuse, or at least a mitigation of the wrong.³⁴ Later authorities qualified the doctrine,³⁵ requiring either that there be a just reason for the repetition or that the defendant repeat the charge as he heard it and refer to the person from whom he heard it as the author, and that the repetition be without any intention to injure or defame the person to whom the charge refers.³⁶ A man who wantonly or inconsiderately repeats a defamatory tale fabricated by another is certainly liable to answer in damages for assisting in the propagation of the slander; but he is not answerable in the same degree as the author of the slander unless it should appear he was actuated by malice and an intention to defame.³⁷ In some cases it was required that the person named as author be responsible and within the state, so he could be sued for the slander.³⁸ The later cases in England

³² *Printing Ass'n v. Smith*, 5 C. C. A. 91, 55 Fed. 240; *Bennett v. Salisbury*, 24 C. C. A. 329, 78 Fed. 769; *Harrison v. Pearce*, 1 F. & F. 567; *Creevy v. Carr*, 7 C. & P. 64. But see *Downey v. Stirton*, 1 Ont. L. R. 186.

³³ *Butler v. Gazette Co.*, 119 App. Div. (N. Y.) 767; *Folwell v. Providence Journal Co.*, 19 R. I. 551.

³⁴ *Earl of Northampton's Case*, 12 Coke 132; *Davis v. Lewis*, 7 T. R. 17; *Hawkes v. Carter*, 1 Law Reporter (London), 192; *Bennett v. Bennett*, 6 C. & P. 588; *Binns v. McCorkle*, 2 Browne 79; *Hersh v. Ringwalt*, 3 Yeates, 508, 2 Am. Dec. 392; *Kennedy v. Gregory*, 1 Bin. 85; *Morris v. Duane*, id. 90; *Cook v. Barkley*, 2 N. J. L. 169, 2 Am. Dec. 343; *Smith v. Stewart*, 5 Pa. 372; *Kelley v. Dillon*, 5 Ind. 426; *Trabue v. Mays*, 3 Dana 138, 28 Am. Dec.

61; *Robinson v. Harvey*, 5 T. B. Mon. 519; *Parker v. McQueen*, 8 B. Mon. 16; *Miller v. Kerr*, 2 McCord, 285, 13 Am. Dec. 722; *Church v. Bridgman*, 6 Mo. 190. See *Folkard's Starkie on Slander*, § 317.

³⁵ *McPherson v. Daniels*, 10 B. & C. 263; *Lewis v. Walter*, 4 B. & Ald. 605.

³⁶ *Cummerford v. McAvoy*, 15 Ill. 311; *Church v. Bridgman*, 6 Mo. 190; *Haynes v. Leland*, 20 Me. 233; *Abrams v. Smith*, 8 Blackf. 95; *Jones v. Chapman*, 5 id. 88; *Johnston v. Lance*, 7 Ired. 448; *Skinner v. Grant*, 12 Vt. 456; *Inman v. Foster*, 8 Wend. 602. See *Baldwin v. Boulware*, 79 Mo. App. 5.

³⁷ *Easterwood v. Quin*, 2 Brev. 64, 3 Am. Dec. 700; *Folwell v. Providence Journal Co.*, 19 R. I. 551; *Williams v. Greenwade*, 3 Dana 432.

³⁸ *Scott v. Peebles*, 10 Miss. 546;

and in several of the states hold that proof that when the words were spoken the author was named is of itself no defense.³⁹ In *Sans v. Joeris*,⁴⁰ Dixon, C. J., said: "The doctrine, extra-judicially announced in the fourth resolution of the Earl of Northampton's Case,⁴¹ that the repetition of slander, if the name of the inventor be given at the time, is not actionable has never been extended to libel; and even in regard to oral slander has met with disapprobation and may be considered as virtually overruled.⁴² Whether this doctrine is placed on the ground that the person who needlessly publishes or repeats a previously invented slander gives it the credit which is due to himself, or, as was said by Chief Justice Best, in *De Crespigny v. Wellesley*,⁴³ that it is every man's moral duty if he hear anything injurious to the character of his neighbor which he does not know to be true and does not concern the public or the administration of justice, to lock it up forever in his own breast; or, on the general rule in this world, said to be applicable to nations as well as individuals, that every person should attend to his own affairs, it is, in my judgment, equally sound law, which the security of reputation, the happiness of families and the peace and good order of society demand shall be rigidly enforced in all cases."⁴⁴

If time is lost because of slander the defendant cannot escape liability for it by proving that the plaintiff received compensation for his time from a third person.⁴⁵ The attitude of the defendant toward the plaintiff prior to the publication of the libel may not be shown to affect the recovery.⁴⁶

Trabue v. Mays, 3 Dana 138, 28 Am. Dec. 61; *Johnston v. Lance*, 7 Ired. 448; *Larkins v. Tarter*, 3 Sneed 681.

³⁹ *McGregor v. Thwaites*, 3 B. & C. 24; *Bennett v. Bennett*, 6 C. & P. 588; *Tidman v. Ainslie*, 10 Ex. 63; *Chevalier v. Brush*, Anthon's Law Stud. 186; *Mapes v. Weeks*, 4 Wend. 659; *Inman v. Foster*, 8 id. 602; *Hotehkiss v. Oliphant*, 2 Hill 510; *Austin v. Hanchet*, 2 Root 148; *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156; *Sans v. Joeris*, 14 Wis. 663; *Haines v. Welling*, 7 Ohio 253.

⁴⁰ 14 Wis. 667.

⁴¹ 12 Coke 134.

⁴² Citing *Bennett v. Bennett*, 6 C. & P. 588; *Lewis v. Walter*, 4 B. & Ald. 605; *Crane v. Douglass*, 2 Blackf. 195; *McPherson v. Daniels*, 10 B. & C. 263. See, also, *Hotehkiss v. Oliphant*, 2 Hill 510.

⁴³ 5 Bing. 393.

⁴⁴ *Tidman v. Ainslie*, 10 Ex. 63, note.

⁴⁵ *Elmer v. Fessenden*, 154 Mass. 427. See § 158.

⁴⁶ *Dorn v. Cooper*, 139 Iowa 742.

CHAPTER XXXV.

MALICIOUS PROSECUTION AND ABUSE OF PROCESS.

§ 1234, 1235. Nature of these wrongs.

1236. Unauthorized suit or appeal.

1237, 1238. Elements of damage.

1239, 1240. Evidence in mitigation.

§ 1234. Nature of these wrongs. The wrong denoted by malicious prosecution is of the same nature as libel and slander. It involves, among other elements of injury, the defamation of the accused. This is so when a criminal charge is maliciously preferred or its prosecution is maliciously continued,¹ without reasonable or probable cause, in a court having jurisdiction of the subject-matter,² though this is not everywhere essential.³ On the termination of an action so brought, in an acquittal or discharge a right of action accrues.⁴ A judgment, though subject

¹ *King v. Erskins*, 116 La. 480; *Carp v. Queen Ins. Co.*, 203 Mo. 295; *Finley v. St. Louis R. & W. G. Co.*, 99 Mo. 559, 563; *Hilbrant v. Donaldson*, 69 Mo. App. 92, 97.

² *Vinson v. Flynn*, 64 Ark. 453, 460, 39 L.R.A. 415, citing *Bixby v. Brundige*, 2 Gray 129, 61 Am. Dec. 443; *Whiting v. Johnson*, 6 Gray 246; *Painter v. Ives*, 4 Neb. 122; *Braveboy v. Cockfield*, 2 McMullen 270, 273, 39 Am. Dec. 123; *Turpin v. Remy*, 3 Blackf. 210, 216; *Marshall v. Betner*, 17 Ala. 832, 836; *Munns v. Dupont*, 3 Wash. O. C. 31; 1 Am. Lead. Cas. (5th ed.) 259. *Shipman v. Fletcher*, 20 D. C. 245, is to the same effect.

³ *Ailstock v. Moore L. Co.*, 104 Va. 565, 2 L.R.A.(N.S.) 1100, 113 Am. St. 1060; *Ward v. Sutor*, 70 Tex. 343, 76 Tex. 403, 8 Am. St. 606; *Stone v. Stevens*, 12 Conn. 219, 30 Am. Dec. 611; *Gibbs v. Ames*, 119

Mass. 60; *Morris v. Scott*, 21 Wend. 281, 34 Am. Dec. 236; *Hays v. Younglove*, 7 B. Mon. 545; *Stubbs v. Mulholland*, 168 Mo. 47, 88.

⁴ *Virtue v. Creamery P. Mfg. Co.*, 123 Minn. 17; *McGuirk v. O'Halloran*, 149 Fed. 909; *Anderson v. Zorn* (Tex. Civ. App.), 131 S. W. 835; *Waldron v. Sperry*, 53 W. Va. 116; *Cooley on Torts*, 180-190; *Dowdell v. Carpy*, 129 Cal. 168; *Murphy v. Ernst*, 46 Neb. 1; *Hinds v. Parker*, 11 App. Div. (N. Y.) 327; *Lawrence v. Cleary*, 88 Wis. 473; *Noble v. White*, 103 Iowa 352; *Robbins v. Robbins*, 133 N. Y. 597; *Stark v. Bindley*, 152 Ind. 182; *Hartshorn v. Smith*, 104 Ga. 235.

The institution of a judicial proceeding is necessary to the maintenance of an action. *Barry v. Third Ave. R. Co.*, 51 App. Div. (N. Y.) 385.

Where the plaintiff appeared be-

to review, is final for the purpose of founding of an action for

fore a justice of the peace and the case was postponed to a certain time, when she again appeared and no one appeared against her and the justice said there was nothing on his docket, that the warrant had not been returned, and nothing further was done, a prosecution was actually commenced and it had terminated. *Strehlow v. Pettit*, 96 Wis. 22. See *Lueck v. Heisler*, 87 Wis. 644; *Cooper v. Armour*, 8 L.R.A. 47, 42 Fed. 215, and cases cited; *Peake v. Milaca State Bank*, 120 Minn. 455.

Issuing a warrant on a criminal charge, though it is not served, is the institution of such a proceeding. *Halberstadt v. New York L. Ins. Co.*, 194 N. Y. 1, 21 L.R.A.(N.S.) 293, disapproving *Heyward v. Cutlbert*, 4 McCord, 354, and *Cooper v. Armour*, *supra*, and noting other cases. See *Pickard v. Bridges*, 7 Ga. App. 463.

The dismissal of the prosecution by the proper officer is a termination of it. *Graves v. Scott*, 104 Va. 372, 2 L.R.A.(N.S.) 927, 7 Ann. Cas. 480; *McIntosh v. Wales*, 21 Wyo. 397.

In Massachusetts the entry of a *nolle prosequi* does not necessarily terminate a criminal suit so as to allow the commencement of an action for malicious prosecution. The effect of so doing will depend upon the facts of each case. *Graves v. Dawson*, 130 Mass. 78; *Langford v. Boston & A. R. Co.*, 144 Mass. 431. But generally the entry of a *nolle prosequi*, unless it was procured by the defendant, is considered sufficient. *Stanton v. Hart*, 27 Mich. 539; *Hatch v. Cohen*, 84 N. C. 602, 37 Am. Rep. 630; *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Apgar*

v. Woolston, 43 N. J. L. 57; *Woodman v. Prescott*, 66 N. H. 375; *Marcius v. Bernstein*, 117 N. C. 31; *Welch v. Check*, 125 N. C. 353; *Douglas v. Allen*, 56 Ohio St. 156; *Southern C. & F. Co. v. Adams*, 131 Ala. 147, 156; *Snead v. Jones*, 169 Ala. 143.

If the accused is brought before an examining magistrate and is discharged the particular prosecution is at an end, "for, although the complaining witness may voluntarily go before the grand jury and charge the accused with the same offense, and an indictment may even be found, yet such prosecution would be a new one and commenced by the complainant before the grand jury and not founded on the original complaint." *Rider v. Kite*, 61 N. J. L. 8, citing *Apgar v. Woolston*, 43 N. J. L. 57; *Fay v. O'Neill*, 36 N. Y. 11; *Robbins v. Robbins*, 133 N. Y. 597; *Moyle v. Drake*, 141 Mass. 238; *Mentel v. Hippely*, 165 Pa. 558. To the same effect *Marbourg v. Smith*, 11 Kan. 554; *Hays v. Blizzard*, 30 Ind. 457. *Contra*, *Hartshorn v. Smith*, 104 Ga. 235; *Stewart v. Blair*, 171 Ala. 147.

A discharge against the protest of one who is under recognizance to appear before a grand jury by the entry of a *nolle*, before action by that body, is a termination of the proceedings. *Graves v. Dawson*, 133 Mass. 419.

The technical prerequisite is that the prosecution be disposed of in such manner that it cannot be revived and that the prosecutor must be put to a new one. *Long v. Rogers*, 17 Ala. 546; *Clark v. Cleveland*, 6 Hill 344; *Vinal v. Core*, 18 W. Va. 1; *Hurgren v. Union Mut. L. Ins. Co.*, 141 Cal. 585.

malicious prosecution.⁵ Where the accusation is acted upon, the arrest of the accused, holding him to bail or imprisoning him and the incidental loss of time and the expense of a defense are among the natural and proximate consequences.⁶

The rule that the prosecution must have terminated rests on the ground that the law will not tolerate inconsistent judgments upon the same question between substantially the same parties. But there is a class of actions in which it has been held that an admission that the alleged malicious suit could not be maintained obviated the necessity of proving that such suit had terminated.⁷ Such admission may be by plea or parol. "The bare possibility of inconsistent verdicts should not exempt or relieve a party from responsibility for admitted wrong."⁸ If a demurrer admits that a suit was maliciously and hopelessly

A discharge upon *habeas corpus* has been held sufficient to base an action upon. *Zebley v. Storey*, 117 Pa. 478.

A dismissal because of a defect in the complaint is not an acquittal; the latter is a deliverance from the charge of guilt. *Wakely v. Johnson*, 115 Mich. 285.

The termination of the prosecution in a manner which prevents its reinstatement is enough though a new one may be instituted. *Graves v. Scott*, 104 Va. 372, 2 L.R.A.(N.S.) 927, 113 Am. St. 1043, overruling *Ward v. Reasor*, 98 Va. 399.

The dismissal of a proceeding against a party who left the jurisdiction before he could be served and remained without it until it was dismissed because of lapse of time was a failure of the action so as to afford a basis for an action. *Halberstadt v. Ins. Co.*, *supra*. But it has been held that where service of process has not been made there cannot be a termination of the action unless the charge is actionable *per se* and *special damage has followed. *Mitchell v. Donanski*, 28

R. I. 94, 9 L.R.A.(N.S.) 171, 125 Am. St. 717.

It may be shown that the plaintiff was acquitted as the result of a compromise. *Carroll v. Central R. Co.*, 134 Fed. 684.

⁵ *Luby v. Bennett*, 111 Wis. 613, 56 L.R.A. 261; *Marks v. Townsend*, 97 N. Y. 590. But see *Reynolds v. De Geer*, 13 Ill. App. 113; *Nebenzahl v. Townsend*, 61 How. Pr. 353; *Ingram v. Root*, 51 Hun 238.

⁶ *Saville v. Roberts*, 1 Lord Raym. 374; *Sonneborn v. Stewart*, 2 Woods, 599; *Lavender v. Hudgens*, 32 Ark. 763; *Garvey v. Wayson*, 42 Md. 178; *Minneapolis T. M. Co. v. Regier*, 51 Neb. 402; *Jones v. Jenkins*, 3 Wash. 17, 33; *Herbener v. Crossan*, 4 Pennew. (Del.) 38; *Harrington v. Tibbet*, 143 Cal. 78; *Sasse v. Rogers*, 40 Ind. App. 197.

⁷ *Wills v. Noyes*, 12 Pick. 326; *Page v. Cushing*, 38 Me. 527; *Page v. Citizens' B. Co.*, 111 Ga. 73, 51 L.R.A. 463; *Sasse v. Rogers*, *supra*. See *White v. International T.-B. Co.*, 156 Iowa 210, 42 L.R.A.(N.S.) 346.

⁸ *Page v. Cushing*, 38 Me. 527.

instituted any presumption to the contrary is overcome and the result of such suit is immaterial.⁹ Where a peace warrant is sued out maliciously and without probable cause in an *ex parte* proceeding and the person proceeded against is committed to jail until he gives security for his future conduct, his right of action is perfect on his release,¹⁰ or if he does not give security, on the expiration of the period fixed for his detention.¹¹ The general rule does not apply to a civil action in which the trial and judgment do not necessarily involve the question of the existence of probable cause, as where an attachment is obtained as auxiliary to such an action.¹² In Texas the claim for damages in such a case may be tried, under a plea of reconvention, with the attachment suit.¹³ If a malicious arrest is made of a servant, against whom there is no right of action, the object being solely to injure his master, the latter has a cause of action for the wrong done him.¹⁴

The abuse of legal process consists in employing it for an unlawful purpose; that may be done without malice or want of probable cause, and it is not essential to the right to maintain an action therefor that the proceeding begun thereby has ended.¹⁵ Questions as to damages for false imprisonment are treated elsewhere.¹⁶

§ 1235. *Same subject.* In many cases the injury to reputation is the most serious consequence of the wrong. An accusation made under the forms of law, on the pretense of bringing a guilty man to justice, is made in the most imposing and impressive manner and may inflict a deeper injury upon the reputation of the party accused than the same words would uttered under any other circumstances.¹⁷ This wrong, however,

⁹ *St. Johnsbury, etc. R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639.

¹⁰ *Hyde v. Greuch*, 62 Md. 577.

¹¹ *Steward v. Gromett*, 7 C. B. (N.S.) 191, 97 Eng. C. L. 191.

¹² *Alsop v. Lidden*, 130 Ala. 548; *Brown v. Master*, 104 Ala. 463; *Portman v. Rottier*, 8 Ohio St. 548, 72 Am. Dec. 606. Compare *Tisdale v. Kingman*, 34 S. C. 326.

¹³ *Tynberg v. Cohen*, 76 Tex. 409.

¹⁴ *St. Johnsbury, etc. R. Co. v. Hunt*, *supra*.

¹⁵ *Mayer v. Walter*, 64 Pa. 283; *Railroad Co. v. Hardware Co.*, 143 N. C. 54; *Stanford v. Grocery Co.*, 143 N. C. 419.

¹⁶ §§ 1257-1258.

¹⁷ *Rockwell v. Brown*, 36 N. Y. 209; *Toomey v. Delaware, etc. R.*

does not consist entirely in the malicious prosecution of groundless criminal proceedings, though the element of defamation is mostly confined to them. The malicious prosecution,¹⁸ without probable cause, of civil proceedings involving arrest, attachment, sequestration or other interference with person or property, or which is the cause of any special grievance or injury, will, according to the general current of authority, give a right of action.¹⁹ The same has been held of proceedings to have a

Co., 4 N. Y. Misc. 392; Morgan v. Duffy, 94 Tenn. 686.

There is no presumption in favor of the plaintiff's good character which operates on the issue of probable cause. Hudson v. Truman, 78 Neb. 840.

A person who procures the arrest and imprisonment of another under an affidavit which states facts not constituting a crime, but which a judicial officer holds charges the commission of a crime, is liable to an action for malicious prosecution, the affidavit being false and malice and want of probable cause existing. Navarino v. Dubrap, 66 N. J. L. 620.

¹⁸ It is "carrying on" a prosecution to cause a warrant to be issued, having the defendant therein arrested and his goods seized, having him brought before a committing magistrate, procuring continuances of the preliminary hearing, and requiring him to give bond for his appearance before the committing magistrate, notwithstanding the prosecution was finally abandoned in the committing court. Page v. Citizens' B. Co., 111 Ga. 73, 51 L.R.A. 463. But it is otherwise where nothing more is done than to make an affidavit before a justice of the peace charging an offense against the law, no arrest being made. Swift v. Witchard, 103 Ga. 193.

¹⁹ *Tamblyn v. Johnston*, 62 C. C. A. 601, 126 Fed. 267; *Harr v. Ward*, 73 Ark. 437; *Woodley v. Coker*, 119 Ga. 226; *Krzyszke v. Kamin*, 163 Mich. 290; *Mihalyik v. Klein*, 22 Pa. Super. Ct. 193; *Dorr C. Co. v. Des Moines Nat. Bank*, 127 Iowa 153; *New Sharon C. Co. v. Knowlton*, 132 Iowa 672; *Ailstock v. Moore L. Co.*, 104 Va. 565, 113 Am. St. 1060; *Fitchet v. Walton*, 22 Ont. L. R. 40; *Wengert v. Beashore*, 2 N. J. L. 232; *Henderson v. Jackson*, 9 Abb. Pr. (N.S.) 393; *Herman v. Brookerhoff*, 8 Watts 240; *Tancred v. Leyland*, 16 Q. B. 669; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59, 17 Ala. 689, 52 Am. Dec. 194; *McKellar v. Couch*, 34 Ala. 336; *Stewart v. Cole*, 46 id. 646; *Collins v. Hayte*, 50 Ill. 353; *Lawrence v. Hagerman*, 56 id. 68, 8 Am. Rep. 674; *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Hayden v. Shed*, 11 Mass. 500; *Lindsay v. Larned*, 17 id. 190; *Weaver v. Page*, 6 Cal. 681; *Pierce v. Thompson*, 6 Pick. 193; *Barhans v. Sanford*, 19 Wend. 417; *Beeson v. Southard*, 10 N. Y. 236; *Churchill v. Siggers*, 3 El. & Bl. 937; *Austin v. Debnam*, 3 B. & C. 139; *Sinclair v. Eldred*, 4 Taunt. 7; *Farley v. Danks*, 4 El. & Bl. 493; *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Nelson v. Danielson*, 82 Ill. 545; *Tomlinson v. Warner*, 9 Ohio 103; *Fortman v. Rottier*, 8 Ohio St. 548, 72 Am. Dec. 606; *Burkhart v.*

person declared insane or bankrupt without probable cause,²⁰ and in cases of malicious abuse of legal process.²¹

Jennings, 2 W. Va. 242; *Savage v. Brewer*, 16 Pick. 453, 28 Am. Dec. 255; *De Medina v. Grove*, 10 Q. B. 168; *Preston v. Cooper*, 1 Dill. 589; *Robinson v. Kellum*, 6 Cal. 399; *Cox v. Taylor*, 10 B. Mon. 17; *Walser v. Thies*, 56 Mo. 89; *Holliday v. Sterling*, 62 id. 321; *McCullough v. Grishobber*, 4 W. & S. 201; *Spengler v. Davy*, 15 Gratt. 381; *Wood v. Weir*, 5 B. Mon. 544; *Fullenwider v. McWilliams*, 7 Bush 389; *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316; *Hoyt v. Macon*, 2 Colo. 113; *Williams v. Hunter*, 3 Hawks 545, 14 Am. Dec. 599, note; *Clark v. Pearce*, 80 Tex. 146; *Brown v. Master*, 104 Ala. 451; *Brounstein v. Sahlein*, 65 Hun 365; *Mitchell v. Silver Lake Lodge*, 29 Ore. 294; *Gundermann v. Buschner*, 73 Ill. App. 180; *Noonan v. Orton*, 30 Wis. 358; *O'Neill v. Johnson*, 53 Minn. 439, 39 Am. St. 615; *Foster v. Pitts*, 63 Ark. 387.

It is otherwise as to a levy upon real estate where there is no disturbance of the possession, use or enjoyment of the premises. *Trawick v. Martin-B. Co.*, 79 Tex. 460; *Heath v. Lent*, 1 Cal. 410; *Brandon v. Allen*, 28 La. Ann. 60; *Muldoon v. Rickey*, 103 Pa. 110, 49 Am. Rep. 117.

An exception is made to this rule where the levy of the attachment prevents the sale of land and it depreciates in value thereafter. *Wetzel v. Tillman*, 3 Tex. Civ. App. 559. But not where the depreciation is the only damage; that is not such a direct effect of the levy as entitles the plaintiff to recover. *Drew v. Ellis*, 6 Tex. Civ. App. 507.

If the attachment defendant has submitted to the attachment, paid the debt for which it was issued and

the costs he cannot maintain an action for malicious prosecution. *Hibbard v. Ryan*, 46 Ill. App. 313.

If the suit which is alleged to have been maliciously brought was against the makers of a joint note who were jointly engaged in business and jointly owned the property attached in that suit they may unite in an action to recover for injury to their joint credit, business or property. *Cochrane v. Quackenbush*, 29 Minn. 376, citing *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141; *Medbury v. Watson*, 6 Metc. (Mass.) 257.

Damages cannot be recovered for the malicious seizure of property without probable cause as though it had been converted. *Burton v. St. Paul, etc. R. Co.*, 33 Minn. 189.

The attachment must be levied or there is no ground of action. *Maskell v. Barker*, 99 Cal. 642.

²⁰ *Griswold v. Griswold*, 143 Cal. 617; *Wait v. Robertson M. Co.*, 37 Wash. 282; *Sonneborn v. Stewart*, 2 Woods 599, 98 U. S. 187, 25 L. ed. 116; *Brown v. Chapman*, 1 W. Bl. 427; *Chapman v. Pickersgill*, 2 Wils. 145; *Lockenour v. Sides*, 57 Ind. 360, 26 Am. Rep. 58; *Quartz Hill Con. G. M. Co. v. Eyre*, 11 Q. B. Div. 674.

²¹ *McClenny v. Inverarity*, 80 Kan. 569, 24 L.R.A.(N.S.) 301; *White v. Apsley R. Co.*, 194 Mass. 97, 8 L.R.A.(N.S.) 484; *Hogg v. Pinckney*, 16 S. C. 387; *Churchill v. Siggers*, 3 El. & B. 929; *Savage v. Brewer*, 16 Pick. 453; *Barnett v. Reed*, 51 Pa. 190, 88 Am. Dec. 574; *Jennings v. Florence*, 2 C. B. (N.S.) 467; *Austin v. Debnam*, 3 B. & C. 139; *Krug v. Ward*, 77 Ill. 603; *Grainger v. Hill*, 4 Bing. N. C.

An action for a malicious prosecution may be maintained against a private corporation,²² and the malice of its officers or employees accompanying the performance of acts within, or incidental to, the discharge of their duties is imputable to the corporation,²³ unless those acts were intended as a mere cover for the accomplishment of some independent and wrongful purpose.²⁴ A public corporation may also be so liable if it specially authorized the action to be brought by any of its officers.²⁵ In some states the act of any corporate agent along this line must be expressly authorized or ratified or the principal will not be liable.²⁶

"The fact that, according to the practice in the court where the criminal proceedings were had, the chief of police signed and swore to the written complaint does not save the defendant if he intentionally induced the chief of police to do so, acting in good faith on the defendant's information."²⁷ One who aids and abets another, or ratifies his acts in a malicious prosecution, is equally liable with the principal actor.²⁸ An officer who

212; *Elsee v. Smith*, 1 D. & R. 97; *Schaper v. Sutter*, 63 Ill. App. 257; *Antcliff v. June*, 81 Mich. 477, 21 Am. St. 533, 10 L.R.A. 621; *Zinn v. Rice*, 161 Mass. 571; *Clark v. Nordholt*, 121 Cal. 26.

Where one is maliciously arrested under bail process upon an allegation of fraud he must allege that the order of arrest was vacated before he began his action, but need not aver that the action in which the arrest was made had terminated. In such an action it is not necessary to prove express malice or malice in fact, nor actual damage; deprivation of liberty and injury to reputation, feelings and person will support a verdict. *Hogg v. Pinckney*, 16 S. C. 387, distinguishing *Frierson v. Hewitt*, 2 Hill (S. C.) 499.

²² *Farmers' Mut. F. Ins. Ass'n v. Stewart*, 167 Ind. 544; *Atchison, etc. R. Co. v. Allen*, 70 Kan. 743;

Willard v. Holmes, 142 N. Y. 492; *Scott v. Dennett S. C. Co.*, 51 App. Div. (N. Y.) 321; *Cornford v. Carlton Bank*, [1899] 1 Q. B. 392, [1900] 1 Q. B. 22.

²³ *Carp v. Queen Ins. Co.*, 203 Mo. 295; *Dwyer v. St. Louis T. Co.*, 108 Mo. App. 152; *Gulf, etc. R. Co. v. James*, 73 Tex. 12, 15 Am. St. 743; *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265.

²⁴ *Willard v. Holmes*, 2 N. Y. Misc. 303. See *Kutner v. Fargo*, 20 N. Y. Misc. 207.

²⁵ *Horton v. Newell*, 17 R. I. 571.

²⁶ *Beiswanger v. American B. & T. Co.*, 98 Md. 287.

²⁷ *Tangney v. Sullivan*, 163 Mass. 166, citing *Gibbs v. Ames*, 119 Mass. 60, 66; *Woodworth v. Mills*, 61 Wis. 44, 50 Am. Rep. 135; *Kline v. Shuler*, 8 Ired. 484, 486, 49 Am. Dec. 402; *Danby v. Beardsley*, 43 L. T. (N.S.) 603, 604. See § 1240.

²⁸ *Oates v. Bullock*, 136 Ala. 537,

serves criminal process which shows on its face that the complainant knew of the falsity of the accusation therein made is liable for malicious prosecution and if he makes an arrest under such warrant is also liable for false imprisonment; the two causes of action may be joined.²⁹ Where a search-warrant is maliciously procured it is not necessary that the affidavit or indictment should have sufficiently charged the defendant with a crime to authorize him to maintain an action for malicious prosecution.³⁰ In such a case the failure to find the goods is a termination of the prosecution.³¹

Whether an action may be maintained for maliciously and without reasonable or probable cause prosecuting a civil action not involving an arrest of the person or seizure of property is a question upon which courts are not agreed.³² On principle it

96 Am. St. 38; *Russell v. Chamberlain*, 12 Idaho 299; *White v. Apsley R. Co.*, 194 Mass. 97, 8 L.R.A. (N.S.) 484; *Mauldin v. Ball*, 104 Tenn. 597.

The rule does not extend to one who signs an attachment bond as surety. *Harr v. Ward*, 73 Ark. 437.

²⁹ *Lueck v. Heisler*, 87 Wis. 644. But see *Davis v. Pacific Tel. & T. Co.*, 127 Cal. 312.

³⁰ *Harlan v. Jones*, 16 Ind. App. 398.

³¹ *Sprangler v. Booze*, 103 Va. 276.

³² See as opposing the right, *Mitchell v. Southwestern R.*, 75 Ga. 398; *Ely v. Davis*, 111 N. C. 24; *Terry v. Davis*, 114 N. C. 31; *Rice v. Day*, 34 Neb. 100; *Mitchell v. Silver Lake Lodge*, 29 Ore. 294; *Smith v. Michigan B. Co.*, 175 Ill. 619, 67 Am. St. 242, 66 Ill. App. 516; *Norcross v. Otis Bros. & Co.*, 152 Pa. 481, 34 Am. St. 669; *Dooley v. Meisenbach*, 83 Ill. App. 75; *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489, 76 Am. St. 433, distinguishing *Coal Co. v. Upson*, 40 Ohio St. 17, and *Pope v. Pollock*, 46 id. 367, 4 L.R.A. 255; *Luby v. Bennett*, 111

Wis. 613, 619, 87 Am. St. 897; *Houghton v. Oakley*, 21 New South Wales L. R. (law) 26; *Bartholomew v. Metropolitan L. Ins. Co.*, 1 Ohio Dec. 267; *McCord-C. C. Co. v. Levi*, 21 Tex. Civ. App. 109; *Runge v. Franklin*, 72 Tex. 590, 13 Am. St. 833, 3 L.R.A. 417; *Cross v. Commercial Agency*, 18 New Zeal. L. R. 153; *Barker v. Sands & McD. Co.*, 16 Vict. L. R. 719; *Calisher D. G. Co. v. Bloch* (Tex. Civ. App.), 147 S. W. 683; *White v. International T.-B. Co.*, 156 Iowa 210, 42 L.R.A. (N.S.) 346. See *Abbott v. Thorne*, 34 Wash. 692, 65 L.R.A. 826, 101 Am. St. 1021 (in the absence of special injury); *Mayer v. Walter*, 64 Pa. 283; *McNamee v. Minke*, 49 Md. 122; *Byne v. Moore*, 5 Taunt. 187; *Gregory v. Derby*, 8 C. & P. 749; *Clarke v. Postan*, 6 id. 423; *Closson v. Staples*, 42 Vt. 245; *Woods v. Funnell*, 13 Bush 628; *Lawyer v. Loomis*, 3 Thomp. & C. 393; *Newfield v. Copperman*, 15 Abb. Pr. (N.S.) 360; *Berry v. Adamson*, 6 B. & C. 528; *Wanzer v. Wyckoff*, 9 Hun 178; *Cardinal v. Smith*, 109 Mass. 158, 12 Am. Rep.

is difficult to deny the right of action where the taxable costs are not a full compensation for the trouble and expense of defending the groundless suit. In the words of Lord Campbell: ³³ "To put into force the process of law, maliciously and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case." ³⁴ The invasion of a house in search of stolen goods under authority of a search warrant is a ground of damage though no arrest was made, property seized or premises searched except by demanding the property desired. ³⁵ The expenses and trouble of defending such an action as is stated are proper elements of damage, and why should they alone not be considered sufficient to maintain the action? Where the claim which is the subject of the action is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery for the expenses incurred and damages sustained should be as fully recognized as if his property had been attached or his body taken charge of by the plaintiff. ³⁶ In England such an action will lie for falsely and

682; *Allgor v. Stillwell*, 6 N. J. L. 166; *Woodmansee v. Logan*, 2 id. 93; 1 Am. Lead. Cas. 200-224; *Cooley on Torts* 188, 189; *Lockenour v. Sides*, 57 Ind. 360, 26 Am. Rep. 58; *Wetmore v. Mellinger*, 64 Iowa 741, 52 Am. Rep. 465; *Smith v. Hintrager*, 67 Iowa 109; *Johnson v. King*, 64 Tex. 226; *Smith v. Adams*, 27 id. 30; *Eberley v. Rupp*, 90 Pa. 259; *Burt v. Smith*, 181 N. Y. 1.

³³ *Churchill v. Siggers*, 3 El. & B. 929.

³⁴ *Carbondale I. Co. v. Burdick*, 67 Kan. 329; *Bosch v. Miller*, 136 Mo. App. 482 (if of a defamatory nature).

³⁵ *Krehbiel v. Henkle*, 142 Iowa 677.

³⁶ *Virtue v. Creamery P. Mfg. Co.*, 123 Minn. 17; *Gulsby v. Louisville*

& N. R. Co., 167 Ala. 122; *First State Bank v. Noser*, 133 Ill. App. 173; *Whitesell v. Study*, 37 Ind. App. 429; *New Sharon C. Co. v. Knowlton*, 132 Iowa 672 (it seems); *Connelly v. White*, 122 Iowa 391; *McCardle v. McGinley*, 86 Ind. 538; *Marbourg v. Smith*, 11 Kan. 554; *Magner v. Renk*, 65 Wis. 364, citing the text; *Woods v. Finnell*, 13 Bush 628; *Eastin v. Bank*, 66 Cal. 123, 56 Am. Rep. 77; *Closson v. Staples*, 42 Vt. 209 (fully reviewing the English and early American cases); *Smith v. Burrus*, 106 Mo. 94, 27 Am. St. 329, 13 L.R.A. 59; *Brady v. Erwin*, 48 Mo. 533; *Kolka v. Jones*, 6 N. D. 461, 66 Am. St. 615; *Lipscomb v. Shofner*, 96 Tenn. 112; *McPherson v. Runyon*, 41 Minn. 524, 16 Am. St. 727; *Whipple v. Fuller*, 11 Conn. 582, 29 Am. Dec.

maliciously and without reasonable or probable cause presenting a petition under the companies' acts 1862, 1867, to wind up a trading company, although no pecuniary loss or special damage to the company can be proved, because the presentation of the petition, which was required to be made public before it could be acted upon, was necessarily calculated to injure the credit of the company.³⁷ Much was said in disposing of the questions in this case which looks toward the denial of a right of action for a malicious prosecution where the bringing of an ordinary action does not, as a natural or necessary consequence, involve any injury to a man's property, for the reason that the only costs which the law recognizes and for which it will compensate him are the costs properly incurred in the action itself. Bowen, L. J., said: "For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs it is because he does not deserve them; if he deserves them he will get them in the original action: if he does not deserve them he ought not to get them in a subsequent action. Therefore the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."³⁸ In cases of this nature the want of probable cause must be very palpable or the plaintiff cannot succeed.³⁹

330; *Cox v. Taylor*, 10 B. Mon. 17; *Pangburn v. Bull*, 1 Wend. 345; *Allen v. Codman*, 139 Mass. 136; *Johnson v. Meyer*, 36 La. Ann. 333; *Hoyt v. Macon*, 2 Colo. 113; *Ant-cliff v. June*, 81 Mich. 477, 10 L.R.A. 621, 21 Am. St. 533; *Pope v. Pollock*, 46 Ohio St. 367, 15 Am. St. 608, 4 L.R.A. 255 (distinguished in *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489); *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. 362; *O'Neill v. Johnson*, 53 Minn. 439, 39 Am. St. 615; *Dolan v. Thompson*, 129 Mass. 205; *Sartwell*

v. Parker, 141 Mass. 405; *Eickhoff v. Fidelity & C. Co.*, 74 Minn. 139; *Wade v. National Bank*, 114 Fed. 377; *Cooper v. Armour*, 42 id. 215, 8 L.R.A. 47 (it seems). The opinion of Corliss, C. J., in *Kolka v. Jones*, *supra*, is very interesting and instructive, and one of the fullest discussions of the question to be found in the reports of recent years.

³⁷ *Quartz Hill Con. G. M. Co. v. Eyre*, 11 Q. B. Div. 674.

³⁸ *Id.*

³⁹ *Virtue v. Creamery P. Mfg. Co.*, 123 Minn. 17, L.R.A. 1915B

In an action for the malicious prosecution of a writ of attachment, for levying the same, for making an excessive levy and for improper conduct in making it there may be a recovery for injuries caused by trespass upon the realty or upon personalty of the plaintiff, or for unnecessarily closing his store in the due execution of the writ, or for an excessive levy upon goods or for an unlawful and damaging detention of the goods so levied on. All these matters are component parts of the malicious prosecution and redress for them may be had in the action brought therefor.⁴⁰ In considering the damage done to a business the value of a lease surrendered because of the attachment is to be regarded.⁴¹ Without determining whether or not a plaintiff who wrongfully procures the appointment of a receiver may be liable for the injury sustained by the defendant, the Texas court has ruled that there cannot be a recovery for loss resulting from the receiver's acts after his appointment, nor for injury to credit, or the loss of speculative profits.⁴² By discontinuing an injunction suit a party who maliciously and without probable cause obtained the writ is liable to the person restrained in an action for malicious prosecution.⁴³

§ 1236. Unauthorized suit or appeal. Though there is no element of malice in one who unauthorizedly brings a suit or prosecutes an appeal in the name of another he is liable to the other party thereto for such damages as may result to him,⁴⁴

1179; *Eickhoff v. Fidelity & C. Co.*, 74 Minn. 139.

⁴⁰ *Brown v. Master*, 104 Ala. 451.

⁴¹ *Katsulis v. Confectioners & B. S. Co.*, 166 Ill. App. 581.

⁴² *Coverdill v. Seymour*, 96 Tex. 1, 9.

⁴³ *Powell v. Woodbury*, 85 Vt. 504.

The damages in such an action, unless assessed in accordance with some statute, must be proved with the same certainty as in any other suit, hence where the injunction obtained was to restrain a sale under foreclosure of a mortgage, and where it did not appear that after

the injunction was dissolved the property was insufficient to pay the debt, damages due to the wrongful restraint of the sale are not sufficiently shown. *Hicks v. Murphy*, — Tex. Civ. App. —, 172 S. W. 1135.

In such a suit, the mortgagee whose sale is wrongfully restrained may recover the cost of advertising the sale, if pleaded, but cannot recover interest from the date set for the sale, as it is uncertain what amount would have been realized by the sale. *Hicks v. Murphy*, *supra*.

⁴⁴ *Foster v. Dow*, 29 Me. 442; *Smith v. Hyndman*, 10 Cush. 554;

as the expenses of a receivership if the fund seized is inadequate to meet them.⁴⁵ Evidence of express malice is competent.⁴⁶ If the plaintiff in an action to recover for such a wrong disclaims special damages for injury to his character the defendant cannot attack it either for the purpose of rebutting the evidence of malice or in mitigation of damages.⁴⁷ The recovery in such an action where an appeal is taken is not affected by the fact that the person who was unauthorizedly named as plaintiff in the original suit had a right of action against the defendant.⁴⁸ Where an appeal is taken without authority the damages to the person in whose favor the judgment was rendered (it remaining in full force) cannot exceed the balance due on it, with the costs of the proceeding in which it was rendered and of the action brought to enforce its collection.⁴⁹ The loss of time and money paid to procure the discontinuance of an unauthorized suit may be recovered, and if it was groundless and was prosecuted with malicious motives—which may be inferred from there existing no right of action, as well as proved in other ways—injury to feelings and reputation are added elements of damage.⁵⁰

§ 1237. **Elements of damage.** These are thus classified by Holt, C. J., in *Saville v. Roberts*:⁵¹ 1. Damages to a man's fame, as if the matter whereof he is accused be scandalous. 2. Where a man is put in danger to lose his life or limb or property. 3. Damage to a man's property, as where he is forced to spend money in necessary charges to acquit himself of the crime. 4. Any special damage. In general terms, said Graves, J., the elements of damage are the expense the plaintiff incurred about the prosecution complained of, his loss of time, his deprivation of liberty and the loss of the society of his family, the injury to his fame, personal mortification and the smart and injury of the malicious arts and acts and oppression of the defendant.⁵² The injury to reputation must be estimated

Bond v. Chapin, 8 Metc. (Mass.) 31; *Streeper v. Ferris*, 64 Tex. 12.

⁴⁵ *Hendrie & B. Mfg. Co. v. Parry*, 37 Colo. 359.

⁴⁶ *Smith v. Hyndman*, 10 Cush. 554.

⁴⁷ *Id.*

⁴⁸ *Foster v. Dow*, 29 Me. 442.

⁴⁹ *Streeper v. Ferris*, 64 Tex. 12.

⁵⁰ *Bond v. Chapin*, *supra*.

⁵¹ 1 *Ld. Raym.* 374.

⁵² *Hamilton v. Smith*, 39 Mich.

and reparation made for it on the same considerations which govern in actions for slander or libel.⁵³ According to numerous adjudications the plaintiff may give evidence as part of his case of his previous good character, whether or not the defendant had knowledge of it.⁵⁴ Such evidence cannot be rebutted by evidence of specific acts; but the plaintiff may be cross-examined concerning his character.⁵⁵ Bodily and mental suffering may be taken into account, and the latter where there is no physical injury or pain.⁵⁶ So the jury may

222; *Wilson v. Bowen*, 64 id. 133, 141; *Killebrew v. Carlisle*, 97 Ala. 535; *Ten Cate v. Fansler*, 10 Okla. 712; *Carp v. Queen Ins. Co.*, 203 Mo. 295; *Missouri, etc. R. Co. v. Groseclose* (Tex. Civ. App.), 134 S. W. 736; *Lavender v. Hudgens*, 32 Ark. 763.

If the court had no jurisdiction of the subject-matter of the action the recovery will be limited to the damages resulting from the mere prosecution, such as the expense of defending it and the annoyance and discredit caused thereby; there cannot be a recovery for the arrest. *Shipman v. Fletcher*, 20 D. C. 245.

Evidence as to the number of persons present when the plaintiff was arrested is inadmissible, it not appearing that the defendant was responsible for any abuse of the officer's power or discretion. *Marks v. Hastings*, 101 Ala. 165.

See as to damages in actions on attachment and forthcoming bonds, §§ 512 *et seq.*

⁵³ *Sheldon v. Carpenter*, 4 N. Y. 578; *French v. Guyot*, 30 Colo. 222; *Ambs v. Atchison, etc. R. Co.*, 114 Fed. 317; *Miles v. Walker*, 66 Neb. 728; *Seidler v. Burns*, *infra*.

"It is those who are hanging on the ragged edge of respectability whose reputations are most deeply affected by false accusations of crime; and when they prove their

innocence they are entitled to such damages as the law will allow." *Kelly v. Durham T. Co.*, 132 N. C. 368.

⁵⁴ *Emory v. Eggan*, 75 Kan. 82; *Shea v. Cloquet L. Co.*, 97 Minn. 41; *Carp v. Queen Ins. Co.*, *supra*; *Cleveland, etc. R. Co. v. Dixon*, 51 Ind. App. 658; *Woodworth v. Mills*, 61 Wis. 44, 50 Am. Rep. 135; *Blizzard v. Hays*, 46 Ind. 169; *Israel v. Brooks*, 23 Ill. 575; *Funk v. Amor*, 7 Ohio C. C. 419; *McIntire v. Levering*, 148 Mass. 546, 2 L.R.A. 517; *Glace v. Hummel*, 10 Pa. Dist. 110; *Miller v. Brown*, 3 Mo. 127; *Scott v. Fletcher*, 1 Overt. 488. See § 1210; *Stubbs v. Mulholland*, 168 Mo. 47, 79. But see *Texas M. R. v. Dean*, 98 Tex. 517, 70 L.R.A. 943.

⁵⁵ *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265.

⁵⁶ *Black v. Canadian Pac. Ry.*, 218 Fed. 239; *Malone v. Belcher*, 216 Mass. 209, 49 L.R.A.(N.S.) 753; *Grorud v. Lossi*, 48 Mont. 274; *Bursow v. Doerr*, 96 Neb. 219; *Seidler v. Burns*, 86 Conn. 249; *Lint v. Lint*, 158 Iowa 444; *Harris v. Thomas*, 140 Mich. 462; *Dwyer v. St. Louis T. Co.*, 108 Mo. App. 152; *Martin v. Corseadden*, 34 Mont. 308; *Finnigan v. Sullivan*, 65 Wash. 625; *Charlton v. Markland*, 36 Wash. 40; *Parkhurst v. Masteller*, 57 Iowa 474; *Rowlands v. Samuel*, 11 Q. B. 39; *Shatto v. Crocker*, 87

take into consideration the indignity.⁵⁷ If a man be falsely and maliciously indicted for a crime which is a scandal to him and hurts his fame an action lies although the indictment be insufficient or an *ignoramus* be found,⁵⁸ for though no expense may be incurred the mischief of the slander has been effected.⁵⁹ The plaintiff's financial condition is not involved unless the wrong done was intensified because of it.⁶⁰ The condition or

Cal. 629 (injury to the feelings is provable under the general allegation of damages); *Merchant v. Pielke*, 10 N. D. 48, citing the text; *Davis v. Seeley*, 91 Iowa 583, 51 Am. St. 356; *Wheeler v. Hanson*, 161 Mass. 370, 376, 42 Am. St. 408; *Friel v. Plumer*, 69 N. H. 498, 76 Am. St. 189; *Jones v. Jenkins*, 3 Wash. 17; *Herbener v. Crossan*, 4 Pennw. (Del.) 38; *Ambs v. Atchison*, etc. R. Co., *supra*; *Cohn v. Saidel*, 71 N. H. 558.

"Bodily pain and suffering are the natural result of bodily harm and compensation for them comes under the head of general damages. So mental anxiety and suffering flow naturally and directly from a groundless and malicious prosecution upon a charge of an infamous crime, the very foundation of which is the indignity inflicted by it." *Grorud v. Lossel*, 48 Mont. 274.

Proof of mental suffering must be made though the plaintiff was confined four days. *Sasse v. Rogers*, 40 Ind. App. 197.

In Illinois mental distress or anxiety not connected with physical injury involved in the prosecution is not an element of damages. *McCormick v. Louis Weber & Co.*, 187 Ill. App. 290.

⁵⁷ *McWilliams v. Hoban*, 42 Md. 56; *Merchant v. Pielke*, *supra*; *Rule v. McGregor*, 115 Iowa 323; *Grorud v. Lossel*, 48 Mont. 274.

⁵⁸ *Saville v. Roberts*, 1 Ld. Raym. 374; *Seidler v. Burns*, *supra*.

⁵⁹ *Id.*

It is said in Minneapolis T. M. Co. v. Regier, 51 Neb. 402, 406: "We believe it is the general doctrine that the defendant in an action for malicious prosecution will not be permitted to allege the insufficiency of the complaint on which he caused the plaintiff's arrest to shield himself from the consequences of his act. *Chambers v. Robinson*, 2 Str. 691; *Wicks v. Fentham*, 4 T. R. 247; *Pippet v. Hearn*, 5 B. & Ald. 634; *Parli v. Reed*, 30 Kan. 534; *Bell v. Keepers*, 37 Kan. 64; *Schattgen v. Holnback*, 149 Ill. 646; *Porter v. Gjertsen*, 37 Minn. 386; *Lueck v. Heisler*, 87 Wis. 644; *Stocking v. Howard*, 73 Mo. 25; *Stanceliff v. Palmeter*, 18 Ind. 321; *Dennis v. Ryan*, 65 N. Y. 385;" *Strehlow v. Pettit*, 96 Wis. 22. *Contra*, *Newman v. Davis*, 58 Iowa 447; *Krause v. Spiegel*, 94 Cal. 370, 28 Am. St. 137, 15 L.R.A. 707; *Satilla Mfg. Co. v. Cason*, 98 Ga. 14, 58 Am. St. 287.

⁶⁰ *Robertson v. Conklin*, 153 N. C. 1, 138 Am. St. 635.

Similarly it has been held that that the financial condition of one against whom an attachment has been levied is not competent as bearing on the question of the justification which existed for making the attachment, since the fact that one

number of the plaintiff's family is not material to the question of damages.⁶¹ But it has been held competent to show that the plaintiff, who had been arrested on a criminal charge, had a family, the condition of his family at the time, including the fact that he had a crippled son who was under medical treatment and with whom he sat up nights, not to show special damage based upon an injury resulting to the plaintiff's family, but for the purpose of showing the character and extent of the plaintiff's mental suffering. It was not necessary to specially plead these facts.⁶² Injury resulting from the sickness of a relative of the plaintiff is too remote.⁶³ Damages cannot be recovered for injuries to the plaintiff's clerk who was in the store when the levy of a writ was made on the goods.⁶⁴ Where the cause of action survives the damages must be limited to such as the decedent sustained.⁶⁵

The damages may consist in the personal labor, trouble and expense imposed on the plaintiff in procuring his acquittal or discharge,⁶⁶ and the pain and anxiety of mind naturally occasioned by the pendency of a criminal accusation.⁶⁷ The plaintiff may prove in aggravation of damages the length of his imprisonment, expenses, situation and circumstances.⁶⁸ A con-

whose property is attached is in poor financial condition has no necessary tendency to prove that he intended to hold a sale of the attached property and thereby defraud his creditors. *Second Nat. Bank of New Hampton v. Lanin*, 164 Iowa 512.

⁶¹ *Reisan v. Mott*, 42 Minn. 49, 18 Am. St. 489.

⁶² *Davis v. Seeley*, 91 Iowa 583, 51 Am. St. 356; *Flam v. Lee*, 116 Iowa 289; *Stewart v. Blair*, 171 Ala. 147; *Fleckinger v. Taffee*, 149 Mich. 678; *Stoecker v. Nathanson*, 5 Neb. (Unof.) 435.

⁶³ *Hampton v. Jones*, 58 Iowa 317; *Sperier v. Ott*, 116 La. 1087, 7 L.R.A. (N.S.) 518, 114 Am. St. 537.

⁶⁴ *Brown v. Master*, 104 Ala. 451, 464.

⁶⁵ *Missouri, etc. R. Co. v. Grose-close* (Tex. Civ. App.), 134 S. W. 736.

⁶⁶ *McCardle v. McGinley*, 86 Ind. 538.

⁶⁷ *Lavender v. Hudgens*, 32 Ark. 763; *King v. Erskins*, 116 La. 480; *Carp v. Queen Ins. Co.*, 203 Mo. 295; *Rawson v. Leggett*, 97 App. Div. (N. Y.) 416; *Stanford v. Grocery Co.*, 143 N. C. 419 (expense); *Urban v. Tyszka*, 16 Pa. Dist. 625; *Ambs v. Atchison, etc. R. Co.*, 114 Fed. 317; *Ruth v. St. Louis T. Co.*, 98 Mo. App. 1.

⁶⁸ *Folkard's Starkie on Slander & L.*, § 651; *Spear v. Hiles*, 67 Wis. 350; *Cointement v. Cropper*, 41 La. Ann. 303; *Neys v. Taylor*, 12 S. D. 488; *Ten Cate v. Fansler*, 10 Okla. 7; *Merchant v. Pielke*, 10 N. D. 48.

tinuance of the case brought against him and which he obtained is presumed to have been granted for legal reasons, and the defendant is liable for the proximate damages resulting thereafter.⁶⁹ The plaintiff may, in some jurisdictions, show the condition of the jail in which he was confined and the treatment received therein. The case of *Zebbley v. Storey*⁷⁰ to the contrary was disapproved, and it is said to be clearly against the weight of authority.⁷¹ But a different view is convincingly maintained in a recent case in which the plaintiff sought to recover for the physical consequences of cold, and lack of a bed and deprivation of food while under arrest, the defendant not having knowledge of these things or reason to anticipate them.⁷² In harmony with this view is an Alabama case which rules that the defendant is not responsible for any wrong or abuse in the manner of making the arrest unless he directed or approved it,⁷³ or ratified what

The ruling in *Peterson v. Toner*, 80 Mich. 350 indicates that the recovery of liberal compensation will be disapproved. Compare *Ruth v. St. Louis T. Co.*, *supra*.

The extra-legal detention of the plaintiff may be shown. *Coyle v. Snellenburg*, 30 Pa. Super. Ct. 246.

⁶⁹ *Cramer v. Barmon*, 136 Mo. App. 673.

⁷⁰ 117 Pa. 478.

⁷¹ *Drumm v. Cessnum*, 61 Kan. 467, citing *Abrahams v. Cooper*, 81 Pa. 232; *Fenelon v. Butts*, 53 Wis. 344; *San Antonio, etc. R. Co. v. Griffin*, 20 Tex. Civ. App. 91; *Atchison, etc. R. Co. v. Rice*, 36 Kan. 593; *Spear v. Hiles*, 67 Wis. 350; *Johnson v. McDaniel*, 5 Ohio Dec. 717. To the same effect is *Flam v. Lee*, *infra*. See § 1257.

The question of liability for the remanding of a prisoner after a hearing is dealt with in *Lock v. Ashton*, 12 Q. B. 871; *Lyden v. McGee*, 16 Ont. 105.

⁷² *Seidler v. Burns*, 84 Conn. 111, 33 L.R.A.(N.S.) 291, approving

Zebbley v. Storey, 117 Pa. 478, and citing *Flam v. Lee*, 116 Iowa 289, 93 Am. St. 242; *Garvey v. Wayson*, 42 Md. 178; *Laing v. Mitten*, 185 Mass. 233; *Lock v. Ashton*, 13 Jur. 167.

Similarly it has been held that it is not an element of damages, or competent in any way to show on the question of damages in an action for malicious prosecution, that plaintiff while in custody as a result of the prosecution is denied postage for letters to his family, as the jailer is under no obligation to furnish such postage. *Sloss-Shellfield Steel & Iron Co. v. Devaney*, — Ala. —, 66 So. 523.

⁷³ *Marks v. Hastings*, 101 Ala. 172.

An imprisonment which results from the wrongful act of another and is an abuse of process is not chargeable to the defendant if he was not connected with it or did not authorize it. *Bartlett v. Hawley*, 38 Minn. 308; *Ton v. Stetson*, 43 Wash. 471.

was done.⁷⁴ In New York the illegal act of a sheriff in confining a person while in custody under an execution against his body among convicts is not cause for awarding damages against the defendant.⁷⁵ Where a female was falsely and maliciously prosecuted for perjury and suffered in health in consequence and was rendered insane, an increased recovery on that account was sustained.⁷⁶ There can be but one assessment of damages in an action of this nature, and all the damages, those accruing after as well as before the bringing of the

⁷⁴ *Snead v. Jones*, 169 Ala. 143.

A similar rule has been applied in North Carolina in a case where a prosecution was instituted against plaintiff by a railroad official when such act was outside the scope of the employment of such official. *Cooper v. Southern R. Co.*, 165 N. C. 578.

⁷⁵ *Baker v. Secor*, following *Welsh v. Cochran*, 63 N. Y. 181, to the effect that one who issues process is not liable for unauthorized acts of an officer thereunder.

In *Newman v. New York, etc. R. Co.*, 54 Hun 335, the plaintiff was arrested on suspicion by the defendant's employee and turned over to an officer who detained him. "From the time when the plaintiff was taken before the sergeant he was subject to his control and direction, and if he, in the discharge of his duty and the exercise of his authority, considered the case to be one requiring the further detention and examination of the plaintiff, it was his act and not that of the defendant. If, on the contrary, the detention was produced by the instigation or urgency of an officer in the employment of the defendant, having authority on its behalf to make the arrest, then the defendant would be liable for the damages sustained by this continued detention of the plaintiff."

One who gives a prisoner into custody is not liable for his imprisonment after he was remanded into custody by a magistrate. *Lock v. Ashton*, 18 L. J. (Q. B.) 76, followed in the case stated in the preceding note.

In a case of false imprisonment of a civilian by the military authorities the defendant, who was responsible because of his authority for the acts of his subordinates, was bound to see that the plaintiff was not treated with undue harshness or severity or subjected to any discipline not necessary and proper to restrain him of his liberty for the time being; failing in this, the damages were enhanced. *McCall v. McDowell*, *Deady* 233. See, generally, §§ 1257, 1258.

⁷⁶ *Plath v. Braunsdorff*, 40 Wis. 107.

The condition of a child born of a mother who was pregnant when incarcerated in jail is not an element of damages. This was held in view of the testimony and the common knowledge that there are numerous causes for physical, mental or nervous deficiency in children; that healthy women do sometimes give birth to deficient children, and that nervous or otherwise unhealthy women often bear healthy children. *Spear v. Hiles*, 67 Wis. 361.

action, must be included in it.⁷⁷ Where the plaintiff had been arrested on a charge of embezzlement it was competent for him to show the nature of his business and the tools required in it, the difficulty he had in getting employment, the trouble to which he was subjected by taking away the property on which he relied to obtain other tools, the amount of his earnings, the injury to his feelings and reputation, and the indignity suffered.⁷⁸ A levy upon tools is attended with liability for the reasonable value of their use while detained, not what might have been earned with them. If property is unoccupied because of the levy there may be a recovery of the reasonable value of its use. Injury to reputation, pride or feelings is not an element of damages in such a case;⁷⁹ nor is injury to character, credit or business.⁸⁰ Damages for loss of time are not recoverable under an allegation of inability to procure employment of a particular kind.⁸¹ Loss sustained in business as the direct and natural result of the prosecution may be recovered.⁸² An abuse of process by restraining a sale of property involves liability for the expense of setting the order aside though no bond was given.⁸³ Where there is an unlawful arrest and imprisonment the plaintiff may recover not only therefor and the expenses of his defense, but also for the injury to his fame and reputation occasioned by the false accusation.⁸⁴ The professional standing and reputation of the plaintiff may be proved, and the nature

⁷⁷ *Fay v. Guynon*, 131 Mass. 31.

⁷⁸ *Wheeler v. Hanson*, 161 Mass. 370, 376, 42 Am. St. 408.

⁷⁹ *McGill v. Fuller*, 45 Wash. 615.

⁸⁰ *Dorr Co. v. Des Moines Nat. Bank*, 127 Iowa 153.

But compare *Malone v. Belcher*, 216 Mass. 209, 49 L.R.A.(N.S.) 753. In that case, which was an action for abuse of process in causing an attachment of property in order to prevent its sale to another, where plaintiff had no cause of action, such action was said to be analogous to malicious prosecution, and accordingly it was held that it was error to refuse an instruction that the jury should consider any

injuries caused to plaintiff's business, reputation or feelings.

⁸¹ *Missouri, etc. R. Co. v. Groseclose*, 50 Tex. Civ. App. 525.

⁸² *Magmer v. Renk*, 65 Wis. 364.

⁸³ *Milling v. Sulphur T. & L. Co.*, 119 La. 585.

⁸⁴ *Black v. Canadian Pac. Ry.*, 218 Fed. 239; *Sheldon v. Carpenter*, 4 N. Y. 579; *Fagnan v. Knox*, 40 N. Y. Super. 41; *Lunsford v. Dietrich*, 86 Ala. 250, 11 Am. St. 37; *Clarke v. American D. & I. Co.*, 35 Fed. 478; *Blunk v. Atchison, etc. R. Co.*, 38 id. 311; *Kellebrew v. Carlisle*, 97 Ala. 535; *Swales v. Grubbs*, 6 Ind. App. 477; *Spencer v. Cramblett*, 56 Kan. 794; *Drumm v. Cess-*

and extent of his practice before and after the injury.⁸⁵ Publicity given to the fact of the prosecution by the entry of the plaintiff's name upon detective police annals cannot be proven unless they were kept pursuant to law or the fact that such entry would be made was known to the defendant.⁸⁶ Extra legal entries in the docket of an examining magistrate are not evidence against the defendant.⁸⁷ But there are well-considered cases which hold that the defendant is liable for all the injury done to the reputation of the plaintiff, and that it is competent to prove newspaper publications containing accounts of the prosecution or the arrest,⁸⁸ especially if the defendant caused or secured their publication.⁸⁹ Everything done by the officer within the authority granted by the warrant may be shown.⁹⁰

num, 61 Kan. 467; *Wheeler v. Hanson*, 161 Mass. 370, 42 Am. St. 408; *Grimes v. Bowerman*, 92 Mich. 258; *Minneapolis T. M. Co. v. Regier*, 51 Neb. 402; *Gerken v. Ruppert*, 33 N. Y. Misc. 382; *Johnson v. Johnson*, 5 Ohio Dec. 717; *Neys v. Taylor*, 12 S. D. 488; *Hlubek v. Pinske*, 84 Minn. 363; *Jackson v. Bell*, 5 S. D. 257, citing the text; *Kolka v. Jones*, 6 N. D. 461, 478, 66 Am. St. 615; *Flam v. Lee*, 116 Iowa 289, 93 Am. St. 242.

"When it does not appear that the attorneys' fees and other expenses are obviously excessive, testimony of the amounts paid will constitute a *prima facie* case, and it will be assumed in such case that the attorneys' fees so paid were reasonable, unless the contrary appears." *Drumm v. Cessnum*, *supra*. But in North Dakota the value of the attorney's services must be proved or they cannot be recovered for. *Kolka v. Jones*, *supra*.

⁸⁵ *Conklin v. Consolidated R. Co.*, 196 Mass. 302.

⁸⁶ *Garvey v. Wayson*, 42 Md. 178.

⁸⁷ *Fletcher v. Chicago & N. R. Co.*, 109 Mich. 363.

⁸⁸ *Mertens v. Mueller*, 122 Md. 313; *Minneapolis T. M. Co. v. Regier*, *supra*, approving *Filer v. Smith*, 96 Mich. 347, 65 Am. St. 603. *Fletcher v. Chicago & N. R. Co.*, 109 Mich. 363, is to the same effect.

The last case holds that a further statement that the person arrested proposed to push the matter to the limit is inadmissible unless its publication was prompted by the prosecutor. If the article is so framed that the admissible part cannot be read without introducing the objectionable matter the whole should be excluded; but it would be competent to have it appear before the jury that the fact of the arrest was published in the paper.

⁸⁹ *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265; *Cooney v. Chase*, 81 Mich. 203. See also *Mertens v. Mueller*, *supra*, where it is seemingly held that the reasonable apprehension of such publication is enough to make the evidence competent.

⁹⁰ *Laing v. Mitten*, 185 Mass. 233.

The right to recover the expense incurred in defending the criminal prosecution is not affected by the fact that payment thereof has not been made.⁹¹ A recovery in the action for malicious prosecution bars a subsequent action of slander for the accusation uttered for the purpose of having the arrest made and on the occasion when it was made.⁹² The jury are to determine the amount of damages when the essential facts for the maintenance of the action have been established, and may take into consideration the expense to which the plaintiff has been subjected, his trouble and anxiety, and the ignominy of being arraigned at the bar of justice as an offender against the laws;⁹³ they are to take into consideration the circumstances of the case and award such damages as will not only compensate for the wrong and indignity suffered in consequence of the defendant's wrongful act, but they may also award exemplary or punitive damages as a punishment for such act.⁹⁴ Injury to credit may be recovered for under a general averment

⁹¹ *Smith v. Graves*, — Ind. App. —, 108 N. E. 168; *Walker v. Pittman*, 108 Ind. 341; *Minneapolis T. M. Co. v. Regier*, 51 Neb. 402; *Anderson v. Provident L. & T. Co.*, 26 Wash. 192, 203. *Contra*, *Elder v. Kutner*, 97 Cal. 490. See § 85.

The fact that attorney's fees claimed may be excessive goes to the weight and not to the competency of the evidence, as defendants have the right to show the amount of such excess. *Smith v. Graves*, *supra*.

⁹² *Sheldon v. Carpenter*, 4 N. Y. 579.

⁹³ *Thompson v. Massey*, 3 Me. 305; *Fagnan v. Knox*, 40 N. Y. Super. 41.

Where a verdict for \$25,000 was sustained the court said: The law concedes a wide latitude of discretion to juries in this class of actions and, except the limitation that the verdict should not seem to be actuated by prejudice, passion

or malice, places no general limit upon the amount of the recovery. *Rawson v. Leggett*, 97 App. Div. (N. Y.) 416.

⁹⁴ *Welsh v. Haleen*, 157 Iowa 647; *Hurlbut v. Hardenbrook*, 85 Iowa 606; *McWilliams v. Hoban*, 42 Md. 56; *Weaver v. Page*, 6 Cal. 681; *Russell v. Dennison*, 45 Cal. 337; *Lytton v. Baird*, 95 Ind. 349; *Western N. Co. v. Wilmarth*, 33 Kan. 510; *Ruth v. St. Louis T. Co.*, 98 Mo. App. 1; *Atkinson v. Van Cleave*, 25 Ind. App. 508; *Byford v. Girtton*, 90 Iowa 661; *Davis v. Seeley*, 91 Iowa 583, 51 Am. St. 356; *Spencer v. Cramblett*, 56 Kan. 794; *Proctor C. Co. v. Moses*, 19 Ky. L. Rep. 419; *Baldwin v. Von der Ahe*, 184 Pa. 116; *Wright v. Waddell*, 89 Iowa 350; *Eagleton v. Kabrieh*, 66 Mo. App. 231; *Brown v. Master*, 111 Ala. 397; *Merchant v. Pielke*, 10 N. D. 48; *National S. Co. v. Mabry*, 139 Ala. 217; *Woodley v. Coker*, 119 Ga. 226; *Henderson v.*

showing the facts which may justify an award of exemplary damages.⁹⁵ The allowance of such damages is unauthorized where the property seized is used for the purpose of violating the criminal law, either on account of the seizure or the resulting injury to the reputation of the person who carried on the illegal business in which it was used. If he conducted other business in connection with that which was illegal exemplary damages can be recovered only for the wrong done him in connection with that which was not illegal.⁹⁶ Damages are recoverable for the injury caused by the inability to dispose of attached property.⁹⁷ Where growing crops are levied on the damages

McGruder (Ind. App.), 94 N. E. 580; Cooper v. Seyoc, 104 Mo. App. 414 (abuse of process); Thomas v. Kerr, 137 Ill. App. 479. *Contra*, Wilson v. Bowen, 64 Mich. 133.

The defendant's wealth may be proved to affect the amount of punitive damages. Peck v. Small, 35 Minn. 465; Sexson v. Hoover, 1 Ind. App. 65.

In Russell v. Bradley, 50 Fed. 515, a verdict for \$12,500 was sustained on the ground that the punitive damages to be allowed were within the discretion of the jury so long as there was no evidence of prejudice, perverseness or corruption.

⁹⁵ Curlee v. Rose, 27 Tex. Civ. App. 259; Seidler v. Burns, 86 Conn. 249.

A complaint in an action for damages caused by wrongful garnishment will not support a judgment for exemplary damages unless it is alleged that that garnishment, in addition to being wrongful, was without probable cause and with malice. Heidemann v. Martinez, — Tex. Civ. App. —, 173 S. W. 1166.

Such pleading need not in terms aver the want of probable cause. It will be sufficient if it allege facts which show such want of
Suth. Dam. Vol. IV.—61.

probable cause. Johnson v. Tindall, — Tex. Civ. App. —, 161 S. W. 401.

Where it appears that an attachment was without probable cause, it was held error not to submit to the jury the question of malice as justifying exemplary damages, for the reason that while malice may be inferred from the want of probable cause it need not be, and the fact must be determined by the jury and not by the court. Pruitt v. English, — Tex. Civ. App. —, 173 S. W. 1172.

Where the fact of want of probable cause appears from the pleadings, it is error to refuse to submit to the jury the question of exemplary damages. Johnson v. Tindall, *supra*.

⁹⁶ Kauffman v. Babcock, 67 Tex. 241.

⁹⁷ French v. Guyot, 30 Colo. 222; Tilton v. Gates L. Co., 140 Wis. 197 (it seems).

It has been ruled that only nominal damages may be recovered for attaching real estate if there is no evidence of injury to it. New Sharon C. Co. v. Knowlton, 132 Iowa 672. But it would doubtless be otherwise if a sale was prevented

are measured by the difference in their value at the time of the levy and the time of the release; the time after the release necessary to secure and market the crops is not to be regarded.⁹⁸ Injury to a mercantile business because of the attachment of real estate which did not interrupt it may not be recovered for; it is otherwise as to injury to credit.⁹⁹

A partner who does not advise, direct or know of the institution of a suit which is prosecuted in the firm name until after its termination is not liable for vindictive damages,¹ nor for those which are compensatory.² If the action for malicious prosecution is by one of two defendants in the criminal proceedings, while evidence of malice towards both is competent to show the defendant's state of mind, yet for the purpose of fixing

by the proceeding. See the cases cited in the preceding note.

⁹⁸ Pratt v. Hampe, 114 Iowa 237.

Some actual damage must be shown to have been caused by an attachment to warrant the recovery of even nominal damages, for the reason that a plaintiff is not entitled as of right to damages in case of a mere issue and levy of a writ on personal property, so that where a writ was issued and levied, and there was no evidence that the property seized was damaged when returned to plaintiff, or how long the sheriff retained possession of it, or that plaintiff suffered from being deprived of the use of it, there is no basis for a judgment for any damages whatever. Rowe v. Crutchfield, — Tex. Civ. App. —, 168 S. W. 444.

Where the effect of a wrongful attachment of property is entirely to deprive plaintiff of the property, the measure of damages is the actual value of such property at the time of the levy. Pruitt v. English, — Tex. Civ. App. —, 173 S. W. 1172. To the same effect see Fisher

v. Scherer, — Tex. Civ. App. —, 169 S. W. 1133.

⁹⁹ Gramling-S. Co. v. Parker, 3 Ala. App. 325.

¹ Rosenkrans v. Barker, 115 Ill. 331, 56 Am. Rep. 169.

A ward is not liable for vindictive damages for a wrongful attachment sued out in his name by his guardian, where the ward was in no way responsible. Shriver v. Frawley, 167 Iowa 419.

² Marks v. Hastings, 101 Ala. 165.

Conversely the intention of one partner to sell off the partnership property, and thereby to defraud the firm's creditors, if such intention existed in fact, is incompetent in an action to recover damages for a wrongful attachment of such property as having no tendency to prove a justification for the attachment, for the reason that it appeared that the other partner had no such intention, and also that without the consent of such other partner, no such sale could have been made. Brady-Neely Grocer Co. v. De Foe, — Tex. Civ. App. —, 169 S. W. 1135.

the punitive damages the defendant's words and acts towards the plaintiff are only to be considered.³

§ 1238. *Same subject.* The plaintiff, when he has been prosecuted for a crime maliciously and without probable cause, may recover for the expense he has been put to as well as for the annoyance he has undergone and for the injury to his feelings.⁴ The amount of recovery for the expense incurred will be limited to such sum as was reasonably necessary.⁵ Such expense must be specially pleaded.⁶ Where the statutes require that the party summoned in garnishment proceedings shall appear and answer under oath, one who has been garnished and has not appeared cannot recover the expense incurred in sending an agent to appear for him unless the garnishee is a corporation.⁷ It has been held in some cases that it is discretionary with the jury to allow the plaintiff the amount or any portion of it paid in defending against the prosecution;⁸ generally, however, he is entitled to recover not only the costs and expenses attending the defense of the groundless suit, without reference to taxable costs, including counsel fees⁹ but also

³ *Ellis v. Hampton*, 123 N. C. 194.

⁴ *Callahan v. Kelso*, 170 Mo. App. 338 (including loss of time); *Billings v. Atchison, etc. R. Co.*, 76 Kan. 325; *Blazek v. McCartin*, 106 Minn. 461 (though no evidence was given of the value of the services rendered or amount of the expenses incurred); *Mitchell v. Davies*, 51 Minn. 168 was limited; *Rowlands v. Samuel*, 11 Q. B. 39.

Injury to feelings is an element of damage in Louisiana for maliciously prosecuting an ejection suit. *Deslonde v. O'Hern*, 39 La. Ann. 14.

⁵ *Hawkins v. Collins*, 5 Ala. App. 522; *Massena Sav. Bank v. Garside*, 151 Iowa 168 (regardless of the number of counsel); *Aldrich v. Inland Empire Tel. & T. Co.*, 62 Wash. 173; *Tutwiler C. C. & I. Co. v. Tuvin*, 158 Ala. 657; *Harris v. Thomas*, 140 Mich. 462; *Eastin v. Bank*, 66 Cal. 123, 56 Am. Rep. 77;

Hurlbut v. Boaz, 4 Tex. Civ. App. 371. See note to § 1237.

⁶ *Hawkins v. Collins, supra*.

⁷ *Cornell v. Payne*, 115 Ill. 63.

⁸ *Gregory v. Chambers*, 78 Mo. 294; *Bradlaugh v. Edwards*, 11 C. B. (N.S.) 377. See next note.

⁹ *Shriver v. Frawley*, 167 Iowa 419; *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316; *Woods v. Finnell*, 13 Bush 628; *Smith v. Smith*, 20 Hun 559, note; *Magmer v. Renk*, 65 Wis. 364; *Harr v. Ward*, 73 Ark. 437, citing the text. *Contra, Landa v. Obert*, 45 Tex. 540; *Beckham v. Collins*, 54 Tex. Civ. App. 241. In the last case *Findley v. Mitchell*, 50 Tex. 143, is distinguished on the ground that the attorney's fees recovered therein were made necessary by the wrongful act. See *McIntosh v. Wales*, 21 Wyo. 397 (charge of attorney assumed to be reasonable in view of the distance traveled and

consequential damages which naturally and proximately result therefrom.¹⁰ In an early California case a suit was brought on a paid bill of exchange and property attached and held for four months, when it was released by giving a bond. The jury gave a verdict, in an action for a malicious prosecution of that suit and suing out that attachment, for \$15,000, which was sustained. The court say: "In cases of this nature there is no settled rule as to the amount to be recovered. The jury are not confined to the actual pecuniary loss sustained by the plaintiff, but may take into consideration the character and position of the parties and all the circumstances attending the transaction. In such cases we cannot disturb a verdict unless it clearly appears that injustice has been done."¹¹ In

the means used; it was also held that the fee incurred or paid might be recovered whether the plaintiff paid it or some one else paid it for her).

Attorney's fees are recoverable on the dissolution of writs of attachment and sequestration on motion prior to the trial of the action on the merits; and if money has been made unavailable to the party entitled to it interest on it may be recovered. *Mitchell v. Murphy*, 131 La. 1040.

Only the statutory attorney's fee is recoverable for the malicious attachment of property. *McGill v. Fuller*, 45 Wash. 615.

¹⁰ Evidence that the plaintiff became ill by reason of the prosecution and unable to attend to business for a specified time, thereby forfeiting his earnings under a special contract, is inadmissible under the general allegation that he was greatly injured in his business. *Oldfather v. Zent*, 14 Ind. App. 89.

The amount of time spent by one whose property is wrongfully attached in securing a release of the attachment is too uncertain and

speculative to be considered by the jury in assessing damages. *Second Nat. Bank of New Hampton v. Lanin*, 164 Iowa 512.

¹¹ *Wait v. Robertson M. Co.*, 37 Wash. 282; *Weaver v. Page*, 6 Cal. 681; *Peck v. Small*, 35 Minn. 465; *Williams v. Casebeer*, 126 Cal. 77, 89; *Spencer v. Cramblett*, 56 Kan. 794; *Baldwin v. Von der Ahe*, 184 Pa. 116; *Neys v. Taylor*, 12 S. D. 488. See *Russell v. Dennison*, 45 Cal. 337; *Phelps v. Cogswell*, 70 id. 201.

Verdicts have been set aside or reduced for excessiveness in the following cases: *O'Boyle v. Shively*, 65 Ill. App. 278; *Davis v. Seeley*, 91 Iowa 583, 51 Am. St. 356; *Jensen v. Hallam*, 51 Neb. 492; *Billingsley v. Maas*, 93 Wis. 176; *Cointement v. Cropper*, 41 La. Ann. 303; *Phelps v. Cogswell*, 70 Cal. 501; *Gray v. Tanning*, 73 Conn. 115; *Sasse v. Rogers*, 40 Ind. App. 197; *Missouri, etc. R. Co. v. Groseclose* (Tex. Civ. App.), 134 S. W. 736; *Grayson v. St. Louis T. Co.*, 100 Mo. App. 60; *Farrell v. St. Louis T. Co.*, 103 Mo. App. 454.

an English case¹² a judgment creditor who had recovered judgment for £115, of which £100 were afterwards paid, caused the debtor to be taken on execution for the full amount, and this being found to have been done maliciously and without probable cause, and special damages being alleged because the plaintiff was prevented from attending to his business, injured in his credit and character, and incurred expense in procuring his liberation, he was held, on demurrer, entitled to judgment.¹³ Under an allegation that by reason of his prosecution for the violation of the liquor law the plaintiff's credit was impaired so that his creditors demanded security for their debts and he was obliged to mortgage his property to give such security; it may be shown that the plaintiff was a merchant; that he bought goods in a certain city; that he was indebted to several parties therefor; that they, on hearing of the pendency of the charge, refused him further credit and required a mortgage, which he was obliged to give in order to avoid being sued.¹⁴ The suing out of other attachments upon the property of the plaintiff after its attachment by the defendant is the natural result of the latter's wrongful act, and the fact that the other attachments contributed to the injury sustained by the plaintiff does not absolve the defendant from liability.¹⁵ It is the natural and probable result of menacing the possession of a boarding house that a loss of boarders should follow and that persons who might have become boarders should be deterred from doing so. The expense and trouble incurred in giving a bond, including counsel fees, to prevent expulsion is also a ground of damage.¹⁶ The owner of non-productive stock deprived of the opportunity of exchanging it for interest-bearing obligations may recover the difference in the value of the two, including the interest stipulated to be paid; and if such obligations are lost interest at the agreed rate may be recovered;

¹² Churchill v. Siggers, 3 El. & B. 929.

¹³ Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Tiblier v. Alford, 12 Fed. 262.

¹⁴ Fine v. Navarre, 104 Mich. 93.

¹⁵ Grimes v. Bowerman, 92 Mich. 258, 266; § 40.

¹⁶ Wall v. Hardwood Mfg. Co., 127 La. 959; Tullis v. McClary, 128 Iowa 493; Slater v. Kimbro, 91 Ga. 217, 44 Am. St. 19.

if their collection is deferred interest during the time payment is prevented is recoverable.¹⁷

If money has been paid to secure the release of property maliciously seized the damages are measured by the payment.¹⁸ In an Iowa case a party holding a lease of a mine for a specified time was ejected therefrom by a judgment, afterwards reversed, in an action of forcible entry and detainer maliciously instituted. In an action for this proceeding it was held that the measure of damages was the reasonable value of the use of the premises for the time the plaintiff had been kept out of possession, and for any permanent injury to his leasehold interest sustained by reason of the mine caving or otherwise getting out of repair through the failure of the defendant to use ordinary care during the time he held possession.¹⁹ The profits which might have been made by the use of cars are not recoverable. The damages are governed by the interest on their value as affected by their deterioration, if they had been in use, and while their use was forbidden if their release could not have been secured by giving bond.²⁰ If the result of a malicious attachment levied without probable cause upon a growing crop was to so demoralize the tenants and laborers of the owner that they, because of distrust of his financial ability, leave him, and the injury resulting to his credit prevents him from obtaining other laborers and supplies, in consequence of which his crops are injured, such injury is an element of damage to the extent of the resulting depreciation.²¹ In an action for maliciously and without probable cause procuring a merchant to be adjudged a bankrupt, under which adjudication, before the proceeding was dismissed, he was deprived of his entire stock of goods and his store shut up for about thirteen months, the jury were instructed that the plaintiff was entitled to recover the

¹⁷ *Foster v. Bennett* (Tex. Civ. App.), 152 S. W. 233. See also to a similar effect *Bennett v. Foster*, — Tex. Civ. App. —, 161 S. W. 1078 (the same case on a subsequent appeal).

¹⁸ *Clarke v. Pearce*, 80 Tex. 146.

¹⁹ *Moffatt v. Fisher*, 47 Iowa 473;

Newark C. Co. v. Upson, 40 Ohio St. 17.

²⁰ *Railroad Co. v. Hardware Co.*, 143 N. C. 54.

²¹ *Brewer v. Jacobs*, 22 Fed. 217; *Wall v. Hardwood Mfg. Co.*, 127 La. 959.

actual damage to his goods, for the breaking up of his business and the destruction of his credit. "The value of his own time," say the court, "is also a fair charge, as he has been obliged to give his attention to the proceedings instituted against him, and has not been able to pursue any business." It was also held that his expenses for lawyers' fees in following up and setting aside the proceedings in bankruptcy were a fair item of charge to be allowed.²² In *Krug v. Ward*²³ it was held that evidence of the payment of an attorney's fee and expenses of defending the groundless suit was admissible, though the former was paid by another for the plaintiff. But in assessing the damages the expenses of prosecuting the action for malicious prosecution are not deemed the natural and proximate consequence of the wrong complained of, and cannot be taken into consideration.²⁴ They can be awarded only as a punishment, and their allowance is discretionary with the jury.²⁵ Where money was garnished and by reason of its non-payment to the plaintiffs they became unable to pay their rent and employees, and because of such inability their landlord canceled their lease and their employees refused to continue to work, in consequence of which their business was ruined and their prospects blighted, these grounds of damage were too remote and uncertain.²⁶

For this wrong the injured party is entitled to adequate compensation covering all the elements of the particular injury. Therefore the jury, in determining the amount, will consider

²² *Sonneborn v. Stewart*, 2 Woods 599, reversed as to allowance of attorneys' fees and on other points, 98 U. S. 187, 25 L. ed. 116; *Fullenwider v. McWilliams*, 7 Bush 389.

Time and money used in preparing to defend an attachment and in procuring a delivery bond, and the use of a team in connection therewith, are elements of damage. *Tullis v. McClary*, *supra*.

The time lost as a result of a wrongful attachment cannot be recovered for unless pleaded, as the adverse party is not required to ask

for a more specific statement of the damages claimed, and may rely on that filed. *Shriver v. Frawley*, 167 Iowa 419.

²³ 77 Ill. 603.

²⁴ *Stewart v. Sonneborn*, 98 U. S. 197, 25 L. ed. 120; *Good v. Mylin*, 8 Pa. 51, 49 Am. Dec. 493; *Alexander v. Herr*, 11 Pa. 537; *Stopp v. Smith*, 71 id. 285; *Hicks v. Foster*, 13 Barb. 663.

²⁵ *First Nat. Bank v. Williams*, 62 Kan. 431.

²⁶ *O'Neill v. Johnson*, 53 Minn. 439, 39 Am. St. 615.

the nature of the prosecution and its natural effect on reputation, credit and private feelings; the incidental consequences of arrest, holding to bail or of interference with property; the consequential loss of time and any other loss, as the expense of defending. Malice is of the gist of the action, and the damages for other than pecuniary items may be greatly increased or diminished by the evidence on that subject.²⁷ Where actual and express malice on the part of the defendant is shown, exemplary damages may be recovered²⁸ if actual damage has been

²⁷ *Dedebant v. Maestri*, 134 La. 366, holding that in a case of malicious prosecution plaintiff was entitled to greater damages where he was incarcerated than where bail was obtained and there was no incarceration.

²⁸ *Pontius v. Kimble*, 56 Ind. App. 144; *McCormick v. Louis Weber & Co.*, 187 Ill. App. 290; *Stalker v. Drake*, 91 Kan. 142; *Tyler v. Mahoney*, 166 N. C. 509; *Cooper v. Southern R. Co.*, 165 N. C. 578; *McIntosh v. Wales*, 21 Wyo. 397; *Tamblyn v. Johnston*, 62 C. C. A. 601, 126 Fed. 267; *Oates v. Bullock*, 136 Ala. 537, 96 Am. St. 38; *Trep-tow v. Ward*, 153 Ill. App. 422; *Tyler v. Bowen*, 124 Iowa 452; *Connelly v. White*, 122 Iowa 391; *Wall v. Hardwood Mfg. Co.*, 127 La. 959; *Sperier v. Ott*, 116 La. 1087, 7 L.R.A.(N.S.) 518, 114 Am. St. 587; *Grayson v. St. Louis T. Co.*, 100 Mo. App. 60; *Martin v. Corsecadden*, 34 Mont. 308; *Stanford v. Grocery Co.*, 143 N. C. 419; *Kelly v. Durham T. Co.*, 132 N. C. 368; *Murphy v. Booth*, 36 Utah 285; *Singer Mfg. Co. v. Bryant*, 105 Va. 403; *Eggett v. Allen*, 119 Wis. 625; *Abingdon Mills v. Grogan*, 175 Ala. 247; *McWilliams v. Hoban*, 42 Md. 56; *Sonneborn v. Stewart*, 2 Woods 599; *Wanzer v. Bright*, 52 Ill. 35; *Parkhurst v. Masteller*, 57 Iowa

474; *Lunsford v. Dietrich*, 86 Ala. 250; *Lytton v. Baird*, 95 Ind. 349; *Peden v. Mail*, 118 id. 560; *McGarry v. Missouri Pac. R. Co.*, 36 Mo. App. 340; *Orr v. Seiler*, 1 Penny. 445; *Carroll v. First State Bank (Tex. Civ. App.)*, 148 S. W. 818; *Jacobs v. Crum*, 62 Tex. 401 (malice of agent, under the facts, warranted the imposition of exemplary damages against principal); *Farrar v. Talley*, 68 id. 349; *Vinal v. Core*, 18 W. Va. 1, 48; *Spear v. Hiles*, 67 Wis. 350; *Tiblier v. Alford*, 12 Fed. 262; *Jarman v. Stewart*, id. 266 (construing the Tennessee statute, and holding that punitive damages may be recovered whether the action be upon an attachment bond or the case); *Sexson v. Hoover*, 1 Ind. App. 65; *Brown v. McBride*, 24 N. Y. Misc. 235; *Cleveland, etc. R. Co. v. Dixon*, 51 Ind. App. 658.

In Massachusetts exemplary damages are not recoverable in actions of malicious prosecution, or actions analogous thereto, such as abuse of process, and damages are to be limited to such as are the natural and probable consequences of the act complained of. *Malone v. Belcher*, 216 Mass. 209, 49 L.R.A.(N.S.) 753.

If a landlord is reckless in ascertaining what is due before he distrains, or distrains for more than is

sustained.²⁹ In fixing the amount of such damages the jury should exercise a fair and reasonable discretion, keeping in view the nature of the wrong done, the aggravating circumstances³⁰ and the wealth of the defendant,³¹ though evidence on the last point is not everywhere admissible.³² If successive suits were brought by the defendant upon the same groundless claim that fact is admissible to show malice.³³ The risk of conviction on the accusation made is not an independent element of malice because it cannot be assumed that a conviction would follow in the absence of probable cause.³⁴

due, the fact is competent on the question of punitive damages. *Cannon v. Cox*, 98 S. C. 185.

Where a usurer by pretended attorney's fees and court costs increased enormously the amount of a note given for a loan, and by an oppressive use of legal process attempted to enforce the illegal demand, a verdict of \$5,000 for punitive damages was upheld, though the actual damages held recoverable were but \$448. The decision was put on the ground that such damages were not recoverable on account of any special merit in plaintiff's case, but as punishment for wanton invasion of plaintiff's rights, and to deter others from similar acts. *Stalker v. Drake*, 91 Kan. 142.

²⁹ *White v. International Text Book Co.*, 164 Iowa 693; *Bennett v. Foster*, — Tex. Civ. App. —, 161 S. W. 1078; *Foster v. Bennett* (Tex. Civ. App.) 152 S. W. 233; *Schippel v. Norton*, 38 Kan. 567.

The statute authorizes exemplary damages only in actions on the attachment bond. *McGill v. Fuller*, 45 Wash. 615.

³⁰ *White v. International Text Book Co.*, 164 Iowa 693; *Ahrens v. Fenton*, 138 Iowa 559; *Carp v. Queen Ins. Co.*, 203 Mo. 295; *Frankfurter v. Bryan*, 12 Ill. App. 549,

556; *Phelps v. Cogswell*, 70 Cal. 201; *Howe v. Oldham*, 69 Hun 57.

The allowance of exemplary damages in an action for malicious prosecution is not a matter of right but rests wholly in the discretion of the jury, who may allow or disallow them as the facts warrant and it is erroneous for the court to direct jury to allow them as a matter of right. *White v. International Text Book Co.*, 164 Iowa 693.

Where a judgment includes both actual and vindictive damages, but does not show what proportion of the amount awarded is allotted to each, the whole judgment is erroneous and must be reversed if an award of vindictive damages was not warranted by the evidence. *Shriver v. Frawley*, 167 Iowa 419.

³¹ *McIntosh v. Wales*, *supra*; *Spear v. Hiles*, *supra*; *French v. Guyot*, 30 Colo. 222; *Peek v. Small*, 35 Minn. 465; *Atkinson v. Van Cleave*, 25 Ind. App. 508; *Eggett v. Allen*, 106 Wis. 633; *Eagleton v. Kabrich*, 66 Mo. App. 231; *Singer Co. v. Bryant*, *supra*.

³² *Southern C. & F. Co. v. Adams*, 131 Ala. 147, 159.

³³ *Magmer v. Renk*, 65 Wis. 364; *Cooney v. Chase*, 81 Mich. 203; *Einstein v. Berkowsky*, 64 Ill. App. 498; *Severns v. Brainard*, 61 Minn. 265.

³⁴ *Seidler v. Burns*, 84 Conn. 111,

Where the malicious prosecution was based upon some of the counts in an information the plaintiff was not barred of the right to recover actual damages because he did not distinguish between those caused by the malicious counts and those which resulted from the others. In other words, the defendant cannot escape liability because he united groundless accusations with those for which there was probable cause.³⁵

In an action for the malicious abuse of process by making an excessive attachment, evidence of legal acts of third persons is admissible to prove the damage sustained by injuring the plaintiff's business, as the publication of the notice of the attachment in a mercantile paper and inquiries concerning the attachment by the reporters of mercantile agencies and others.³⁶ But in showing the amount of the plaintiff's damages by the injury done to his business, including good will, though a somewhat wide range of evidence may be proper, it is opening too broad a field to cover a period of nine years before the attachment was made and eleven months thereafter, especially if the attachment was in force but two days and the plaintiff's stores were not closed or trade in them stopped. The court observed: The connection between the attachment and the decrease in the volume of business following it is not sufficiently close, and too many other elements enter into the matter; for example, the methods of business pursued before and after the attachment, the amount of advertising done, changes in clerks and other employees, the amount of pains and attention given to the business, and the state of trade in general. Without

33 L.R.A.(N.S.) 291. But see Lavender v. Hudgens, 32 Ark. 763.

³⁵ Boogher v. Bryant, 86 Mo. 42; West v. Platt, 127 Mass. 367; Tangney v. Sullivan, 163 id. 166.

³⁶ Emory v. Egan, 75 Kan. 82.

To charge a sheriff with liability for making an excessive attachment it must be shown that he acted maliciously and without an honest belief that the property seized would bring at a sheriff's sale no more than was reasonably necessary

to satisfy the *ad damnum* of the writ. The decision is put on the ground that from the necessities of the case an officer in making a personal property attachment is clothed with a certain discretion, and is not bound at his peril to attach no more than will satisfy the *ad damnum* of the writ. It is enough that he exercises the discretion in good faith, giving weight to all the facts. Cary Brick Co. v. Tilton, 125 C. C. A. 499, 208 Fed. 497.

determining whether an attack of pneumonia suffered by the plaintiff was a natural and probable consequence of an excessive attachment, the fact could not be established by his testimony, it not appearing that he had special knowledge of the subject.³⁷ The discharge by a stranger of the plaintiff from his employment is too remote to be a ground of damage for the wrongfully and maliciously summoning of the plaintiff's employer as garnishee.³⁸ Vexation is not an element of damages for maliciously suing a distress warrant.³⁹ Exemplary damages may be recovered for the malicious abuse of process.⁴⁰ A person who puts an officer of the law in motion must see that he is properly instructed as to the course to be pursued; failing in this, he must answer for all acts done within the authority of the officer.⁴¹ Suing out an ancillary attachment does not carry liability for the costs incurred in defending the principal action. It will not be assumed that the plaintiff was incited to greater diligence and therefore incurred more expense because such attachment was obtained.⁴² Where process is abused or an attachment obtained for the purpose of vexing and harrassing the defendant, he may recover counsel fees paid for defending the original suit, and facts justifying the allowance of punitive damages.⁴³ And, regardless of punitive damages, there may be a recovery of attorney's fees and the expenses occasioned by

³⁷ *Zinn v. Rice*, 161 Mass. 571, 576.

The suing out of an injunction restraining the sale of a farm is not the proximate cause of trouble, annoyance and expense because of failure to secure men to work the farm: and so of expenses incurred in securing a loan. *Hawkins v. Hubbell*, 127 Tenn. 312.

³⁸ *Cooper v. Seyoe*, 104 Mo. App. 414.

³⁹ *Beckham v. Collins*, 54 Tex. Civ. App. 241.

It is held in Texas that attorney's fees cannot be recovered in an action for unlawfully suing out a distress warrant. *Tyler v. Sowders*, — Tex. Civ. App. —, 173 S. W. 640.

⁴⁰ *Jackson v. American Tel. & T. Co.*, 139 N. C. 347, 70 L.R.A. 738; *Railroad Co. v. Hardware Co.*, 138 N. C. 174; *Marlatte v. Weickgenant*, 147 Mich. 266. *Contra*, *Malone v. Belcher*, 216 Mass. 209, 49 L.R.A.(N.S.) 753.

Exemplary damages may be allowed for the malicious abuse of process if the defendant knew when he garnished the plaintiff's bank account that the money on deposit belonged to him and not to the defendant in the judgment. *Whelan v. Miller*, 49 Pa. Super. Ct. 91.

⁴¹ *Jacobs v. Robb*, 10 Up. Can. Q. B. 276.

⁴² *White v. Wyley*, 17 Ala. 167.

⁴³ *Marshall v. Betner*, 17 Ala. 832.

attending court.⁴⁴ Where a party makes an unlawful demand against another, and maliciously and oppressively uses the machinery of the courts and the process of law as well as other measures in an endeavor to enforce the payment of such demand, the injured party may recover the loss and damage resulting therefrom.⁴⁵ Though lost profits, as such, are not recoverable their amount as a fact may be considered in determining the extent of the wrong in suing out a distress warrant against a tradesman. The average profits he was making when his stock of goods was seized may be regarded in estimating his damage for the time before suit (not after it was instituted) during which it was detained. The expense of setting the stock aside because exempt is not recoverable.⁴⁶ The depreciation in the value of property while its sale is restrained is an element of the injury in favor of a trustee though there was no

Where in an action to recover damages due to a wrongful attachment one whose property is attached seeks to recover for the expense of counsel in securing a release of the attachment, he must show a necessity for the employment of counsel and also the value of the services rendered. *Second Nat. Bank of New Hampton v. Lanin*, 164 Iowa 512.

⁴⁴ *Harr v. Ward*, 73 Ark. 437.

⁴⁵ *Stalker v. Drake*, 91 Kan. 142.

Where a usurer loans money on a note at an exorbitant rate of interest, and increases the amount of the loan by various devices such as fabricated attorney's fees on pretense that the note had been placed in the hands of an attorney, as well as pretended court costs for the same reason, and where to enforce such illegal demand suits were actually brought in distant places, and dilatory tactics used in such suits, all calculated to exhaust plaintiff's resources, and force him to pay the demand, plaintiff was allowed to recover all attorney's

fees incurred in defending such oppressive legal proceedings, as well as expenses for securing bonds and railroad, hotel and incidental expenses connected therewith. *Stalker v. Drake*, *supra*.

⁴⁶ *Sturgis v. Frost*, 56 Ga. 188.

In Texas, where it is held that profits lost by reason of a wrongful attachment cannot be an element of damages therefor, it is held that such profits are competent in estimating punitive damages, providing that a proper predicate is established. *Bennett v. Foster*, — Tex. Civ. App. —, 161 S. W. 1078.

Where a recovery for profits lost in business is allowed, it is settled that to be competent such profits must be proved with a reasonable degree of certainty sufficient to enable the jury to ascertain the loss, and that evidence of such profits is always incompetent where they are speculative and conjectural, and not susceptible of ascertainment with reasonable definiteness. *Bennett v. Foster*, *supra*.

liability for injury to reputation, feelings and the like, these being foreign to his trusteeship.⁴⁷ The value of the property wrongfully taken in a replevin suit and the attorney's fees incurred in the trial of it are recoverable against the plaintiff therein though he gave a bond; his liability in any other form of action was not affected by the bond.⁴⁸

§ 1239. Evidence in mitigation. The plaintiff is required to show that the defendant was actuated by malice and that the prosecution was without probable cause.⁴⁹ Except in Louisiana⁵⁰ the absence of such cause does not raise a legal presumption of malice, but the jury may infer malice as matter of fact from the want of it.⁵¹ The want of probable cause, how-

⁴⁷ Powell v. Woodbury, 85 Vt. 504.

⁴⁸ Bridges v. Engers, 167 Ill. App. 425.

⁴⁹ Hawkins v. Collins, 5 Ala. App. 522; Lavender v. Hudgens, 32 Ark. 763; Lisseck v. Anderson, 167 Ill. App. 393; McIntosh v. Wales, 21 Wyo. 397; National S. Co. v. Mabry, 139 Ala. 217; Kansas & T. C. Co. v. Galloway, 71 Ark. 351, 100 Am. St. 79; Hurgren v. Union Mut. L. Ins. Co., 141 Cal. 585; Russell v. Chamberlain, 12 Idaho 299; Farmers' Mut. F. Ins. Ass'n v. Stewart, 167 Ind. 544; Whitesell v. Study, 37 Ind. App. 429; Stephens v. Gravit, 136 Ky. 479; Moneyweight S. Co. v. McCormick, 109 Md. 170; Miller v. Lai, 77 N. J. L. 135; Faroux v. Cornwell, 40 Tex. Civ. App. 529; Paddock v. Watts, 116 Ind. 146, 9 Am. St. 832; Girod v. Graham, 41 La. Ann. 511; Hicks v. Faulkner, 8 Q. B. Div. 167; Winfield v. Kean, 1 Ont. 193; Magowan v. Rickey, 64 N. J. L. 402; Ferguson v. Arnou, 142 N. Y. 580; Ball v. Rawles, 93 Cal. 222, 27 Am. St. 174; Whitehead v. Jessup, 2 Colo. App. 76; Stewart v. Sonneborn, 98 U. S. 187, 25 L. ed. 116; Florence

O. & R. Co. v. Huff, 14 Colo. App. 281; Stuckey v. Savannah, etc. R. Co., 102 Ga. 782; Helwig v. Beckner, 149 Ind. 131; Wright v. Hayter, 5 Kan. App. 638; Albin Co. v. Mumford, 21 Ky. L. Rep. 1613; Le Clear v. Perkins, 103 Mich. 131, 26 L.R.A. 627; McClafferty v. Philp, 151 Pa. 86; Messman v. Ihlenfeldt, 89 Wis. 585, 591; Crescent City L. S. Co. v. Butchers' Union S.-H. Co., 120 U. S. 141, 30 L. ed. 614; Ambis v. Atchison, etc. R. Co., 114 Fed. 317; Richards v. Jewett, 118 Iowa 629; Cartwright v. Elliott, 45 Ill. App. 458, is not in harmony with the almost unbroken current of authority.

Where one commences a criminal prosecution for the purpose of collecting a just debt it is *prima facie* evidence of want of probable cause and of malice, and shifts the burden of showing it was not so on the defendant. MacDonald v. Schroeder, 214 Pa. 411, 6 L.R.A. (N.S.) 701; Squires v. Job, 50 Pa. Super. Ct. 289.

⁵⁰ Weil v. Isrel, 42 La. Ann. 955, 964.

⁵¹ Lint v. Lint, 158 Iowa 444; Callahan v. Kelso, 170 Mo. App.

ever, cannot be inferred from malice.⁵² In these respects no distinction is made between criminal and civil actions,⁵³ and this is true respecting the advice of counsel as a defense.⁵⁴ The important inquiry, therefore, in such cases is whether there was probable cause, which is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or to entertain an honest and strong suspicion, that the facts essential to the prosecution exist.⁵⁵ Prob-

338; *Hawkins v. Collins*, 5 Ala. App. 522; *Evans v. R. Co.*, *infra*; *Dare v. Harper*, 101 Ark. 37; *Wyatt v. Burdette*, 43 Colo. 208; *First State Bank v. Noser*, 133 Ill. App. 173; *White v. International T. B. Co.*, 144 Iowa 92; *Pierce v. Doolittle*, 130 Iowa 333, 6 L.R.A.(N.S.) 143; *Davis v. McMillan*, 142 Mich. 391, 3 L.R.A.(N.S.) 928, 113 Am. St. 585; *Price v. Denison*, 95 Minn. 106; *Martin v. Corseadden*, 34 Mont. 308; *Kelly v. Durham T. Co.*, 132 N. C. 368; *Harpham v. Whitney*, 77 Ill. 32; *Frankfurter v. Bryan*, 12 Ill. App. 549; *Paddock v. Watts*, 116 Ind. 146, 9 Am. St. 832; *Ambs v. Atchison, etc. R. Co.*, 114 Fed. 317; *Decoux v. Lieux*, 33 La. Ann. 392; *Jacobs v. Crum*, 62 Tex. 401; *Vinal v. Core*, 18 W. Va. 1; *Tibbler v. Alford*, 12 Fed. 262; *Winfield v. Kean*, 1 Ont. 193; *Roy v. Goings*, 112 Ill. 656; *Levy v. Brannan*, 39 Cal. 485; *Harkrider v. Moore*, 44 id. 144; *Mowry v. Whipple*, 8 R. I. 360; *Straus v. Young*, 36 Md. 246; *Lawyer v. Loomis*, 3 Thomp. & C. 393; *Carson v. Edgworth*, 43 Mich. 241; *Heath v. Heape*, 1 H. & N. 478; *Wanzer v. Wyckoff*, 9 Hun 178; *Wheeler v. Nesbitt*, 24 How. 544, 16 L. ed. 765; *Humphries v. Parker*, 52 Me. 505; *Sutton v. Johnson*, 1 T. R. 493; *Pullen v. Glidden*, 68 Me. 562; *Parker v. Parker*, 102 Iowa 500; *McKenna v. Heinlen*, 128

Cal. 97; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Florence O. & R. Co. v. Huff*, 14 Colo. App. 281; *Hicks v. Brantley*, 102 Ga. 264; *Helwig v. Beckner*, 149 Ind. 131; *Torsch v. Dell*, 88 Md. 459; *Langley v. East River G. Co.*, 41 App. Div. (N. Y.) 470; *McClafferty v. Philp*, 151 Pa. 86; *Wuest v. American T. Co.*, 10 S. D. 394.

⁵² *Id.*; *Griswold v. Griswold*, 143 Cal. 617; *Singer Mfg. Co. v. Bryant*, 105 Va. 403; *Evans v. Atlantic C. L. R. Co.*, 105 Va. 72; *Brown v. Smith*, 83 Ill. 291; *Wright v. Hayter*, 5 Kan. App. 638; *Lang v. De Luca*, 108 La. 304; *Cohn v. Saidel*, 71 N. H. 558.

⁵³ *Stewart v. Sonneborn*, 98 U. S. 192, 25 L. ed. 118; *Le Clear v. Perkins*, 103 Mich. 131, 26 L.R.A. 637, and cases cited.

⁵⁴ *Le Clear v. Perkins*, *supra*; *Emerson v. Cochran*, 111 Pa. 619; *Allen v. Codman*, 139 Mass. 136; *LeMay v. Williams*, 32 Ark. 166; *Brewer v. Jacobs*, 22 Fed. 222; *Kompass v. Light*, 122 Mich. 186.

⁵⁵ *Oates v. Bullock*, 136 Ala. 537, 96 Am. St. 38; *Davis v. McMillan*, 142 Mich. 391, 113 Am. St. 585; *Eggett v. Allen*, 106 Wis. 633; *Johnson v. Southern Pac. Co.*, 157 Cal. 333; *Bacon v. Towne*, 4 Cush. 238; *Carl v. Ayres*, 53 N. Y. 17; *Foshay v. Ferguson*, 2 Denio 617; *Harpham v. Whitney*, 77 Ill. 42; *Scanlan v. Cowley*, 2 Hilt. 489; *Heyne v. Blair*,

able cause does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution, if he is an ordinarily prudent or reasonable person.⁵⁶ In some cases the test as to what constitutes probable cause is less favorable to the defendant than that given, the words "honest and strong suspicion" being omitted. Thus, in Minnesota the term is defined, as to civil actions, to be such reasons, supported by facts and circumstances, as will warrant a cautious⁵⁷ man in the belief that his action and the means taken in prosecuting it are legally just

62 N. Y. 22; *Lacey v. Mitchell*, 23 Ind. 67; *Rice v. Ponder*, 7 Ired. 390; *Fitzgibbon v. Brown*, 43 Me 169; *Ash v. Marlow*, 20 Ohio 119; *Barron v. Mason*, 31 Vt. 197; *Decoux v. Lieux*, 33 La. Ann. 392; *Hyde v. Greuch*, 62 Md. 577; *Wilson v. Bowen*, 64 Mich. 133; *Blunk v. Atchison*, etc. R. Co., 38 Fed. 311; *Torsch v. Dell*, 88 Md. 459, 467; *Jenkins v. Gilligan*, 131 Iowa 176.

⁵⁶ *McIntosh v. Wales*, 21 Wyo. 397; *Griswold v. Griswold*, 143 Cal. 617; *Fleishhauer v. Fabens*, 8 Cal. App. 30; *Lawrence v. Leathers*, 31 Ind. App. 414; *Hudson v. Nolen*, 142 Ky. 824; *Stephens v. Gravit*, 136 Ky. 479; *Kirk v. Wiener-L. L. Co.*, 120 La. 820; *Moneyweight S. Co. v. McCormick*, 109 Md. 170; *Martin v. Corseadden*, 34 Mont. 308; *Burt v. Smith*, 181 N. Y. 1; *Robitzek v. Daum*, 220 Pa. 61; *Boyd v. Kerr*, 216 Pa. 259; *MacDonald v. Schroeder*, 28 Pa. Super. Ct. 128; *Indianapolis T. & T. Co. v. Henby*, 178 Ind. 239; *James v. Phelps*, 11 Ad. & E. 483; *Ambs v. Atchison*, etc. R. Co., 114 Fed. 317; *Heslop v. Chapman*, 23 L. J. (Q. B.) 49; *Hall v. Suydam*, 6 Barb. 83; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. 174; *Turner v. Ambler*, 10 Q. B. 260; *Struby-E. M. Co. v. Kyes*, 9 Colo. App. 190; *Florence O. & R.*

Co. v. Huff, 14 Colo. App. 281; *Messman v. Ihlenfeldt*, 89 Wis. 585, 591; *Stamper v. Raymond*, 38 Ore. 16, 24; *Foster v. Pitts*, 63 Ark. 387, 392; *Willard v. Holmes*, 142 N. Y. 492. Compare *Bell v. Pearcey*, 5 Ired. 83; *Delegal v. Highley*, 3 Bing. N. C. 950; *Haddrick v. Heslop*, 12 Q. B. 267. See *Vinal v. Core*, 18 W. Va. 1.

⁵⁷ The use of "cautious" for "prudent" is error; the former may mean over-prudent or timorous. *McClafferty v. Philp*, 151 Pa. 86, 90. This refinement has not always been made. *Ross v. Langworthy*, 13 Neb. 492; *Messman v. Ihlenfeldt*, *supra*; *Munns v. Dupont*, 3 Wash. C. C. 31; *Richey v. McBean*, 17 Ill. 63; *Ash v. Marlow*, 20 Ohio 119; *Cole v. Curtis*, 16 Minn. 182; *Center v. Spring*, 2 Iowa 393; *Hess v. Webb*, 53 Ill. App. 53; *Neufeld v. Rodeminski*, 144 Ill. 83; *Treptow v. Ward*, 153 Ill. App. 422.

The use of "really cautious" was condemned in *Eggett v. Allen*, 106 Wis. 634, 637. But the use of "man of ordinary caution, prudence and good conscience" has been approved. *Clement v. Major*, 8 Colo. App. 86.

"Reasonably" may be used instead of "ordinarily." *Billingsley v. Maas*, 93 Wis. 176, 179.

and proper.⁵⁸ This definition has been applied in other cases, without reference to whether the prosecution complained of was civil or criminal.⁵⁹ It is not substantially different from that given by the supreme court of the United States: "Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."⁶⁰ As defined by Hawkins, J., reasonable and probable cause is an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be, first, an honest belief of the accuser in the guilt of the accused; second, such belief must be based on an honest conviction of the circumstances which led the accuser to that conclusion; third, such second-mentioned belief must be based upon reasonable grounds; by this is meant such ground as would lead any fairly cautious man in the defendant's situation so to believe; fourth, the circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused.⁶¹ If the prosecutor is so injured by the offense committed that he is not capable of drawing his conclusions with the same impartiality that a disinterested person would have done, the jury, in passing upon the question of probable cause, may consider that fact.⁶²

⁵⁸ *Burton v. St. Paul, etc. R. Co.*, 33 Minn. 189; *Pinson v. Campbell*, 124 Mo. App. 260.

⁵⁹ *Callahan v. Kelso*, 170 Mo. App. 338; *Kansas & T. C. Co. v. Gallo-way*, 71 Ark. 351, 100 Am. St. 79; *Lane v. Pennsylvania R. Co.*, 78 N. J. L. 672; *Van Sickle v. Brown*, 68 Mo. 635; *Sharpe v. Johnston*, 76 id. 660; *McGarry v. Missouri Pac. R. Co.*, 36 Mo. App. 340. See *Vinal v. Core*, 18 W. Va. 1, 27.

⁶⁰ *Wheeler v. Nesbitt*, 24 How. 544, 16 L. ed. 765; *Spear v. Hiles*, 67 Wis. 350; *Clement v. Major*, *Messman v. Ihlenfeldt*, *supra*; *Cook v. Proskey*, 70 C. C. A. 563, 138 Fed. 273; *Gulsby v. Louisville & N. R. Co.*, 167 Ala. 122. See *Casavan v. Sage*, 201 Mass. 547.

⁶¹ *Hicks v. Faulkner*, 8 Q. B. Div. 167, 171.

⁶² *Spear v. Hiles*, *supra*.

The meaning of the word "malice" in this form of action is not to be taken as merely a feeling of spite or hatred towards the individual who has been prosecuted, but as being that state of mind which denotes that the party was actuated by improper and indirect motives. "If a prosecution is initiated upon weak and unsubstantial ground, for purposes of annoyance or of frightening and coercing the party prosecuted into the settlement of a demand, the surrender of goods, or for the accomplishment of any other object, aside from the apparent object of the prosecution and the vindication of public justice, the party who puts the criminal law into motion under such circumstances lays himself open to the charge of being actuated by malice. Such motives are indirect and improper, and for the gratification of which the criminal law should not be made the instrument."⁶³ "Probable cause, unlike malice, is not determined by the standard of the particular defendant, but of the ordinary prudent and cautious man, exercising conscience, impartiality and reason, without prejudice, upon the particular facts."⁶⁴ And so, a mere honest belief in guilt is not enough; it

⁶³ Sloss-S. S. & I. Co. v. O'Neal, 169 Ala. 83; Fleischhauer v. Fabens, 8 Cal. App. 30; White v. International T.-B. Co., 144 Iowa 92; Jenkins v. Gilligan, 131 Iowa 176, 9 L.R.A.(N.S.) 1087; Moneyweight S. Co. v. McCormick, 109 Md. 170; Dwyer v. St. Louis T. Co., 108 Mo. App. 152; MacDonald v. Schroeder, 214 Pa. 411, 6 L.R.A.(N.S.) 701; Johns v. Marsh, 52 Md. 333; Torsch v. Dell, 88 Md. 459, 468; Ross v. Langworthy, 13 Neb. 492; Foster v. Pitts, 63 Ark. 387; Stamper v. Raymond, 38 Ore. 16, 22; Neufeld v. Rodeminski, 144 Ill. 83.

Proof that criminal process had been used as a means for the collection of a debt is not conclusive in establishing the want of probable cause and the existence of malice; at most it is *prima facie*. Wenger v. Phillips, 195 Pa. 214, 78 Am. Suth. Dam. Vol. IV.—62.

St. 810. Malice may be inferred in such a case. Ross v. Langworthy, 13 Neb. 492; Morgan v. Duffy, 94 Tenn. 686; Sebastian v. Cheney, 86 Tex. 497; Kimball v. Bates, 50 Me. 308; Paddock v. Watts, 116 Ind. 146, 9 Am. St. 832; Peterson v. Reisdorph, 49 Neb. 529. Such a use of such process is malicious prosecution. Lueck v. Heisler, 87 Wis. 644.

Substantially the same rule governs where a civil action resulting in an attachment of property is begun without cause. Harr v. Ward, 73 Ark. 437.

⁶⁴ Reynolds v. Dunlap, 73 Kan. 759; Atchison, etc. R. Co. v. Allen, 70 Kan. 743; Mundal v. Minneapolis, etc. R. Co., 92 Minn. 26; Rawson v. Leggett, 97 App. Div. (N. Y.) 416; Heyne v. Blair, 62 N. Y. 19, and cases cited.

must be founded upon reasonable grounds.⁶⁵ For though he have belief, and yet act negligently and irrationally, the prosecutor may not have probable cause. The test, then, is not exclusively limited to the actual knowledge in fact of the defendant, but may be put to any knowledge which he could or ought to have gained in the exercise of ordinary prudence and caution. And if by such exercise a proper investigation might have cleared away suspicious circumstances, and yet was omitted, here may be evidence of no probable cause.⁶⁶ Were the rule otherwise, the omission of ordinary care and prudence would equal the exercise thereof and rashness would rank with caution. And then, too, the question would not turn on the belief of the ordinarily prudent and cautious man; but on the belief of a defendant who might have been imprudent and incautious.”⁶⁷ This doctrine is inapplicable where the prosecutor has sought and obtained the advice of the proper prosecuting officer and made a full, fair and correct statement of all the facts that are known to him, or which he had reason to believe existed, without suppression, evasion or falsehood and as he believes them to be, if he has acted honestly upon the advice given.⁶⁸ The complainant is not bound to make a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the accused;⁶⁹ though he may not shut his eyes to other facts if those within his knowledge put him upon inquiry respecting them.⁷⁰ Generally only such facts as were known to the defendant when he instituted the suit are to be considered in

⁶⁵ *Farnam v. Feeley*, 56 N. Y. 451; *Fagnan v. Knox*, 66 id. 525; *MacDonald v. Schroeder*, 28 Pa. Super. Ct. 128; *Eggett v. Allen*, 119 Wis. 625.

⁶⁶ *Addison on Torts* 221; *Sweet v. Smith*, 42 App. Div. (N. Y.) 502, 509; *Farnam v. Feeley*, *supra*; *Grinnell v. Stewart*, 32 Barb. 544; 2 Greenl. on Ev. 452; *Barron v. Mason*, 31 Vt. 189; *Abrath v. Northeastern R. Co.*, 11 Q. B. Div. 440, 442, 450; *Tabert v. Cooley*, 46 Minn. 366, 13 L.R.A. 463.

⁶⁷ *Per Jenks, J.*, in *Scott v. Dennett S. C. Co.*, 51 App. Div. (N. Y.) 321.

⁶⁸ *Dunlap v. New Zealand F. & M. Ins. Co.*, 109 Cal. 365; *Johnson v. Miller*, 69 Iowa 562, 58 Am. Rep. 231; *Holliday v. Holliday*, 123 Cal. 26, 36.

⁶⁹ *Johnson v. Miller*, *supra*; *Kansas & T. C. Co. v. Galloway*, 71 Ark. 351, 100 Am. St. 79.

⁷⁰ *Dunlap v. Ins. Co.*, *supra*.

determining the question of probable cause;⁷¹ but in North Carolina the defendant may protect himself by any additional facts tending to show that the plaintiff was guilty, though he may not have known them when he began the prosecution.⁷² And in Missouri the defendant is chargeable with knowledge of all the facts which he could have learned with due diligence before the prosecution was begun.⁷³ The plaintiff who sues one who has been unsuccessful in a civil action must show very clearly and satisfactorily the existence of all the fundamental facts constituting his case.⁷⁴

Where the proceeding instituted is of a criminal character the finding of an indictment or the commitment of the accused by an examining magistrate is *prima facie* evidence of such cause,⁷⁵ but is not conclusive.⁷⁶ The waiver of a preliminary examination has the same weight as such a finding or commitment.⁷⁷ The refusal to find an indictment or to commit the accused is very persuasive evidence that probable cause did not exist,⁷⁸ but it is not sufficient to show a want of such

⁷¹ Smith v. Koziolk, 51 Pa. Super. Ct. 211; Singer Mfg. Co. v. Bryant, 105 Va. 403; Cleveland, etc. R. Co. v. Dixon, 51 Ind. App. 658; Jacobs v. Crum, 62 Tex. 401; Smith v. King, 62 Conn. 515.

⁷² Johnson v. Chambers, 10 Ired. 287, 32 N. C. 287; Thurber v. Eastern B. & L. Ass'n, 118 N. C. 129.

⁷³ Stubbs v. Mulholland, 168 Mo. 47.

⁷⁴ Ferguson v. Arnou, 142 N. Y. 580.

⁷⁵ Sharpe v. Johnston, 76 Mo. 660, 670; Louisville, etc. R. Co. v. Hendricks, 13 Ind. App. 10; Ricord v. Central Pac. R. Co., 15 Nev. 167; Ganea v. Southern Pac. R. Co., 51 Cal. 140; Wells v. Parker, 76 Ark. 41; Johnson v. Southern Pac. Co., 157 Cal. 333; Stanford v. Grocery Co., 143 N. C. 419.

⁷⁶ Bauer v. Clay, 8 Kan. 580, 585; Ross v. Hixon, 46 Kan. 550, 12 L.R.A. 760; Spalding v. Lowe, 56

Mich. 366; Darnell v. Sallee, 7 Ind. App. 581; Whaling v. Wells, 50 La. Ann. 562; Putnam v. Stalker, 50 Ore. 210. See Burt v. Smith, 181 N. Y. 1; White v. International T.-B. Co., 156 Iowa 210, 42 L.R.A. (N.S.) 346.

⁷⁷ Hess v. Oregon B. Co., 31 Ore. 503.

⁷⁸ Wells v. Parker, 76 Ark. 41; Delany v. Lindsay, 46 Pa. Super. Ct. 26; Charlton v. Markland, 36 Wash. 40; Eggett v. Allen, 119 Wis. 625; Sharpe v. Johnston, 70 Mo. 660, 670; Bostick v. Rutherford, 4 Hawks 83; Vinal v. Core, 18 W. Va. 1, 42; Brown v. Vittur, 47 La. Ann. 607; Messman v. Ihlenfeldt, 89 Wis. 585, 591; Eastman v. Monastes, 32 Ore. 291; Stamper v. Raymond, 38 Ore. 16, 34; Frost v. Holland, 75 Me. 108, 112; Secor v. Babcock, 2 Johns. 203; Straus v. Young, 36 Md. 246; Bornholdt v. Louillard, 36 La. Ann. 103;

cause.⁷⁹ The dismissal of the prosecution upon motion of the prosecuting officer, no evidence having been taken, has no bearing upon the question of probable cause.⁸⁰ The final termination of the criminal case in favor of the plaintiff in the suit for malicious prosecution is not *prima facie* evidence of malice,⁸¹ nor sufficient evidence on the issue of probable cause.⁸² When the court of first instance has jurisdiction to render final judgment in a criminal case, if the hearing is fair, without fraud, and the testimony for the prosecution is free from perjury and results in conviction, such conviction is conclusive on the question of probable cause for the prosecution, though the defendant may be acquitted on appeal.⁸³ As has been suggested, it may be shown that the conviction was obtained by fraud and perjury.⁸⁴ In Wisconsin the fraud which will deprive a judgment of the effect

Bartright v. Tammany, 158 Pa. 545, 38 Am. St. 853; Beihof v. Loef-fer, 159 Pa. 374. *Contra*, Israel v. Brooks, 23 Ill. 575; Thompson v. Beacon R. Co., 56 Conn. 493; Heldt v. Webster, 60 Tex. 207; Apgar v. Woolston, 43 N. J. L. 57.

⁷⁹ Magowan v. Rickey, 64 N. J. L. 402; Perry v. Sulier, 92 Mich. 72; St. Louis, etc. R. Co. v. Tyus, 96 Ark. 325.

⁸⁰ McIntosh v. Wales, 21 Wyo. 397; Davis v. McMillan, 142 Mich. 391, 3 L.R.A.(N.S.) 928, 113 Am. St. 585.

⁸¹ Callahan v. Kelso, 170 Mo. App. 338; Tuebbecke v. Rothschild, 152 Ill. App. 321; Catzen v. Belcher, 64 W. Va. 314, 131 Am. St. 903; Helwig v. Beckner, 149 Ind. 131, 134; Eastman v. Monastes, *supra*; Apgar v. Woolston, 43 N. J. L. 60; Purcell v. McNamara, 9 East 361; Scott v. Simpson, 1 Sandf. 601; Biting v. Ten Eyek, 82 Ind. 421, 42 Am. Rep. 505; Stone v. Crocker, 24 Pick. 81; Stewart v. Sonneborn, 98 U. S. 187, 25 L. ed. 116; Brant v. Higgins, 10 Mo. 728; Ganea v. Southern Pacific R. Co.,

51 Cal. 140; Thomas v. Muehlmann, 92 Ill. App. 571.

⁸² Sundmaker v. Gaudet, 113 La. 887.

⁸³ Blackman v. West Jersey, etc. R. Co., 126 Fed. 252; Duerr v. Kentucky & I. B. Co., 132 Ky. 228 (a plea of guilty in connection with the judgment is conclusive); Schnider v. Montross, 158 Mich. 263; Thick v. Washer, 137 Mich. 155; Smith v. Thomas, 149 N. C. 100; Lipowicz v. Jervis, 209 Pa. 315; Thomas v. Muehlmann, 92 Ill. App. 571, 575, citing, among others, these cases: Parker v. Farley, 10 Cush. 281; Griffis v. Sellars, 2 Dev. & Batt. 492, 31 Am. Dec. 422; Biting v. Ten Eyek, 82 Ind. 424, 42 Am. Rep. 505; Adams v. Bicknell, 126 Ind. 211, and cases cited; Welch v. Boston & P. R. Co., 14 R. I. 609; Boogher v. Hough, 99 Mo. 183; Olson v. Neal, 63 Iowa 216; Crescent City L. S. Co. v. Butchers' Union S.-H. Co., 120 U. S. 141, 30 L. ed. 614.

⁸⁴ Carpenter v. Sibiey, 153 Cal. 215, 15 L.R.A.(N.S.) 1143, 126 Am. St. 77.

stated must be extrinsic of the questions litigated.⁸⁵ This does not appear to be the rule in Nebraska.⁸⁶ In Minnesota such a conviction and reversal is only strong *prima facie* evidence of probable cause, which is rebuttable by any competent evidence showing the lack thereof.⁸⁷ A judgment for the defendant shows the want of probable cause in the absence of proof of circumstances indicating that the plaintiff had no reasonable belief in the validity of his cause of action.⁸⁸

The want of such cause is in some degree a negative, and the plaintiff can only be called upon to give slight evidence of it.⁸⁹ A discharge because of the lack of jurisdiction, and also, after indictment, under advice of counsel, the bill being *non prossed* for the same reason, no investigation having been made into the merits, are not facts from which either want of probable cause or malice may be inferred;⁹⁰ and so of a discharge generally.⁹¹ Efforts made by the defendant to have the proceedings against the plaintiff dismissed cannot be proven in mitigation where the latter has been arrested and imprisoned.⁹² But evidence concerning offers by the complainant, made pending the criminal proceedings, looking to the withdrawal of the charge is competent upon the question of malice, of the authority of the person making them and as part of the *res gestæ* of the criminal prosecution.⁹³

Where the action was for the abuse of legal process by making an excessive attachment, malice was properly defined as acting in bad faith, and that if the defendant, with the design to injure or oppress, by fixing an excessive *ad damnum*, went beyond what he believed to be necessary and proper to secure the payment of the judgment which he might recover, by foreclosing payment of a sum larger than would otherwise be paid,

⁸⁵ Topolewski v. Plankinton P. Co., 143 Wis. 52.

⁸⁶ Nehr v. Dobbs, 47 Neb. 863.

⁸⁷ Skeffington v. Eylward, 97 Minn. 244, 114 Am. St. 711.

⁸⁸ Connelly v. White, 122 Iowa 391.

⁸⁹ Taylor v. Williams, 2 B. & Ad. 845; Cotton v. James, 1 id. 128;

Vinal v. Core, 18 W. Va. 1, 41.

⁹⁰ McClafferty v. Philp, 151 Pa. 86; Sasse v. Rogers, 40 Ind. App. 197.

⁹¹ Davis v. McMillan, 142 Mich. 391, 113 Am. St. 585.

⁹² Owens v. Owens, 81 Md. 518.

⁹³ Scott v. Dennett S. C. Co., 51 App. Div. (N. Y.) 321.

he was not acting in good faith, and that that would warrant an inference that he was acting maliciously. The same test was applicable to the conduct of the defendant's attorney who directed the making of the excessive attachment.⁹⁴ One who sues out an attachment against the endorser of a note may show that he had previously sued out a writ against the maker which was returned *non est*.⁹⁵ Though a judgment has been rendered for an attachment defendant, it does not preclude the plaintiff therein when sued for wrongfully and vexatiously obtaining the writ from showing that the debt was due; that evidence shows probable cause and meets the issue of malice.⁹⁶ The recovery by a debtor imprisoned under an execution against his person is lessened to the extent of the amount of the judgment against him, on which the execution issued, was discharged by the defendant.⁹⁷ Any benefit derived by the plaintiff because of the application of money received from the sale of the property involved will lessen his recovery.⁹⁸ Though an action for an illegal arrest does not involve the character of the plaintiff, if he seeks to recover for shame and humiliation it may be shown in mitigation that he had been previously arrested upon charges similar to that involved in making the arrest.⁹⁹

⁹⁴ Zinn v. Rice, 161 Mass. 571.

⁹⁵ White v. Wyley, 17 Ala. 167.

⁹⁶ Marshall v. Betner, 17 Ala. 832.

⁹⁷ Baker v. Secor, 4 N. Y. Supp. 363.

Similarly a defendant in an action for a wrongful attachment of personal property may prove in mitigation the amount of the judgment obtained against plaintiff in the attachment suit, and plaintiff's damages must be lessened by the amount of such judgment. Pruitt v. English, — Tex. Civ. App. —, 173 S. W. 1172.

Where a plaintiff in an action to recover for damages caused by a wrongful attachment magnanimous-

ly pleads the fact of a judgment recovered against him in the attachment action complained of and requests that it be deducted from the damages claimed as due to the wrongful attachment, it is not to be treated as a set-off or counterclaim, but as a plea of facts entitling defendant to a credit, consequently when so treated defendant cannot rely upon it as error as being a set-off of a liquidated debt against one which is unliquidated. Brady-Neely Grocer Co. v. De Foe, — Tex. Civ. App. —, 169 S. W. 1135.

⁹⁸ Jacobs v. Robb, 10 Up. Can. Q. B. 276.

⁹⁹ Texas M. R. v. Dean, 98 Tex. 517, 70 L.R.A. 943.

§ 1240. **Same subject.** If it appears that there was probable cause that is a complete defense.¹ But if the evidence tending to show it fails in that object, to the extent that it affords ground for belief that the party prosecuted was guilty, it tends to rebut malice and may mitigate exemplary damages or those which might be awarded solely because of malice.² Facts within defendant's knowledge, facts communicated to him by others, and even rumors or reports in the neighborhood have been allowed to be proved.³ Proof that the defendant acted

In an action for both actual and punitive damages for causing the ejection of a passenger from a train, the arrest of the passenger, his fine by a justice of the peace, the complaint, warrant, and a transcript of the justice's record, are, after plaintiff has testified to the proceedings before the justice, competent to show the nature of the proceedings, who conducted them, and in mitigation of damages, as well as a matter of defense to the action. In that case plaintiff was a negro, and refused to leave the car assigned to white persons, and go into that assigned to colored persons, as required by the law of Oklahoma. *Thompkins v. Missouri, K. & T. R. Co.*, 52 L.R.A.(N.S.) 791, 128 C. C. A. 1, 211 Fed. 391.

¹ *Whipple v. Gorsuch*, 82 Ark. 252, 10 L.R.A.(N.S.) 1133; *Rulison v. Collins*, 5 Ind. Terr. 282; *Carbondale I. Co. v. Burdick*, 67 Kan. 329; *Hudson v. Truman*, 78 Neb. 840; *Railroad Co. v. Hardware Co.*, 143 N. C. 54; *Lipowicz v. Jervis*, 209 Pa. 315; *Beckham v. Collins*, 54 Tex. Civ. App. 241; *Cahoon v. Hoggan*, 31 Utah 74; *Staunton v. Goshorn*, 36 C. C. A. 75, 94 Fed. 52.

² *Bacon v. Towne*, 4 Cush. 217; *Bell v. Pearey*, 5 Ired. 83.

The question of probable cause in making an attachment is only com-

petent on the question of exemplary damages, and cannot affect the right to recover the actual damages caused by the wrongful use of the harsh remedy of attachment. *Fisher v. Scherer*, — Tex. Civ. App. —, 169 S. W. 1133. See *Tyler v. Mahoney*, 166 N. C. 509 holding that plaintiff must prove want of probable cause for a wrongful attachment in order to recover substantial damages, but that malice is only competent on the question of punitive damages, and *Shadden v. Butler*, 164 Iowa 1, holding that proof of want of probable cause and malice is essential to a recovery for damages caused by an abuse of process, and that it was error to submit the question of malice to the jury as bearing merely on exemplary damages.

³ *Penney v. Johnston*, 142 Ill. App. 634; *Hiersche v. Scott*, 1 Neb. (Unof.) 48; *Pullen v. Glidden*, 68 Me. 562; *Carl v. Ayers*, 53 N. Y. 14; *Bacon v. Towne*, *supra*; *Carpenter v. Sheldon*, 5 Sandf. 77; *Hitchcock v. North*, 5 Rob. (La.) 328, 39 Am. Dec. 540; *Lamb v. Gulland*, 44 Cal. 609; *Thomas v. Russell*, 9 Ex. 764; *Lister v. Perryman*, L. R. 5 Ex. 365; *Heyne v. Blair*, 62 N. Y. 19; *Miller v. Milligan*, 48 Barb. 30; *Foshay v. Ferguson*, 2 Denio 617; *Galloway v. Burr*, 32 Mich. 332; *Wyatt v. White*, 6 H. &

upon the advice of counsel learned in the law, or, as it is sometimes expressed, a reputable practicing attorney,⁴ who is disinterested and unbiased,⁵ given after a full and fair statement of all the known facts and those within his belief,⁶ and, in some jurisdictions, such as ordinary care and diligence would have disclosed,⁷ will generally be a full defense, especially if the advice was given by a prosecuting officer in his official capacity.⁸ This rule applies to all persons in the like circum-

N. 371; *Vinal v. Core*, 18 W. Va. 1; *Hicks v. Faulkner*, 8 Q. B. Div. 167; *Warren v. Flood*, 72 Mo. App. 199; *Staunton v. Goshorn*, *supra*; *Le Clear v. Perkins*, 103 Mich. 131, 26 L.R.A. 627; *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265.

⁴ *O'Neal v. McKinna*, 116 Ala. 606, 620; *Stubbs v. Mulholland*, 168 Mo. 47; *Johnson v. Southern Pac. Co.*, 157 Cal. 333.

⁵ *Bueki v. Atlantic L. Co.*, 57 C. A. 469, 121 Fed. 233; *Smith v. Fields*, 139 Ky. 60, 30 L.R.A.(N.S.) 870; *Adkin v. Pillen*, 136 Mich. 682; *White v. Carr*, 71 Me. 555, 36 Am. Rep. 533.

If an attorney's compensation depends upon the number of prosecutions instituted his advice is not a defense. *McGarry v. Missouri Pac. R. Co.*, 36 Mo. App. 340. Neither is it so when client and attorney are in complicity in instituting a groundless prosecution. *Watt v. Corey*, 76 Me. 87; *Hamilton v. Smith*, 39 Mich. 222.

⁶ *Black v. Buckingham*, 174 Mass. 102; *Missouri, etc. R. Co. v. Groseclose* (Tex. Civ. App.), 134 S. W. 736; *Rainey v. Kemp*, 54 Tex. Civ. App. 486.

⁷ *Gillespie v. Stafford*, 4 Neb. (Unof.) 873; *Drake v. Vickery*, 81 Kan. 519; *Smith v. Fields*, 139 Ky. 60, 30 L.R.A.(N.S.) 870.

⁸ *Duffy v. Scheerger*, 91 Neb. 511;

Abingdon Mills v. Grogan, 167 Ala. 146; *Shannon v. Simms*, 146 Ala. 673; *Kansas & T. C. Co. v. Gallo-way*, 71 Ark. 351, 100 Am. St. 79; *Van Meter v. Bass*, 40 Colo. 78, 18 L.R.A.(N.S.) 49; *Florida E. C. R. Co. v. Groves*, 55 Fla. 436; *Emory v. Eggan*, 75 Kan. 82; *Nance v. Cash*, 143 Ky. 358; *Kirk v. Wiener-L. L. Co.*, 120 La. 820; *Smith v. Tolan*, 158 Mich. 89; *Slater v. Walter*, 148 Mich. 650; *Fleckinger v. Taffee*, 149 Mich. 678; *Baldwin v. Capitol S. L. Co.*, 109 Minn. 38; *Mundal v. Minneapolis, etc. R. Co.*, 92 Minn. 26; *Pinson v. Campbell*, 124 Mo. App. 260; *Putnam v. Stalker*, 50 Ore. 210; *Roessing v. Pittsburg R. Co.*, 226 Pa. 523; *Lipowicz v. Jervis*, 209 Pa. 315; *Macdonald v. Schroeder*, 28 Pa. Super. Ct. 128; *Kranse v. Bishop*, 18 S. D. 298; *Cooper v. Flemming*, 114 Tenn. 40, 68 L.R.A. 849; *Simmons v. Gardner*, 46 Wash. 282; *Topolewski v. Plankinton P. Co.*, 143 Wis. 52; *King v. Apple River P. Co.*, 131 Wis. 575, 120 Am. St. 1063; *Brinsley v. Schulz*, 124 Wis. 426; *Longdon v. Bilsky*, 22 Ont. L. R. 4; *Ravenga v. Mackintosh*, 2 B. & C. 693; *Stanton v. Hart*, 27 Mich. 539; *Wicker v. Hotchkiss*, 62 Ill. 107, 14 Am. Rep. 75; *Laid v. Taylor*, 66 Barb. 143; *Pullen v. Glidden*, 68 Me. 566; *Paddock v. Watts*, 116 Ind. 146, 9 Am. St. 832; *Schippel v. Norton*, 38 Kan. 567; *Dunlap v. New*

stances, including lawyers who, for themselves or as agents

Zealand F. & M. Ins. Co., 109 Cal. 365; *Smith v. Austin*, 49 Mich. 286; *Yocum v. Polly*, 1 B. Mon. 358, 36 Am. Dec. 583; *Huntington v. Gault*, 81 Mich. 144; *Allen v. Codman*, 139 Mass. 136; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Bernar v. Dunlap*, 94 Pa. 329; *Cooney v. Chase*, 81 Mich. 203; *Eastman v. Keasor*, 44 N. H. 518; *Ash v. Marlow*, 20 Ohio 119; *Holliday v. Holliday*, 123 Cal. 26, 36; *Williams v. Casebeer*, 126 Cal. 77; *Whitehead v. Jessup*, 2 Colo. App. 76; *Neufeld v. Rodeminski*, 144 Ill. 83; *Parker v. Parker*, 102 Iowa 500; *Warren v. Flood*, 72 Mo. App. 199; *Peterson v. Reisdorph*, 49 Neb. 529; *Bell v. Atlantic R. Co.*, 58 N. J. L. 227; *Magowan v. Rickey*, 64 N. J. L. 402; *Staunton v. Goshorn*, 36 C. C. A. 75, 94 Fed. 52; *Sanders v. Palmer*, 5 C. C. A. 77, 55 Fed. 217; *Forbes v. Hagman*, 75 Va. 168; *Jordan v. Alabama, etc. R. Co.*, 81 Ala. 227; *Perry v. Sulier*, 92 Mich. 72; *Le Clear v. Perkins*, 103 Mich. 131, 26 L.R.A. 627; *Poupard v. Dumas*, 105 Mich. 326; *Kompass v. Light*, 122 Mich. 86; *McClafferty v. Philp*, 151 Pa. 86; *Beihofer v. Loeffert*, 159 Pa. 374; *Billingsley v. Maas*, 93 Wis. 176, 181; *Sylva v. Cockett*, 12 Hawaii 133; *Small v. McGovern*, 117 Wis. 608. See *Vinal v. Core*, 18 W. Va. 1.

Advice given upon a misrepresentation of the circumstances is not available as a defense (*Decoux v. Lieux*, 33 La. Ann. 392), or upon a partial statement of the facts known to the defendant. *Roy v. Goings*, 112 Ill. 656; *Cointement v. Cropper*, 41 La. Ann. 392; *Watt v. Corey*, 76 Me. 87; *Peterson v. Toner*, 80 Mich. 350.

Not only must all known facts

be fully disclosed, but also all such facts and information as in the exercise of reasonable care and prudence, with due regard to the rights of the party to be proceeded against, the defendant ought to have obtained. *Watt v. Corey*, 76 Me. 87; *Hyde v. Greuch*, 62 Md. 577.

The advice of counsel is more important on the question of malice than on that of probable cause, and is not conclusive as to the former. *Brewer v. Jacobs*, 22 Fed. 217.

If the jury find that the defendant acted maliciously and without probable cause the fact that he was advised to institute a suit will not exempt him from liability. *Jacobs v. Crum*, 62 Tex. 401; *Gulf, etc. R. Co. v. James*, 73 id. 12, 15 Am. St. 743; *Glasecock v. Bridges*, 15 La. Ann. 672; *Roy v. Goings*, 112 Ill. 656.

In determining the effect to be given to the advice of counsel the jury may consider whether the defendant paid for it or not. *Cooney v. Chase*, 81 Mich. 203.

If the counsel advised with was interested, his advice is not a protection. *White v. Carr*, 71 Me. 555, 36 Am. Rep. 533.

It must appear that the counsel was such as the defendant had no reason to suspect of bias or prejudice and in whose judgment he was justified in reposing confidence. *Smith v. King*, 62 Conn. 515; *Schattgen v. Holnback*, 149 Ill. 646.

A defendant cannot shelter himself by his own advice to himself, though he be a lawyer. *Epstein v. Berkowsky*, 64 Ill. App. 498.

The client must give the attorney all the facts in his possession though the attorney made an investigation himself, but without dis-

for others, are personally concerned in bringing or defending actions.⁹ The question of the good faith of counsel in giving the advice is not an element in the problem.¹⁰ In some states the advice of counsel and action thereon in good faith is provable merely to rebut malice and want of probable cause, and is not an absolute justification of the prosecution.¹¹ It may be considered in determining the absence of malice and the existence of probable cause.¹² In Texas the general rule, as stated, applies when the advice is given by the proper prosecuting officer,¹³ and so in Georgia.¹⁴ If the facts clearly make the question of probable cause one of law, advice of counsel is of no effect.¹⁵ The cases all agree that the advice which constitutes a defense must rest on an honest and full presentation to counsel of all facts within the knowledge of the prosecutor, or which he has reasonable ground for believing he is able to

covering some facts of which the client had knowledge. *Hurlbut v. Hardenbrook*, 85 Iowa 606; *Koster v. Seney*, 99 Iowa 584.

In a late Iowa case, the effect of reliance on advice of counsel seems to be limited to relieving defendant of exemplary damages. *Second Nat. Bank of New Hampton v. Lanin*, 164 Iowa 512.

⁹ *Terre Haute & I. R. Co. v. Mason*, 148 Ind. 578, 589.

¹⁰ *Shea v. Cloquet L. Co.*, 92 Minn. 348; *Sandell v. Sherman*, 107 Cal. 397; *Seabridge v. McAdam*, 119 Cal. 460. But compare *Smith v. King*, 62 Conn. 515.

¹¹ *Cook v. Proskey*, 70 C. C. A. 563, 138 Fed. 273; *Cook v. Bartlett*, 115 App. Div. (N. Y.) 829; *Railroad Co. v. Hardware Co.*, 143 N. C. 54; *Atkinson v. Van Cleave*, 25 Ind. App. 508 (citing *Lytton v. Baird*, 95 Ind. 349); *Paddock v. Watts*, 116 Ind. 146, 9 Am. St. 832; *Brown v. McBride*, 24 N. Y. Misc. 235; *Sebastian v. Cheney*, 86 Tex. 497, 501, and local cases cited; *Smith v. Eastern B. & L. Ass'n*, 116

N. C. 73; *Thurber v. Same*, 116 N. C. 75; *Hicks v. Brantley*, 102 Ga. 264, 270; *Mauldin v. Ball*, 104 Tenn. 597; *Kendrick v. Cypert*, 10 Humph. 291; *Morgan v. Duffly*, 94 Tenn. 686.

¹² *Casarella v. National G. Co.*, 151 Mich. 15; *Smith v. Glynn* (Mo. App.), 144 S. W. 149; *Abingdon Mills v. Grogan*, 175 Ala. 247; *Grimstead v. Lofgren*, 105 Minn. 286, 127 Am. St. 566, 17 L.R.A. (N.S.) 990; *Hurlbut v. Boaz*, 4 Tex. Civ. App. 371; *Scott G. Co. v. Kelly*, 14 Tex. Civ. App. 136, 141; *Bell v. Atlantic City R. Co.*, 202 Pa. 178.

¹³ *Missouri, etc. R. Co. v. Groseclose*, 50 Tex. Civ. App. 525 (but not otherwise); *Sebastian v. Cheney*, *supra*; *Lenoir v. Marlin*, 10 Tex. Civ. App. 376.

¹⁴ *Hicks v. Brantley*, *supra*.

¹⁵ *Parr v. Loder*, 97 App. Div. (N. Y.) 218; *Hazzard v. Flury*, 120 N. Y. 223. Compare *Horsley v. Style*, 9 T. L. Rep. 605.

As where there is no such offense as that the plaintiff was charged with. *Mackenzie v. Hyam*, 8 New South Wales St. Rep. 587.

prove. An incomplete and unfair statement warrants the inference that the advice was sought as a cover for the prosecution.¹⁶ The president of a corporation may exonerate himself by stating all the facts within his knowledge; but he does not exonerate the corporation by so doing if other of its officers have information they did not communicate to him.¹⁷ It is also essential that such advice be acted upon in good faith.¹⁸ Advice from persons not learned in the law will not be a defense.¹⁹ There is not entire agreement as to the effect to be given the advice of magistrates or police officers. In some states such advice may be proven to show the circumstances under which the prosecution was instituted and to mitigate damages.²⁰ But

¹⁶ *Weddington v. White*, 148 Ky. 671; *Virtue v. Creamery P. Mfg. Co.*, 123 Minn. 17, L.R.A. 1915B 1179; *Sloss-S. S. & I. Co. v. O'Neal*, 169 Ala. 83; *National S. Co. v. Mabry*, 139 Ala. 217; *Wyatt v. Burdette*, 43 Colo. 208; *Thomas v. Kerr*, 137 Ill. App. 479; *Lawrence v. Leathers*, 31 Ind. App. 414; *Dorr C. Co. v. Des Moines Nat. Bank*, 127 Iowa 153; *Smith v. Fields*, 139 Ky. 60, 30 L.R.A.(N.S.) 870; *Gatz v. Harris*, 134 Ky. 550; *King v. Erskins*, 116 La. 480; *Davis v. McMillan*, 142 Mich. 391, 3 L.R.A.(N.S.) 928, 113 Am. St. 585; *Rosenblatt v. Rosenberg*, 1 Neb.(Unof.) 656; *Gillespie v. Stafford*, 4 Neb.(Unof.) 873; *Lathrop v. Mathers*, 143 App. Div. (N. Y.) 376; *Radcliffe v. Hollyfield*, 216 Pa. 367; *Missouri, etc. R. Co. v. Groseclose*, 50 Tex. Civ. App. 525; *Evans v. Atlantic C. L. R. Co.*, 105 Va. 72; *Hippler v. Quandt*, 145 Wis. 221; *Haas v. Powers*, 130 Wis. 406; *Indianapolis T. & T. Co. v. Henby*, 178 Ind. 239; *Barhight v. Tammany*, 158 Pa. 545, 551, 38 Am. St. 853; *Serivani v. Dondero*, 128 Cal. 31; *Parker v. Parker*, 102 Iowa 500; *Torsch v. Dell*, 88 Md. 459; *Jackson v. Bell*, 5 S. D. 257, 265; *Wuest*

v. American T. Co., 10 S. D. 394; *Jones v. Morris*, 97 Va. 43; *Miles v. Walker*, 66 Neb. 728; *Jensen v. Halstead*, 61 Neb. 249; *Hess v. Oregon B. Co.*, 31 Ore. 503. See § 1239; *Repogle v. Frothingham*, 16 Pa. Super. Ct. 374.

¹⁷ *Aldrich v. Inland Empire Tel. & Tel. Co.*, 62 Wash. 173.

¹⁸ *Powell v. Woodbury*, 85 Vt. 504; *Harr v. Ward*, 73 Ark. 437; *White v. International T.-B. Co.*, 144 Iowa 92; *Moneyweight S. Co. v. McCormick*, 109 Md. 170; *Martin v. Corseadden*, 34 Mont. 308; *Williams v. Casebeer*, 126 Cal. 77; *Biddle v. Jenkins*, 61 Neb. 400; *Merchant v. Pielke*, 10 N. D. 48; *Neufeld v. Rodeminski*, 144 Ill. 83; *Connery v. Manning*, 163 Mass. 44; *O'Neal v. McKinna*, 116 Ala. 606, 621; *Wuest v. American T. Co.*, *supra*; *Jones v. Morris*, 97 Va. 43; *Kehl v. Hope O. M. & C. Co.*, 77 Miss. 762.

¹⁹ *McCaffrey v. Hill*, 3 New South Wales St. Rep. 303; *Stanton v. Hart*, 27 Mich. 539; *Burgett v. Burgett*, 43 Ind. 78; *Murphy v. Larson*, 77 Ill. 172; *Beal v. Robeson*, 8 Ired. 276.

²⁰ *Catzen v. Belcher*, 64 W. Va. 314, 131 Am. St. 903; *Hirsch v. Feeney*, 83 Ill. 550; *White v. Tucker*,

generally the advice of magistrates who are not counselors at law is not a defense.²¹ In Massachusetts and New York the advice of the magistrate who received the complaint, he being a member of the bar, is admissible upon the question of probable cause.²² In England if the magistrate is required before granting the warrant to try the question of probable cause the complainant is not liable to an action.²³ In some states the advice of a justice of the peace is a protection, regardless of his being a member of the legal profession and without reference to statutory provisions.²⁴ In Alabama the advice of a magistrate, though he be a lawyer, is not a defense.²⁵ If a "person discloses fairly and truthfully to an officer whose duty it is to detect crime, all matters within his knowledge which, as a man of ordinary intelligence, he is bound to suppose would have a material bearing upon the question of the innocence or guilt of the person suspected, and leaves it to the officer to act entirely upon his own judgment and responsibility as a public officer, as to whether or not there shall be a criminal prosecution, and does no more, he cannot be held answerable in an action for malicious prosecution, even if the officer comes to the wrong conclusion and prosecutes when he ought not to do so."²⁶ The advice of the plaintiff's family physician, put in

16 Ohio St. 468; Florence O. & R. Co. v. Huff, 14 Colo. App. 281; Wilkinson v. Arnold, 11 Ind. 45; Mauldin v. Ball, *supra*.

²¹ Cook v. Proskey, 70 C. C. A. 563, 138 Fed. 273; Stephens v. Gravitt, 136 Ky. 479; Catzen v. Belcher, 64 W. Va. 314, 131 Am. St. 903, overruling Sisk v. Hurst, 1 W. Va. 53; Olmstead v. Partridge, 16 Gray 381; Straus v. Young, 36 Md. 246; Coleman v. Henrich, 2 Mackey 189; Brobst v. Ruff, 100 Pa. 91, 45 Am. Rep. 358; Gee v. Culver, 12 Ore. 228; Cooney v. Chase, 81 Mich. 203; Gilbertson v. Fuller, 40 Minn. 413; McLeod v. McLeod, 73 Ala. 42, 46; Finn v. Frink, 84 Me. 261, 30 Am. St. 348; Lueck v. Heisler,

87 Wis. 644; Sutton v. McConnell, 46 Wis. 269; Beihofer v. Loeffert, 159 Pa. 365, 159 Pa. 374; Necker v. Bates, 118 Iowa 545.

²² Monaghan v. Cox, 155 Mass. 487, 31 Am. St. 555; Turner v. Dinnebar, 20 Hun 465.

²³ Hope v. Evered, 17 Q. B. Div. 338; Lea v. Charrington, 23 id. 45.

²⁴ Casavan v. Sage, 201 Mass. 547; Ball v. Rawles, 93 Cal. 222, 235; 27 Am. St. 174; Hahn v. Schmidt, 64 Cal. 284; Newman v. Davis, 58 Iowa 447 (it seems); Williams v. Casebeer, *supra*.

²⁵ Marks v. Hastings, 101 Ala. 165.

²⁶ Burnham v. Collateral L. Co., 179 Mass. 268.

possession of all the facts respecting his mental condition, is admissible on the issue of malice in causing an arrest on the ground of insanity.²⁷

According to the better authorities the defendant may prove the general bad reputation of the plaintiff, both to rebut the proof of want of probable cause and in mitigation of damages. The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of notoriously bad character for honesty and integrity would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation.²⁸ The character of the plaintiff is immaterial if the defendant was without knowledge of it when the proceeding against him was begun.²⁹

The fact that the plaintiff might, in the criminal proceeding against him, have shortened his imprisonment by availing

²⁷ *Griswold v. Griswold*, 143 Cal. 617.

²⁸ *Martin v. Corscadden*, 34 Mont. 308, citing the text; *Rosenkrans v. Barker*, 115 Ill. 333, 56 Am. Rep. 169, quoting the first sentence of the text; *Gregory v. Chambers*, 78 Mo. 294; *Martin v. Hardesty*, 27 Ala. 458, 62 Am. Dec. 773; *Pullen v. Glidden*, 68 Me. 563; *Barron v. Mason*, 31 Vt. 201; *Bacon v. Towne*, 4 Cush. 217, 240; *Rodriguez v. Tadmir*, 2 Esp. 721; *Fitzgibbon v. Brown*, 43 Me. 169; *Israel v. Brooks*, 23 Ill. 575; *Hlubek v. Pinske*, 84 Minn. 363; *McIntyre v. Levering*, 148 Mass. 546, 2 L.R.A. 517, 12 Am. St. 594; *Davis v. Seeley*, 91 Iowa 583, 51 Am. St. 356. See *Blizzard v. Hays*, 46 Ind. 166; *Oliver v. Pate*, 43 id. 132; *Scott v. Fletcher*, 1 Overt. 488; *Bostick v. Rutherford*, 4 Hawks. 83.

It is not competent to prove acts of the plaintiff done after his release from arrest. *Black v. Buckingham*, 174 Mass. 102.

The defendant cannot give evi-

dence of another offense unless there is some clear connection between that and the one with which the plaintiff was charged. A lapse of ten years is too remote to justify proof of another offense of the same nature. *Williams v. Casebeer*, 126 Cal. 77.

Testimony as to the bad reputation of the plaintiff in respect to the matter charged in the original proceeding is admissible if pleaded, otherwise not. *Scheer v. Keown*, 34 Wis. 349. And so as to evidence of a general rumor to the effect that the plaintiff was guilty of the offense for which he was prosecuted. *Spear v. Hiles*, 67 Wis. 350.

If the plaintiff is a minor and has been maliciously informed against for threatening a breach of the peace the general bad reputation of his mother as a peaceable and orderly person is not provable to show good faith. *Hyde v. Greuch*, 62 Md. 577.

²⁹ *Gulshy v. Louisville & N. R. Co.*, 167 Ala. 122.

himself of his right to a preliminary examination need not be considered as a ground for reducing damages unless there is affirmative proof that his motive in waiving such examination and exposing himself to continued imprisonment was to enhance damages.³⁰ Though the plaintiff claims damages only for the ignominy and disgrace of the prosecution, the defendant may show that he was not actually arrested but voluntarily surrendered himself. Less of ignominy and disgrace was incident to the prosecution in the latter case than would have attended it in the former.³¹ The fact that plaintiff, while in custody as a result of a malicious prosecution, was offered opportunity to give bail, and could readily have done so, but declined, is competent in mitigation of damages.³²

³⁰ *King v. Colvin*, 11 R. I. 582.

³¹ *Chatfield v. Bunnell*, 69 Conn. 511, 519.

³² *Sloss-Sheffield Steel & Iron Co. v. Devaney*, — Ala. —, 66 So. 523. In that case it is said that the ele-

ment of separation from plaintiff's family, and humiliation due to being in custody are attributable to plaintiff's own choice, and are not the result of the act of the defendant.

CHAPTER XXXVI.

PERSONAL INJURY.¹

- § 1241. Elements of damage; bad motive not essential.
1242. Physical and mental pain.
1243. Same subject; what mental suffering may be recovered for: aggravated wrongs.
1244. Same subject; recovery for secondary consequences.
1245. Same subject; rule where negligence only is alleged, and where wrong was wilful.
1246. Loss of time, injury to business, diminished capacity.
1247. Same subject; pleading.
1248. Same subject; evidence.
1249. Same subject; measure of recovery.
1250. Expenses for surgical and medical aid, etc.
1251. But one action maintainable; prospective damages.
1252. Husband's, wife's or parent's action; intoxicating liquors; civil damage acts.
1253. Exemplary damages.
1254. Pecuniary and other circumstances of the parties.
1255. Evidence in mitigation.
1256. Province of the jury concerning damages, and instructions thereto.
1257. False imprisonment.
1258. Same subject; exemplary damages; mitigations.

§ 1241. Elements of damage; bad motive not essential. The law aims to afford full redress for personal injuries as well as for all others. The sufferer is entitled to compensation from the person by whose fault the injury occurred for the pain resulting from the corporal hurt so long as it produces pain; for mental suffering naturally resulting from the injury or wrong, and, according to the better opinion, whether such suffering be apprehension and anxiety from the depressing effect of the wrong or induced by its alarming character; for wounded sensibility or affection, and for sense of wrong and insult by reason of the malice of the wrong-doer and the

¹ This subject received some attention under the head of Carriers of Passengers, §§ 938-953. See also

§§ 150, 151 and ch. 40, *post*, damages under Federal Employers' Liability Act.

incidents of the infliction;² for impaired health and working capacity, mutilation or (according to the preponderance of authority) disfigurement,³—the latter a consideration of

² *Singer S. M. Co. v. Phipps*, 49 Ind. App. 116; *Thomas v. Gates*, 126 Cal. 1; *Ft. Worth B. R. Co. v. Turney* (Tex. Civ. App.), 157 S. W. 274, citing the text.

"The total loss of the left hand of a boy ten years of age takes a great deal of usefulness and enjoyment out of his prospective life. The loss of earning power is by no means the extent of the injury." *Haynes v. Waterville & O. St. R.*, 101 Me. 335.

³ *St. Louis, I. M. & S. Ry. Co. v. McMichael*, 115 Ark. 101; *Burho v. Minneapolis & St. L. Co.*, 121 Minn. 326; *Dudley v. Wabash R. Co.*, 171 Mo. App. 652; *Johnson v. Pickering L. & T. Co.*, 132 La. 425; *Southwestern B. & I. Co. v. Schmidt*, 226 U. S. 162, 57 L. ed. 170; *Bump v. Delaware, etc. R. Co.*, 157 App. Div. (N. Y.) 102; *Gray v. Washington W. P. Co.*, 30 Wash. 665; *Chicago & M. E. R. Co. v. Krempel*, 103 Ill. App. 1 (later Illinois cases to the contrary are cited in § 1243); *Korzib v. Netherlands-Am. S. N. Co.*, 175 Fed. 998; *The J. G. Lindauer*, 158 Fed. 449; *St. Louis, etc. R. Co. v. Price*, 83 Ark. 437; *James v. Oakland T. Co.*, 10 Cal. App. 785; *Chicago City R. Co. v. Smith*, 226 Ill. 178; *Merchants' & M. T. Co. v. Corcoran*, 4 Ga. App. 654; *Seaboard A. L. R. v. Miller*, 5 Ga. App. 402; *O'Callaghan v. Dellwood Park Co.*, 149 Ill. App. 34; *Pittsburgh, etc. R. Co. v. Collins*, 168 Ind. 467; *Witt v. Latimer*, 139 Iowa 273 (disfigurement); *Whitehead v. Wisconsin Cent. R. Co.*, 103 Minn. 13; *Bernier v. St. Paul G. Co.*, 19 Am. Neg.

Rep. 511, 92 Minn. 214; *Phelan v. Granite B. P. Co.*, 227 Mo. 666, 137 Am. St. 582; *Shortridge v. Scarritt Est. Co.*, 145 Mo. App. 295; *Olson v. Nebraska Tel. Co.*, 87 Neb. 593; *Jones v. New York Cent., etc. R. Co.*, 99 App. Div. (N. Y.) 1; *Busch v. Robinson*, 18 Am. Neg. Rep. 614, 46 Ore. 539; *Ubeda y Salazar v. San Juan L. & T. Co.*, 4 Porto Rico Fed. 533; *Robinson v. Morris*, 30 R. I. 132; *Waters-P. O. Co. v. Snell*, 47 Tex. Civ. App. 413; *Haggard v. Seattle*, 61 Wash. 499; *Nelson v. Western S. Co.*, 61 Wash. 672; *Prior v. Eggert*, 39 Wash. 481; *Hocking v. Windsor S. Co.*, 131 Wis. 532; *Morin v. Ottawa E. R. Co.*, 18 Ont. L. R. 209 (lessened prospects of marriage); *St. Louis, etc. Co. v. Trotter*, 101 Ark. 183; *Power v. Augusta*, 191 Fed. 647; *Murray v. Chicago, etc. R. Co.*, 152 Iowa 732; *Texas T. Co. v. Hanson* (Tex. Civ. App.), 143 S. W. 214; *Newbury v. Getchel & M. L. & Mfg. Co.*, 100 Iowa 441, 457, 14 Am. Neg. Cas. 568, 62 Am. St. 582; *Rosenkranz v. Lindell R. Co.*, 108 Mo. 9, 15, 32 Am. St. 588; *Bennett v. Brooklyn Heights R. Co.*, 1 App. Div. (N. Y.) 205; *Smith v. Pittsburgh & W. R. Co.*, 90 Fed. 783; *Railway Co. v. Dobbins*, 60 Ark. 481; *St. Louis, etc. R. Co. v. Waren*, 65 Ark. 619, 627; *Rockwell v. Eldred*, 7 Pa. Super. Ct. 95; *Chicago & M. E. R. Co. v. Krempel*, 103 Ill. App. 1; *Reliance T. & D. Works v. Mitchell*, (Ky.) 24 Ky. L. Rep. 1286; *Giffen v. Lewiston*, 6 Idaho 231. See § 1243.

Contra, as to disfigurement. *Souleyret v. O'Gara C. Co.*, 161 Ill. App. 60, following *Lake St. E. R.*

especial importance in the case of young women if it is visible, —for the expenses of nursing and care, and for all other detrimental effects which naturally and proximately ensue,⁴ including, according to some courts, and for good reasons, inconvenience.⁵ The objection that that term is too vague and indefinite⁶ is not cogent. "It is to be assumed that every physical

Co. v. Gormley, 108 *id.* 59; Cullen v. Higgins, 216 Ill. 78, 19 Am. Neg. Rep. 178; Trzietatowski v. Evening American Pub. Co., 185 Ill. App. 451; Taylor v. Peoria, B. & C. Traction Co., 184 Ill. App. 188; (but compare Weinberg v. Chicago, 172 Ill. App. 77; Metropolitan West Side E. R. Co. v. Fortin, 107 Ill. App. 157); Lexington R. Co. v. Herring, 29 Ky. L. Rep. 794, 30 Ky. L. Rep. 269. See Cole v. Seattle etc. R. Co., 42 Wash. 462.

The disfigurement of the face of a young girl may not be regarded as bearing upon her prospects of marriage; it is too remote. Price v. Wright, 35 New Bruns. 26.

Regard must be had to the available means for lessening the disfigurement. Haynes v. Maine Cent. R. Co., 108 Me. 243. The age of a disfigured man may bear upon the allowance to be made on account of his disfigurement. Smith v. Day, 136 Fed. 964.

In Young v. Gravenhurst, 22 Ont. L. R. 291, the court said of the damages a young man might recover in view of the parent's purpose to educate him: He can never lead a boy's life with boys, or a youth's life with youths. He cannot join in the usual athletic sports of the average student, which he was entitled to share in. Then the necessarily somewhat solitary and non-social life the lad is doomed to lead is itself an evil, and one who shuns his species must needs pay the penalty, and no light penalty.

Suth. Dam. Vol. IV.—63.

In *The Oriflamme*, 3 Sawyer 397, 404, Deady, J., allowed \$500 as compensation for the permanent disfigurement of the female plaintiff's face.

In *Bennett v. Brooklyn Heights R. Co.*, 1 App. Div. (N. Y.) 205, a verdict for \$6,000 was sustained, the face of a girl aged eight years being permanently disfigured, her collar bone and four ribs broken and pelvis injured.

⁴ *Foley v. Everett*, 142 Ill. App. 250; *Ford v. Warner Co.*, 1 Marvel 88; *Stewart v. Philadelphia, etc. R. Co.*, 8 Houst. 450, 13 Am. Neg. Cas. 743; *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 573, 584, 37 L. ed. 284, 286, 289.

⁵ *McRae v. Metropolitan St. R. Co.*, 125 Mo. App. 562; *Costello v. St. Louis T. Co.*, 119 Mo. App. 391; *Miller v. Ocean S. Co.*, 6 N. Y. St. Rep. 664; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. 1, 2 Am. St. 639; *Scott v. Montgomery*, 95 Pa. 444; *Smith v. Mauch Chunk*, 3 Pa. Super. Ct. 495.

"Inconvenience" is entirely too latitudinous to be mentioned in an instruction as an element of damage. *Louisville & N. R. Co. v. Sights*, 121 Ky. 203.

It is not a ground of damage in addition to the injury sustained. *Jensen v. Chicago, etc. R. Co.*, 86 Wis. 589, 22 L.R.A. 680. See *Texas T. Co. v. Hanson* (Tex. Civ. App.), 124 S. W. 494.

⁶ *Root v. Des Moines City R. Co.*, 113 Iowa 675.

endowment, function and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each and all of them. And to the extent to which any function is destroyed, or its discharge rendered painful or perilous by the wrongful infliction of personal injury, is the party complaining entitled to damages. We can, in other words, conceive of no physical injury, wrongfully inflicted, whether entailing pain only, or disfigurement, or incapacity, relative or absolute, to perform any of the functions of life which may not be made the predicate for compensation in damages.”⁷ The

⁷ Alabama, etc. R. Co. v. Hill, 93 Ala. 514, 519, 9 Am. Neg. Cas. 11, 30 Am. St. 65 (per McClellan, J., in a case in which the injury to an unmarried woman rendered child-bearing perilous to life); Partridge v. Boston & M. R. Co., 107 C. C. A. 49, 184 Fed. 211 (to the same effect); Jones v. Bunker Hill & S. M. & C. Co., 124 Fed. 675 (loss of sexual power); Bonnet v. Foote, 47 Colo. 282, 28 L.R.A. (N.S.) 136; Epstein v. Pennsylvania R. Co., 143 Mo. App. 135 (impotency); Simpson v. Foundation Co., 201 N. Y. 479; Devine v. Brooklyn Heights R. Co., 131 App. Div. (N. Y.) 142; Galveston, etc. R. Co. v. Collins, 31 Tex. Civ. App. 70, 20 Am. Neg. Rep. 666 (impotency); Myhra v. Chicago, etc. R. Co., 62 Wash. 1 (loss of sexual vigor); Garthley v. Seattle E. Co., 49 Wash. 616 (same); Normile v. Wheeling T. Co., 57 W. Va. 132, 68 L.R.A. 901 (loss of child-bearing capacity); Garbaczewski v. Third Ave. R. Co., 5 App. Div. (N. Y.) 186 (impairment of vocal organs); Ferguson & Wheeler Land, Lumber & Handle Co. v. Good, 112 Ark. 260, citing the text (disfigurement, including humiliation and mental anguish); Brennan v. Streater, 168 Ill. App. 134 (inability to become a mother);

Strauss v. Atlantic C. L. R. Co., 94 S. C. 324 (loss of sexual power); National C. C. Co. v. Duvall, 150 Ky. 192 (loss of procreative power).

The loss of virility may be shown by the fact that the plaintiff had begotten a child prior to the injury, and since then had lost his sexual power. Deering v. Barzak, 227 Ill. 71; Postal Tel.-C. Co. v. Likes, 225 Ill. 249.

The plaintiff may express his opinion as to the usefulness of his sexual organs. Birmingham R., L. & P. Co. v. Rutledge, 142 Ala. 195.

It is said in Campbell v. United R. Co., 243 Mo. 141, an action by a boy of 12 years: The jury no doubt took into consideration the fact of the loss of the plaintiff's hand, not only in an industrial sense, but with respect to its inconvenience in all the other relations of his life. They not only considered his acute physical suffering, but also the mental suffering that would probably result from both the disability and deformity, interference with his education already suffered, and which he would probably continue to suffer for an indefinite time in the future, and the uncertainty as to whether or not the vitality and vigor of mind and body which had before characterized him, and must stand

damages caused by the postponement of a marriage because of personal injuries are not too indefinite and uncertain to be a ground of recovery.⁸

The right to recover for a personal injury is not affected by the motive with which the injury was inflicted; the motive is only material when punitive damages are sought.⁹ There may be a recovery of compensatory damages though the injury was inflicted in a fight mutually consented to in anger by the parties.¹⁰ If the condition of a person injured is such that a shortening of life may be apprehended this may be considered in determining the extent of the injury, the consequent disability to earn a living, and the bodily and mental suffering which will result. But damages cannot be recovered for the loss or shortening of life.¹¹ "The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the loss or shortening of his own life."¹² Under a statute providing for the survival of actions for negligent injury to the person if the person injured survives the injury an appreciable length of time, it is proper in estimating the damages to consider "the earning ability of the injured person, and the length of time he probably would have lived had he not been injured, and the loss he sustained by reason of being deprived, by such injuries, of the ability to labor and earn money during the time he probably could have lived had he not been injured."

behind all his efforts, would ever be restored. They were undoubtedly influenced more or less by the idea that the wrong-doer should not have the right to set a value on a healthy, intelligent American lad founded upon the efficiency he might probably attain with a pick and shovel. We think the jury had the right to determine this question from the standpoint we have stated.

Double compensation is not authorized by a charge permitting recovery for physical pain and mental suffering, and impairment of the nervous system and memory. North-

ern Texas T. Co. v. Yates, 39 Tex. Civ. App. 114.

⁸ Remey v. Detroit United R., 141 Mich. 116.

⁹ Kirton v. North Chicago St. R. Co., 91 Ill. App. 554.

¹⁰ Shay v. Thompson, 59 Wis. 540, 48 Am. Rep. 538; Grotton v. Glidden, 84 Me. 589, 30 Am. St. 413, and cases cited.

¹¹ Ramsdell v. Grady, 97 Me. 319.

¹² Richmond G. Co. v. Baker, 146 Ind. 600, 609, 1 Am. Neg. Rep. 25, 36 L.R.A. 683; Cleveland, etc. R. Co. v. Miller, 165 Ind. 381; Muncie P. Co. v. Hacker, 37 Ind. App. 194;

The administrator may also recover for the pain endured by the decedent intermediate his injury and death.¹³ No deduction is to be made from the estimated earnings of the decedent for the probable sum he would have expended for necessities.¹⁴

The elements of damages in cases of this nature are to be ascertained upon the principles of general jurisprudence; the federal courts will determine them for themselves regardless of the rules laid down by the courts of the state in which the right of action arose.¹⁵

§ 1242. **Physical and mental pain.** An injury to the person necessarily causes pain; it is a direct effect; and whether the pain is only momentary or continues for a long period, it is an immediate consequence. In the absence of any supervening fault of the injured party, having the effect to retard or prevent a cure, he is entitled to compensation from the person who wrongfully inflicted the injury for all the pain suffered in consequence of it from the moment of the injury to the time of its complete cure.¹⁶ Money is an inadequate recompense for pain; but as the law can afford no other redress it aids the sufferer to obtain this in such measure as a jury, dispassionately considering all the circumstances, will allow.¹⁷ Whether

Krakowski v. Aurora, etc. R. Co., 167 Ill. App. 469, citing the text.

¹³ **Kyes v. Valley Tel. Co.,** 132 Mich. 281, 13 Am. Neg. Rep. 340; **Olivier v. Houghton County St. R. Co.,** 134 Mich. 367; **Savage v. Chicago & J. R. Co.,** 142 Ill. App. 342; **Ramsdell v. Grady, supra.**

¹⁴ **Olivier v. R. Co., supra.**

¹⁵ **Power v. Augusta,** 191 Fed. 647.

¹⁶ If future suffering is reasonably certain to follow it may be recovered for though the injury is not permanent. **Haxton v. Kansas City,** 190 Mo. 53.

¹⁷ **Blakley v. Pittsburgh Rys. Co.,** 243 Pa. 250; **Denver City T. Co. v. Martin,** 44 Colo. 324; **Colorado Springs, etc. R. Co. v. Petit,** 37

Colo. 326; Horn v. Boise City C. Co., 7 Idaho 640; **Beattie v. Detroit,** 137 Mich. 319; **Mack v. Chicago, etc. R. Co.,** 123 Mo. App. 531; **Jones v. Peterson,** 44 Ore. 161; **Davis v. Holy Terror M. Co.,** 20 S. D. 399; **Barlow v. Lowder,** 35 Ark. 492; **Smith v. Bagwell,** 19 Fla. 117, 45 Am. Rep. 12; **Chicago & E. R. Co. v. Holland,** 122 Ill. 461; **Wall v. Livezey,** 6 Colo. 465, 9 Am. Neg. Cas. 124; **Winkler v. St. Louis, etc. R. Co.,** 21 Mo. App. 99; **Indiana C. Co. v. Parker,** 100 Ind. 181, 14 Am. Neg. Cas. 422; **Central P. R. Co. v. Kuhn,** 86 Ky. 578, 11 Am. Neg. Cas. 626, 9 Am. St. 309; **Phillips v. London, etc. R. Co.,** 42 L. T. Rep. 6; **Wallace v. Western North Carolina R. Co.,** 104 N. C. 442; **Houston, etc.**

the injury is the result of negligence or direct personal violence

R. Co. v. Boehm, 57 Tex. 152; Ver-
rill v. Minot, 31 Me. 299; Pennsyl-
vania R. Co. v. Allen, 53 Pa. 276;
Slater v. Sherman, 5 Bush 206;
Elliott v. Van Buren, 33 Mich. 49,
20 Am. Rep. 668; Ransom v. New
York, etc. R. Co., 15 N. Y. 415;
Chicago v. Langlass, 66 Ill. 361;
Scott v. Hamilton, 71 id. 85; Mc-
Laughlin v. Corry, 77 Pa. 109, 18
Am. Rep. 432; Lucas v. Flinn, 25
Iowa 9; Oliver v. North Pac. T. Co.,
3 Ore. 84; Telft v. Wilcox, 6 Kan.
46; Welch v. Ware, 32 Mich. 77;
Beardsley v. Swann, 4 McLean 333;
Pierce v. Millay, 44 Ill. 189; John-
son v. Wells, etc. Co., 6 Nev. 225, 3
Am. Rep. 245; Montgomery & E. R.
Co. v. Mallette, 92 Ala. 209, 217,
citing the text; Morgan v. Southern
Pac. Co., 95 Cal. 501, 2 Am. Neg.
Cas. 196, 17 L.R.A. 71; Greer v.
Louisville & N. R. Co., 94 Ky. 169,
177, 15 Am. Neg. Cas. 191, 42 Am.
St. 345; Railway Co. v. Dobbins,
60 Ark. 481; St. Louis, etc. R. Co.
v. Waren, 65 Ark. 619; Sandwich v.
Dolan, 141 Ill. 430; Central R. Co.
v. Serfass, 153 Ill. 379; Standard O.
Co. v. Tierney, 92 Ky. 367, 36 Am.
St. 595, 14 L.R.A. 677; Gerdes v.
Christopher & S. A. I. & F. Co., 124
Mo. 347; Fullerton v. Fordyce, 144
Mo. 519, 532; American W. W. Co.
v. Dougherty, 37 Neb. 373, 377, 16
Am. Neg. Cas. 550; Baker v. Irish,
172 Pa. 528; Mobile & O. R. Co. v.
George, 94 Ala. 199, 13 Am. Neg.
Cas. 29; Alabama, etc. R. Co. v.
Bailey, 112 Ala. 167, 177, 13 Am.
Neg. Cas. 69; Same v. Davis, 119
Ala. 572; Musick v. Latrobe, 184
Pa. 375, 4 Am. Neg. Rep. 269; Bam-
ford v. Pittsburg & B. T. Co., 194
Pa. 17; Washington & G. R. Co. v.
Patterson, 9 App. Cas. (D. C.) 423,
436; Alabama, etc. R. Co. v. Bur-

gess, 114 Ala. 587; West Chicago
St. R. Co. v. Foster, 175 Ill. 396;
Rodney v. St. Louis S. R. Co., 127
Mo. 676, 16 Am. Neg. Cas. 483;
Hamilton v. Great Falls St. R. Co.,
17 Mont. 334, 12 Am. Neg. Cas. 229.

The amount to be allowed for
pain and suffering cannot be meas-
ured by any known rule of law, but
it must necessarily be determined by
the good sense and conscience of the
jury as applied to the particular
facts of the case under proper in-
structions by the trial court. Ehly
v. Philadelphia & Reading R. Co.,
56 Pa. Super. Ct. 512.

It is not often that a case is
found in which the suffering of the
plaintiff constitutes the sole ground
of damage. There are a few cases
which approximate this ground. In
Merrill v. St. Louis, 12 Mo. App. 466,
the injury consisted of a sprained
ankle. A physician prescribed for
it once, and the plaintiff treated it
herself for six weeks, after which
time she was treated gratuitously at
a hospital. No expenditures were
proven. The plaintiff was confined
to her room for several weeks, and
for four months was unable to at-
tend to her boarding-house. There
was no evidence that any pecuniary
loss was sustained; "though," said
Judge Thompson, "we suppose from
all the circumstances a jury might
fairly infer that she sustained some
loss." The court looked upon an
award of \$2,000 with distrust, but
affirmed the judgment, saying: "We
have no scales with which to esti-
mate the value of this suffering, and
consequently we cannot say that the
jury, in awarding the sum named,
have awarded an excessive sum,
much less that they have acted from
passion or prejudice." See Dinmitt

the resulting pain is an element of damage to be compensated;

v. Hannibal, etc. R. Co., 40 Mo. App. 654, 9 Am. Neg. Cas. 505; Missouri, etc. R. Co. v. Collins, 106 Ark. 353.

In *Jennings v. Van Schaick*, 13 Daly 7, not very materially different from the above, a verdict for \$10,000 was set aside as excessive. See *Galveston E. Co. v. Dickey* (Tex. Civ. App.), 138 S. W. 1093.

A verdict for \$10,000 in favor of a man 76 years of age who was permanently injured and must continue to suffer great pain and be cared for during life was approved. *Keim v. Gilmore & P. R. Co.*, 23 Idaho 511.

A verdict for \$10,000 for the pain and suffering an injured person endured during the nine months intervening between injury and death was reduced to \$7,000. *Thompson v. Seattle, etc. R. Co.*, 71 Wash. 436.

Where a woman was confined to bed for three months and went down stairs but once in five months a verdict for \$7,500 was sustained. *Southern Pac. R. Co. v. Blake* (Tex. Civ. App.), 128 S. W. 668.

A young woman, assaulted by a hack driver who made efforts to violate her person, retained a verdict for \$2,000, though no serious physical injury was sustained. *Beardmore v. Barton*, 108 Minn. 28.

In *St. Louis, etc. R. Co. v. Hesterly*, 98 Ark. 240, the deceased had both legs cut off up to the knees and was without medical aid for an hour and a half; he lived five hours after the injury was inflicted. A majority of the court reduced a verdict for \$10,000 to \$5,000.

In *Harold v. New York, etc. R. Co.*, 13 Daly 378, external lacerations and internal injuries were received by a woman aged thirty-five

whose earnings were \$30 a month. She was confined to her bed several months, obliged to have medical services for months thereafter, and there was a strong probability that she would suffer permanently. On the first trial the verdict was for \$4,500; on the second, for \$8,000. This was sustained.

The injury to a married woman of forty-three was to the sciatic nerve, which produced inflammation of a uterian ligament, accompanied by obstinate constipation, nervous prostration and sexual difficulty, all resulting in suffering when she walked. A verdict for \$10,000 was reduced to \$4,000. *Lockwood v. Twenty-third St. R. Co.*, 15 Daly 374, 5 Am. Neg. Cas. 755.

A verdict for \$10,000 for a broken leg, dislocated arm, injured back and shoulder, resulting in disability to work for a year, and which caused great suffering, was sustained in favor of a woman. *Brown v. Sullivan*, 71 Tex. 470, 17 Am. Neg. Cas. 549. But a federal court in Louisiana, in determining the extent of the plaintiff's lien against the receiver of the railroad company which caused the injury, allowed only \$5,000. *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 Fed. 311.

Where a passenger's injury consisted of the fracture of the small bone of the leg at the ankle, in consequence of which he was laid up for about eight weeks, and there was no evidence that he would have future serious trouble as a consequence, a verdict of \$4,000 was held excessive under pleadings which claimed compensation only for the pain and suffering. *South Covington & C. St. R. Co. v. Ware*, 84 Ky. 267.

in other words, it is an element of compensatory damages.¹⁸

In *The William Branfoot*, 48 Fed. 914, a court of admiralty allowed \$500 to a seaman one of whose legs was amputated below the knee as a result of a fracture as compensation for his suffering.

Where a man aged sixty-two had three ribs broken, side bruised, and was for a time insensible, but had so far recovered at the time of the trial as not to be a great sufferer, though his testimony showed impairment of his appetite and general health, a verdict for \$3,750 was sustained. *Missouri Pac. R. Co. v. Aiken*, 71 Tex. 373.

Where there was a fracture of that portion of the pelvis called the crest of the *ilium*, and the plaintiff, a woman, suffered considerable pain and was confined to bed for ten months and had not fully recovered at the time of the trial, more than three years after the accident, a verdict for \$4,000 was sustained. *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401.

Where the injury resulted in the loss of three fingers of the left hand of a man employed at \$1.50 per day, and his hand did not get well until eight months thereafter, and it was necessary to probe the hand and remove bone, some of which came out at the wrist, which was stiff at the time of the trial, a verdict for \$6,000 was sustained. *Murtaugh v. New York, etc. R. Co.*, 49 Hun 456.

In *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, a verdict for \$4,000 for the pain, anguish, loss of time, etc., suffered by the plaintiff's intestate during the ten days he lived after the accident was sustained.

A judgment for \$3,500 for the pain caused by a sprained ankle was reduced to \$2,000. *Lorton v.*

Wabash R. Co., 159 Mo. App. 559.

¹⁸ *Id.*; *Richmond & D. R. Co. v. Weems*, 97 Ala. 270; *Mueller v. Kuhn*, 59 Ill. App. 353; *Georgia, etc. R. Co. v. Wright*, 130 Ga. 696; *Atlantic & B. R. Co. v. Douglas*, 119 Ga. 658; *McClain v. Lewiston Interstate F. & R. Ass'n*, 17 Idaho 63, 25 L.R.A.(N.S.) 691; *Pratt v. Davis*, 118 Ill. App. 161; *Chicago & A. R. Co., v. Tracey*, 109 id. 563; *Dorris v. Warford*, 124 Ky. 768, 9 L.R.A.(N.S.) 1090; *Leavitt v. Dow*, 105 Me. 50, 134 Am. St. 534; *Sibley v. Nason*, 196 Mass. 125, 12 L.R.A.(N.S.) 1173, 124 Am. St. 520; *Smart v. Kansas City*, 208 Mo. 162, 14 L.R.A.(N.S.) 565, 123 Am. St. 415; *Jones v. New York Cent., etc. R. Co.*, 99 App. Div. (N. Y.) 1; *Rushing v. Seaboard A. L. R. Co.*, 149 N. C. 158; *McCullough v. Illinois S. Co.*, 148 Ill. App. 566; *Igle v. People's Ry. Co.*, — Del. Super. Ct. —, 93 Atl. 666; *Reynolds v. Clark*, — Del. Super. Ct. —, 92 Atl. 873; *Smith v. Pennsylvania R. Co.*, 246 Pa. 370; *McGowan v. Wilmington & Philadelphia Traction Co.*, — Del. Super. Ct. —, 92 Atl. 1015; *Girardo v. Wilmington & Philadelphia Traction Co.*, — Del. Super. Ct. —, 90 Atl. 476; *Brown v. Mayor & Council of Wilmington*, — Del. Super. Ct. —, 90 Atl. 44; *Barnett v. Chicago City R. Co.*, 167 Ill. App. 87; *Denbeigh v. Oregon-W. R. & N. Co.*, 23 Idaho 663; *Stanley v. Taylor*, 160 Iowa 427 (pain endured because of malpractice); *Southwestern B. & I. Co. v. Schmidt*, 226 U. S. 162, 57 L. ed. 170; *Cincinnati, etc. R. Co. v. Spears*, 152 Ky. 200.

The increased pain caused by giving premature birth to a child as the result of an injury may be re-

Damages may be recovered for mental suffering as a result of an assault although there is no battery.¹⁹ Suffering resulting from the imagination of the plaintiff must be compensated for if the imagination was affected by the wrong done,²⁰ and so of pain which results from the efforts of medical men of average skill and proficiency in making tests to locate the injury and determine its extent.²¹ The right to recover for suffering is not affected by the disposition the plaintiff made of his earnings;²² nor by the fact that they were as much after as before the injury.²³

Pain is not to be regarded as an independent item of damages to be compensated by a sum of money that may be considered as a pecuniary equivalent. The word "compensation," in the phrase "compensation for pain and suffering," is

covered for. *Minot v. Doherty*, 203 Mass. 37, 133 Am. St. 281.

An admission that long and painful treatment was necessary is not ground for excluding evidence as to the details of the treatment for the purpose of showing that pain and suffering were endured. *Olwell v. Skobis*, 126 Wis. 308.

The plaintiff's physician may testify whether the injuries sustained were of such a nature as would be likely to cause pain. *Greenway v. Taylor County*, 144 Iowa 332 and cases cited.

If a serious physical injury has been sustained there need be no verbal proof of the resulting pain. *Chicago, etc. R. Co. v. Warner*, 108 Ill. 538, 14 Am. Neg. Cas. 348, 401; *Brown v. Hannibal, etc. R. Co.*, 99 Mo. 310.

Evidence that the plaintiff suffered and would always suffer great pain furnishes sufficient data for the assessment of damages. *Alabama, etc. R. Co. v. Bailey*, 112 Ala. 167, 13 Am. Neg. Cas. 69.

Damages are duplicated by a recovery for mental and physical suf-

fering and for lessened earning capacity. *Lyon v. Bedgood*, 54 Tex. Civ. App. 19.

In the case of a broken limb the fact may be shown that it was necessary, either because of the nature of the hurt or the condition of the patient, to reset it at different times, if it was proper to do so under the circumstances, and the original treatment was skilful. *Goshen v. England*, 119 Ind. 368, 5 L.R.A. 253.

¹⁹ *Western U. Tel. Co. v. Bowdoin*, — Tex. Civ. App. —, 168 S. W. 1.

²⁰ *Chicago, etc. R. Co. v. Barnes*, 50 Tex. Civ. App. 46.

²¹ *Louisville & N. R. Co. v. Lynch*, 137 Ky. 696.

Testimony as to the pain suffered while undergoing an examination by physicians pursuant to an order of court is improper. *Etzkorn v. Oelwein*, 142 Iowa 107.

²² *Louisville & N. R. Co. v. Woods*, 115 Ala. 527, 2 Am. Neg. Rep. 284.

²³ *Arnesen v. Brooklyn City R. Co.*, 9 N. Y. Misc. 270. See *Wilkins v. Detroit United R.*, 169 Mich. 437.

not to be understood as meaning price or value, but as describing an allowance looking towards recompense for, or made because of, the suffering consequent upon the injury.²⁴ Where the bill of particulars in an action by husband and wife for injury to the latter claimed only for medical attendance, medicines, supplies and nursing, there could not be a recovery for the suffering endured.²⁵ Incapacity to labor may be shown for the purpose of establishing the nature and extent of the disability of the injured person.²⁶

§ 1243. Same subject; what mental suffering may be recovered for; aggravated wrongs. The jury may consider the case with all its facts and take into account, for the purpose of awarding compensation, not only the physical pain, but also such mental suffering as they are satisfied must have been experienced by the plaintiff as the natural result of the wrong done or injury inflicted.²⁷ The sense of loss and burden, the

²⁴ *Goodhart v. Pennsylvania R. Co.*, 177 Pa. 115, 55 Am. St. 705.

²⁵ *Howells v. North American T. & T. Co.*, 24 Wash. 689.

Admiralty courts sometimes make a specific allowance for pain and suffering. (*Ramjak v. Austro-S. S. Co.*, 186 Fed. 417), and the other elements of damage. See *The Ruth*, 178 Fed. 749; *Porter v. Delaware, etc. R. Co.*, 134 Fed. 155.

²⁶ *Pomerene v. White*, 70 Neb. 171; *Bliss v. Beck*, 80 Neb. 290.

²⁷ *St. Louis, I. M. & S. Ry. Co. v. McMichael*, 115 Ark. 101, 171 S. W. 115 (on account of disfigurement); *Ryan v. Oakland G., L. & H. Co.*, 21 Cal. App. 14, quoting the text; *Vansant v. Kowalewski*, — Del. Super. Ct. —, 90 Atl. 421; *City of Key West v. Baldwin*, 69 Fla. 136; *Acton v. Smith*, 150 Ky. 703; *Shields v. Rowland*, 151 Ky. 136; *Wachs v. New York Rys. Co.*, 84 Misc. (N. Y.) 632; *Alley v. Charlotte P. & F. Co.*, 159 N. C. 327; *Turk v. Norfolk & W. Ry. Co.*, —

W. Va. —, L.R.A. 1915E 145, 84 S. E. 569; *Elwell v. Bosshard*, 151 Wis. 46; *Kansas City S. R. Co. v. Rogers*, 203 Fed. 462; *Illinois Cent. R. Co. v. Nelson*, 128 C. C. A. 525, 212 Fed. 69; *Middlesex & B. St. R. Co. v. Egan*, 131 C. C. A. 53, 214 Fed. 747, aff'g 212 Fed. 562; *Birmingham R., L. & P. Co. v. Wright*, 153 Ala. 99; *Arkansas M. R. Co. v. Robinson*, 96 Ark. 32; *Chicago, etc. R. Co. v. Swan* (Tex. Civ. App.), 130 S. W. 855; *St. Louis, etc. R. Co. v. Leamons*, 82 Ark. 504 (fear of death considered); *Melone v. Sierra R. Co.*, 151 Cal. 113; *Colorado Springs & I. R. Co. v. Allen*, 48 Colo. 4; *McConathy v. Deck*, 34 Colo. 461, 4 L.R.A.(N.S.) 358; *Western U. Tel. Co. v. Ford*, 8 Ga. App. 514; *Wrightsville & T. R. Co. v. Tompkins*, 9 Ga. App. 154; *Farr v. Oregon S. L. R. Co.*, 14 Idaho 192, 125 Am. St. 151, citing the text; *Chicago Con. T. C. v. Schritter*, 222 Ill. 364; *Garvey v. Metropolitan West*

inconvenience and embarrassment which a person naturally feels because materially crippled or disabled in body or limb,

- Side E. R. Co., 155 Ill. App. 601; Chicago v. Davis, 110 id. 427; Pittsburgh, etc. R. Co. v. Collins, 168 Ind. 467; Fleming v. Loughren, 139 Iowa 517; Missouri, etc. R. Co. v. Wade, 73 Kan. 359; Manser v. Collins, 69 Kan. 290; Big Sandy R. Co. v. Blankenship, 133 Ky. 438, 23 L.R.A.(N.S.) 345; Dorris v. Warford, 124 Ky. 768, 9 L.R.A.(N.S.) 1090; Ramsdell v. Grady, 97 Me. 319; Hollingshed v. Yazoo, etc. R. Co., 99 Miss. 464; West v. St. Louis S. R. Co., 187 Mo. 351; Panos v. American & F. Co., 147 Mo. App. 570; Kirby v. St. Louis, etc. R. Co., 146 Mo. App. 304; Batten v. St. Louis T. Co., 102 Mo. App. 285; Saunders v. Gilbert, 156 N. C. 463, 38 L.R.A.(N.S.) 404; Gagnier v. Fargo, 12 N. D. 219, 11 Am. Neg. Rep. 336; Robinson v. St. Matthews, 89 S. C. 30; Galveston, etc. R. Co. v. Averill (Tex. Civ. App.), 136 S. W. 98; Freeman v. Johnson (Tex. Civ. App.), 136 S. W. 275; Vicksburg, etc. R. Co. v. Jackson (Tex. Civ. App.), 133 S. W. 925; Chesapeake & O. R. Co. v. Hoffman, 109 Va. 44; Wolf v. Trinkle, 103 Ind. 355; Root v. Sturdivant, 70 Iowa 55; Kendall v. Albia, 73 Iowa 241; Salina v. Trosper, 27 Kan. 544, 564; Central P. R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. 309, 11 Am. Neg. Cas. 626; Sloan v. Edwards, 61 Md. 89; Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589; Winkler v. St. Louis, etc. R. Co., 21 Mo. App. 98; Randolph v. Hannibal, etc. R. Co., 18 id. 609; Wallace v. Western North Carolina R. Co., 104 N. C. 442; Scott v. Montgomery, 95 Pa. 444; Robinson v. Marino, 3 Wash. 434, 28 Am. St. 50, 1 Am. Neg. Cas. 253; Seger v. Barkhamsted, 22 Conn. 290; Masters v. Warren, 27 id. 293; Lawrence v. Housatonic R. Co., 29 id. 390; Fenelon v. Butts, 53 Wis. 344; Craker v. Chicago, etc. R. Co., 36 Wis. 657, 8 Am. Neg. Cas. 665, 17 Am. Rep. 504; Mason v. Ellsworth, 32 Me. 271; Prentiss v. Shaw, 56 id. 427, 96 Am. Dec. 425; Wadsworth v. Treat, 43 Me. 163; Goddard v. Grand Trunk R. Co., 57 id. 202; Wyman v. Leavitt, 71 id. 229; Giblin v. McIntyre, 2 Utah 384; McIntyre v. Giblin, 131 U. S. CLXXIV, Appx. and 25 L. ed. 572; Hanson v. Fowle, 1 Sawyer 539, 546; Fairchild v. California S. Co., 13 Cal. 559, 9 Am. Neg. Cas. 67; Smith v. Holecomb, 99 Mass. 552; Canning v. Williamstown, 1 Cush. 451; Wright v. Compton, 53 Ind. 337, 14 Am. Neg. Cas. 482; West v. Forrest, 22 Mo. 344; Ferguson v. Davis Co., 57 Iowa 601; Muldowney v. Illinois, etc. R. Co., 36 Iowa 462, 14 Am. Neg. Cas. 612, 618; McKinley v. Chicago, etc. R. Co., 44 Iowa 314, 24 Am. Rep. 748, 8 Am. Neg. Cas. 253; Blake v. Midland R. Co. 18 Q. B. 110; South & North Alabama R. Co. v. McLendon, 63 Ala. 266; Taber v. Hutson, 5 Ind. 322, 61 Am. Dec. 96; Nossaman v. Rickert, 18 Ind. 350; Smith v. Pittsburgh, etc. R. Co., 23 Ohio St. 10; Indianapolis, etc. R. Co. v. Stables, 62 Ill. 313; McMahon v. Northern Cent. R. Co., 39 Md. 438, 12 Am. Neg. Cas. 33; Elkhart v. Ritter, 66 Ind. 136; Indianapolis v. Gaston, 58 id. 224; Porter v. Hannibal, etc. R. Co., 71 Mo. 66, 36 Am. Rep. 454, 16 Am. Neg. Cas. 455; McMillan v. Union P. B. Works, 6 Mo. App. 434; Morris v. Chicago, etc. R. Co., 45 Iowa 29, 11 Am. Neg. Cas. 536, 537; Quigley v. Central Pac. R. Co.,

and which cannot be escaped, are to be considered.²⁸ It is not necessary that the mental suffering have its origin with the infliction of the injury if it is the direct result of it.²⁹ Such suffering is an element of damages in favor of a young child whose physical injuries were very serious and permanent,³⁰ and in favor of the family of an adult married woman who was not living with her husband, but in the family of her father, and upon whom a carnal assault was made.³¹ Where actions for

11 Nev. 350, 21 Am. Rep. 757; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 28; *Greer v. Louisville & N. R. Co.*, 94 Ky. 169, 177, 15 Am. Neg. Cas. 191, 42 Am. St. 345; *Atchison, etc. R. Co. v. Chance*, 57 Kan. 40; *Alabama, etc. R. Co. v. Davis*, 119 Ala. 572; *Southern Exp. Co. v. Platten*, 36 C. C. A. 46, 93 Fed. 936; *Goucher v. Jamieson*, 124 Mich. 21; *West Chicago St. R. Co. v. Foster*, 175 Ill. 396; *Maisenbaecker v. Society Concordia*, 71 Conn. 369, 377, 71 Am. St. 213; *Chicago City R. Co. v. Taylor*, 170 Ill. 49; *West Chicago St. R. Co. v. Lups*, 74 Ill. App. 420; *North Chicago St. R. Co. v. Lehman*, 82 id. 238; *Kellyville C. Co. v. Yelnka*, 94 id. 74; *Atchison, etc. R. Co. v. Midget*, 1 Kan. App. 138, 15 Am. Neg. Cas. 136; *Same v. Lee*, 8 Kan. App. 24, 4 Am. Neg. Rep. 633; *Fort Scott, etc. R. Co. v. Lightburn*, 9 Kan. App. 642; *Omaha St. R. Co. v. Emminger*, 57 Neb. 240; *O'Neil v. Dry Dock, etc. R. Co.*, 59 N. Y. Super. 123; *San Antonio, etc. R. Co. v. Corley*, 87 Tex. 432; *Fort Worth St. R. Co. v. Ferguson*, 9 Tex. Civ. App. 610; *Reinke v. Bentley*, 90 Wis. 457; *Atchison, etc. R. Co. v. Lamoreux*, 5 Kan. App. 813, 2 Am. Neg. Rep. 542; *Consolidated T. Co. v. Lambertson*, 60 N. J. L. 457. See *Joeh v. Dankwardt*, 85 Ill. 331; *Johnson v. Wells, etc. Co.*, 6 Nev. 225, 3 Am. Rep. 245; *McCray v. Sharpe*, 188 Ala. 375.

Where there is no claim for lost time or for medical services and the injury is not permanent, the measure of damages is a sum reasonably sufficient to compensate plaintiff for his physical and mental suffering, but if the injury is permanent a sum reasonably sufficient to compensate plaintiff for the permanent reduction of his earning power should also be allowed. *Weil v. Hagan*, 161 Ky. 292.

The sufferings caused by the injury may be described in detail. *Scharpf v. Union O. Co.*, 19 Cal. App. 100.

Injury to the feelings of others than the person injured is not an element of damage. *Pla v. San Juan L. & T. Co.*, 3 Porto Rico Fed. 216.

²⁸ *Rice v. Council Bluffs*, 124 Iowa 639. See § 1241.

The torture due to enforced idleness may be regarded. *Merchants' M. T. Co. v. Corcoran*, 4 Ga. App. 654.

²⁹ *Louisville & N. R. Co. v. Brown*, 127 Ky. 732, 13 L.R.A. (N.S.) 1135.

³⁰ *Ft. Worth, etc. R. Co. v. Wininger (Tex. Civ. App.)*, 151 S. W. 586; *Galveston, etc. R. Co. v. Clark*, 21 Tex. Civ. App. 167; *Gulf, etc. R. Co. v. Sauter*, 46 Tex. Civ. App. 309.

³¹ *Palmer v. Baum*, 123 Ill. App. 584.

personal injuries survive the mental suffering of the decedent is an element of the compensation due his heirs or representatives.³² When bodily pain is caused, mental suffering follows as a consequence, (unless the injured person was rendered insane by his injuries)³³ especially when the former is so severe as to create apprehension and anxiety,³⁴ as where one is

³² *Boeler v. Butte & L. C. D. Co.*, 41 Mont. 465; *Johnson v. Butte & S. C. Co.*, 41 Mont. 158, 4 N. C. C. A. 966; *St. Louis, etc. R. Co. v. Billingsley*, 79 Ark. 335.

³³ *Western U. Tel. Co. v. Tweed* (Tex. Civ. App.), 138 S. W. 1155.

³⁴ *St. Louis, etc. R. Co. v. Hartung*, 95 Ark. 220; *Watson v. Augusta B. Co.*, 124 Ga. 121, 1 L.R.A. (N.S.) 1178, 19 Am. Neg. Rep. 107, 110 Am. St. 157; *Nashville, etc. R. Co. v. Miller*, 120 Ga. 453, 67 L.R.A. 87; *Maguire v. St. Louis T. Co.*, 103 Mo. App. 459; *Fink v. Busch*, 83 Neb. 599; *Britt v. Carolina N. R. Co.*, 148 N. C. 37; *Cincinnati T. Co. v. McKee*, 27 Ohio C. C. 630, 6 Ohio C. C. (N.S.) 426; *Texas Tel. & T. Co. v. Thompson* (Tex. Civ. App.), 130 S. W. 705; *Houston & T. Cent. R. Co. v. Lindsey*, 51 Tex. Civ. App. 67; *Wyman v. Leavitt*, 71 Me. 229; *Webb v. Gilman*, 80 id. 177; *Brown v. Hannibal, etc. R. Co.*, 99 Mo. 310; *Brown v. Sullivan*, 71 Tex. 470, 17 Am. Neg. Cas. 549; *Kennon v. Gilmer*, 131 U. S. 22, 33 L. ed. 110; *The Lord Derby*, 17 Fed. 265; *Smith v. Pittsburgh & W. R. Co.*, 90 Fed. 783, 788; *Central R. Co. v. Serfass*, 153 Ill. 379; *American W. W. Co. v. Dougherty*, 37 Neb. 373, 377, 16 Am. Neg. Cas. 550; *Webb v. Yonkers R. Co.*, 51 App. Div. (N. Y.) 194; *Heintz v. Caldwell*, 16 Ohio C. C. 630; *International, etc. R. Co. v. Rhoades*, 21 Tex. Civ. App. 459; *Texas & P. R. Co. v. Scruggs*,

23 Tex. Civ. App. 712; *Norfolk & W. R. Co. v. Marpole*, 97 Va. 594, 600, 7 Am. Neg. Rep. 171; *Southern Bell Tel. & T. Co. v. Clements*, 98 Va. 1, 6; *Antonio v. Kreusel*, 17 Tex. Civ. App. 594. See *North Chicago St. R. Co. v. Lehman*, 82 Ill. App. 238.

So fixed is the union of mental suffering and physical pain "in the mind that an instruction which should direct a jury in estimating the damages to disassociate mental from physical pain and agony would be the very acme of carrying the most abstruse metaphysics of the school-man into the practical deliberations of the jury room." *Fell v. Rich Hill C. M. Co.*, 23 Mo. App. 216.

It has been said that if no claim is made for mental suffering it will be better for the court not to instruct upon it; but if it is alleged that the injury deformed the plaintiff such suffering necessarily results. *Central R. & B. Co. v. Lannier*, 83 Ga. 587. But the general rule is that damages for mental anguish need not be specially claimed where there is a physical injury. *Gronan v. Kukkuak*, 59 Iowa 18; *Morgan v. Kendall*, 124 Ind. 454, 9 L.R.A. 445; *Brown v. Sullivan*, 71 Tex. 470, 17 Am. Neg. Cas. 549. See § 1244.

A claim for damages for mental suffering need not necessarily be supported by direct evidence thereof, but such suffering may be in-

conscious of the impairment of his earning capacity;³⁵ or has been bitten by a dog and apprehends that hydrophobia may follow,³⁶ though as to the last there is not accord.³⁷ If, as the result of mental disability induced by the defendant's fault, the plaintiff suffered from apprehension of insanity, such suffering is an element of damages,³⁸ as is the apprehension of death from such a cause.³⁹ The peril attending the performance of

ferred as a result of physical pain. *Baisdrenglien v. Missouri, K. & T. R. Co.*, 91 Kan. 730.

In North Carolina proof of mental suffering must be made. *Smith v. Railroad*, 126 N. C. 712; *Wilkie v. Railroad*, 128 N. C. 113.

³⁵ *Ryan v. Oakland G., L. & H. Co.*, 21 Cal. App. 14, quoting the text; *Brush E. L. & P. Co. v. Simonsohn*, 107 Ga. 70; *Funck v. Metropolitan St. R. Co.*, 133 Mo. App. 419; *Galveston, etc. R. Co. v. Parish*, 45 Tex. Civ. App. 493, 3 Am. Neg. Rep. 106; *Same v. Garcia*, 45 Tex. Civ. App. 229. See § 1249.

"It seems to us that the physical pain resulting from the injury, which is clearly an element of damage, was not more natural than the distress and anxiety of mind occasioned by the consciousness that the injury received was such as to wholly incapacitate the head of the family from pursuing his usual occupation, thus to provide for those dependent upon him." *Ft. Worth B. R. Co. v. Turney* (Tex. Civ. App.), 157 S. W. 274.

³⁶ *Warner v. Chamberlain*, 7 Houst. 18; *Ayers v. Macoughtry*, 29 Okla. 339, 5 N. C. C. A. 729; *Go-deau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751; *Buck v. Brady*, 110 Md. 568, 132 Am. St. 459.

The probable consequences of the injury may be shown as bearing upon the degree of mental suffering which necessarily follows that

probability. *Alley v. Charlotte P. & F. Co.*, 159 N. C. 327.

Though there can be no recovery for the shortening of the plaintiff's life, yet, if that is a result of the injury it may be considered in connection with the illness and suffering which ordinarily attend an injury of so grave a nature. *Cleveland, etc. R. Co. v. Miller*, 165 Ind. 381.

³⁷ Where the plaintiff was bitten by a dog it was held error to permit testimony to the effect that when she was first examined by a physician he stated to her she was in danger of hydrophobia, lockjaw and blood poisoning, as tending to show the state of her mind. *Trinity & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690; *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56.

³⁸ *Krakowski v. Aurora, etc. R. Co.*, 167 Ill. App. 469; *Flynn v. Chicago City R. Co.*, 158 Ill. App. 405; *Louisville & N. R. Co. v. Brown*, 127 Ky. 732, 13 L.R.A. (N.S.) 1135; *Cincinnati T. Co. v. McKee*, 27 Ohio C. C. 630, 6 Ohio C. C. (N.S.) 426; *Walker v. Boston & M. R.*, 71 N. H. 271; *Butts v. National Exch. Bank*, 99 Mo. App. 168.

³⁹ *American T.-P. Co. v. Williams*, 30 Ind. App. 46, 13 Am. Neg. Rep. 147; *Cincinnati, etc. R. Co. v. Leonard*, 35 Ind. App. 268.

Though the inability to bear children may not be shown as a

any natural function and the mental suffering growing out of it

basis for damages, the existence of the capacity to conceive and that the plaintiff would continually suffer the pain and discomfort of miscarriages is relevant on the issue of pain. She was entitled to recover for the loss of her natural powers. *Devine v. Brooklyn Heights R. Co.*, 131 App. Div. (N. Y.) 142.

In *Bovee v. Danville*, 53 Vt. 190, the question was whether, among other damages for a personal injury, the plaintiff, a mother, was entitled to recover for injury to her feelings occasioned by the loss of a child by miscarriage. *Ross, J.*, said: "Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachel, she wept for her children and would not be comforted, a question of continuing damage is presented too delicate to be weighed by any scales which the law has yet invented." Is this sense of loss more delicate than that of injury by disfigurement or maiming? To the same effect: *McGee v. Vanoven*, 148 Ky. 737 (claimed as damages for a slight assault).

In *Smith v. Overby*, 30 Ga. 241, action was brought against a physician for want of skill and care in a parturition case by which injury was inflicted on the mother and the life of the child unnecessarily destroyed. A new trial was granted because the jury were deemed to have been misled by the charge so as to overlook this latter element of the injury. Compare *Augusta &*

S. R. Co. v. Randall, 85 Ga. 297, 332.

Bovee v. Danville, *supra*, is cited in *Chicago, etc. R. Co. v. Caulfield*, 11 C. C. A. 552, 63 Fed. 396, to sustain the proposition, which the court seems to have approved, that there cannot be a recovery for mental suffering induced by a crippled condition, such as feelings of mortification. See § 1241 and cases cited. The same conclusion was reached in *Linn v. Duquesne*, 204 Pa. 551, and in *Chicago, etc. R. Co. v. Hines*, 45 Ill. App. 299.

In *Terre Haute & I. R. Co. v. Brunner*, 128 Ind. 542, 552, 11 Am. Neg. Cas. 508, exception was taken to an instruction that the jury should take into account the peril of the plaintiff's life. The answer was: It was clearly proper to consider the hazard and jeopardy in which he was placed, in other words, the peril to his life, and allow such damages as resulted therefrom in determining the damages which he sustained, and the suffering of both body and mind which he sustained by reason of the injury. It certainly seems to us that it cannot be contended with much force that when, under such circumstances, one's life is jeopardized by the negligent acts of another and injuries follow as in this case, the defendant is not liable for the damages sustained by the plaintiff by reason of being put in such a perilous position. *Louisville & N. R. Co. v. Williams*, 20 Ind. App. 576, 588.

It is error to allow damages for mental suffering and also for peril as a distinct element: the former includes the latter. *San Antonio, etc. R. Co. v. Corley*, 87 Tex. 432.

are to be considered.⁴⁰ There may be a recovery for the apprehension by a woman that a fœtus, constituting a part of her person, might become a deformed child and for her disappointment at the birth of such a child. "Her ability to be delivered of a normal and healthy child was jeopardized and her grief and apprehension before the birth on account of what the probable or not unreasonable effect would be upon the child is not a remote consequence of the alleged negligence of the defendant."⁴¹ In case of fright or shock resulting from bodily injury and the circumstances connected therewith or attending the same, as a collision of trains, the accompanying explosion, fire and wreckage of the cars, there may be a recovery therefor. The fright or shock is directly attributable to the collision and injury.⁴² Though the sole physical injury sustained arose from an attempt to escape from actual danger, damages may be recovered for the impairment of health occasioned by the consequent fright.⁴³ In some jurisdictions which do not allow recovery for mere fright there may be a recovery for physical injuries sustained as a result of the fright.⁴⁴ The fright or mental suffering

Peril in which the plaintiff was prior to the injury and of which he knew nothing is not an element of damage. *Id.*; *Hall v. Manson*, 90 Iowa 585, 34 L.R.A. 207.

⁴⁰ *Partridge v. Boston & M. R. Co.*, 107 C. C. A. 49, 184 Fed. 211.

⁴¹ *Prescott v. Robinson*, 74 N. H. 460, 17 L.R.A.(N.S.) 594, 124 Am. St. 987.

⁴² *Kennell v. Gershonovitz*, 84 N. J. L. 577; *Samarra v. Allegheny Valley St. R. Co.*, 238 Pa. 469; *Howe v. Chicago, etc. R. Co.*, 139 Mich. 638, 18 Am. Neg. Rep. 145; *Heiberger v. Missouri & K. Tel. Co.*, 133 Mo. App. 452; *Porter v. Delaware, etc. R. Co.*, 73 N. J. L. 405; *Lofink v. Interborough R. T. Co.*, 102 App. Div. (N. Y.) 275; *Fernandez v. Valdes*, 4 Porto Rico Fed. 48; *Denver, etc. R. Co. v. Roller*, 41 C. C. A. 22, 33, 100 Fed. 738, 49 L.R.A. 77; *Bell v. Great Northern*

R. Co., L. R. 26 Ir. 428; *Consolidated T. Co. v. Lambertson*, 59 N. J. L. 297; *Warren v. Boston & M. R. Co.*, 163 Mass. 484; *Sloane v. Southern California R. Co.*, 111 Cal. 668, 32 L.R.A. 193; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 16 L.R.A. 203; *Lehigh, etc. R. Co. v. Marchant*, 28 C. C. A. 544, 84 Fed. 870; *Maek v. South Bound R. Co.*, 52 S. C. 323, 334, 40 L.R.A. 679, 68 Am. St. 913; *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334. See *Southern Ry. in Kentucky v. Owen*, 156 Ky. 827.

⁴³ *Buchanan v. West Jersey R. Co.*, 52 N. J. L. 265, 9 Am. Neg. Cas. 574.

⁴⁴ *Cohn v. Ansonia Realty Co.*, 162 App. Div. (N. Y.) 791; *Conley v. United Drug Co.*, 218 Mass. 238 (injuries sustained by a fall as a result of fright caused by an explosion).

which preceded the physical injury to a deceased person is an element of damage.⁴⁵

The manner of committing the injury or its very nature may be such that compensation should be given largely, and perhaps principally, for injury to the feelings. This is the case where the personal wrong is a shock to the moral sensibilities, or tends to vex, disgrace or humiliate the injured party.⁴⁶

Where an unusual jar of a train causes a strain of the internal organs of a pregnant woman, and coupled with the nervous shock, produces a miscarriage, there may be a recovery for the miscarriage although there could be no recovery for fright alone. *Bell v. New York, N. H. & H. R. Co.*, 217 Mass. 408.

⁴⁵ *Yeaton v. Boston & M. R.*, 73 N. H. 285, 18 Am. Neg. Rep. 335.

⁴⁶ *Axman v. Washington G. Co.*, 38 App. Cas. (D. C.) 150; *Fanning v. Brandl*, 178 Ill. App. 224; *Johnson v. Lamm*, 156 Ill. App. 287; *Coal Belt E. R. Co. v. Young*, 126 id. 651; *Chicago & A. R. Co. v. Tracey*, 109 id. 563; *Doerhoefer v. Shewmaker*, 123 Ky. 646; *Bonneval v. American C. Co.*, 127 La. 57; *Warner v. Talbot*, 112 La. 817, 104 Am. St. 460, 66 L.R.A. 336; *Beardmore v. Barton*, 108 Minn. 28; *Happy v. Prichard*, 111 Mo. App. 6; *O'Donnell v. St. Louis T. Co.*, 107 Mo. App. 34; *Helland v. Bridenstine*, 55 Wash. 470 (infection with loathsome disease by use of unsterilized instruments); *Lowe v. Ring*, 123 Wis. 107; *Wolf v. Trinkle*, 103 Ind. 355; *Morgan v. Curley*, 142 Mass. 107; *Smith v. Holcomb*, 99 Mass. 552; *Craker v. Chicago, etc. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Fay v. Swan*, 44 Mich. 544; *Ford v. Jones*, 62 Barb. 484; *Wadsworth v. Treat*, 43 Me. 163; *Welch v. Ware*, 32 Mich. 84; *Elliott v. Van Buren*, 33 id. 49, 20 Am. Rep.

668; *Kepler v. Hyer*, 48 Ind. 499; *Von Reeden v. Evans*, 52 Ill. App. 209; *Nipp v. Wiseheart*, 7 Ind. App. 642; *Kelley v. Kelley*, 8 Ind. App. 606, 614; *Crosby v. Beadley*, 11 Ky. L. Rep. 954 (Ky. Super. Ct.); *Sechrist v. Jahn*, 11 Pa. Super. Ct. 59; *Bruske v. Neugent*, 116 Wis. 488; *Knoche v. Knoche*, 160 Mo. App. 257; *Burns v. Jones*, 211 Mass. 475; *Moore v. Fisher*, 117 Minn. 339.

In *Ryerson v. Phelps*, 163 Mich. 237, "mental anguish, shame or mortification growing out of the assault and battery, with its attendant injuries to, and disfigurement of plaintiff's person, causing remarks by strangers in street cars and other public places and wide notoriety through publication in the public press" was recognized as cause for compensation.

It is not proper in an action for assault and battery to increase the damages because offensive questions were put by counsel after consultation with his client. *Driscoll v. Collins*, 31 N. B. 604. But the conduct of counsel on the trial has been considered on the question of the client's malice in other cases. See § 1216, note.

In *Ragsdale v. Ezell*, 20 Ky. L. Rep. 1567, a verdict for \$700 was sustained for hugging and kissing a woman against her will. See *Bruske v. Neugent*, *supra*.

The injury may be greatly enhanced by the motive of the wrong-doer; and the sense of justice of jurors will always incline them to fix a higher rate of compensation whenever the wrong was wantonly or maliciously committed. Damages for pain, not being measurable by a money standard, are in some degree retributive; every circumstance which increases the turpitude of the wrong-doer's conduct adds to the injury and correspondingly to the injured party's right to compensation.⁴⁷ If actionable negligence is admitted and there cannot be a recovery of punitive damages, in the absence of mental suffering, it is not proper to receive evidence showing that the negligence was gross.⁴⁸ Personal injury may cause disfigurement,⁴⁹ mutilation or permanently impaired health. When it does there is an element of mental pain for which there is no cure. When a healthy person is thus made permanently an invalid; deprived largely of his capacity to enjoy life; suddenly transformed from a mental state of cheerfulness and hope to another of melancholy by day and unrest and bad dreams by night, is he not entitled to some compensation for this physical and psychical alteration in himself.⁵⁰

Courts of admiralty do not award liberal damages for injuries inflicted upon seamen by the officers of vessels; compensation for the physical injury is the limit; the personal indignity is not important. *The General Rucker*, 35 Fed. 152.

⁴⁷ Cases cited in first paragraph of preceding note; *Root v. Sturdivant*, 70 Iowa 55; *Armstrong v. Jackson*, 37 La. Ann. 219; *Webb v. Gilman*, 80 Me. 177; *Sloan v. Edwards*, 61 Md. 89; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Sampson v. Henry*, 11 Pick. 379; *Ransom v. New York, etc. R. Co.*, 15 N. Y. 415; *Stuppy v. Hof*, 82 Mo. App. 272; *Delmage v. Crow*, 22 N. Y. Misc. 511; *Redd v. Missouri Pac. R. Co.*, 161 Mo. App. 522.

⁴⁸ *Rueping v. Chicago, etc. R. Co.*, 116 Wis. 625.

Suth. Dam. Vol. IV.—64.

⁴⁹ See § 1241.

⁵⁰ *Walker v. Erie R. Co.*, 63 Barb. 260, 9 Am. Neg. Cas. 666; *The Ori-flamme*, 3 Sawyer 397, 404; *Stewart v. Ripon*, 38 Wis. 584; *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. 320, 11 Am. Neg. Cas. 350; *Scott v. Montgomery*, 95 Pa. 444; *Powell v. Augusta & S. R. Co.*, 77 Ga. 200; *Augusta v. Owens*, 111 Ga. 464, 479; *Power v. Augusta*, 191 Fed. 647, quoting the text; *Texas T. Co. v. Hanson* (Tex. Civ. App.), 143 S. W. 214; *Burho v. Minneapolis, etc. R. Co.*, 121 Minn. 326.

It is said in *Shortridge v. Scarritt Est. Co.*, 145 Mo. App. 295, that the distinction between mental pain caused by physical pain and mental pain produced by the bitter knowledge that the victim will be maimed or disfigured for life is

There is not entire agreement as to the right to recover for some phases of mental suffering which are clearly attributable to the physical injury. There cannot be a recovery for that

more refined and subtle than it is practical or humane. How can it be said that one is more remote or intangible than the other? Both are real, substantial, natural causes of the injury that caused the disfigurement. It is just as certain that the injured person will be oppressed by a sense of humiliation and mortification over the despoiling of his body as it is that he will suffer mental anguish as a result of his physical pain. The jury can understand the nature and extent of the one as well as of the other and estimate the compensation of each with equal exactness. To deprive plaintiff of this element of his damages would be violative of the fundamental rule that gives to the plaintiff, injured by the negligence of the defendant, full and fair compensation for the actual damages suffered. *Gibbs v. Poplar Bluff L. & P. Co.*, 142 Mo. App. 19.

In a recent case the jury was instructed to give adequate compensation for all of the physical and mental pain and suffering which the plaintiff endured at the time of the accident, and which he is reasonably certain to suffer in the future by reason of his injuries; "also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his fellows." In considering an exception to the quoted words the reviewing court said: "It is urged that these words convey to the jury an idea different from that conveyed by the

words 'mental pain and suffering' which resulted from the injury. We think the learned judge only used the expressions excepted to as indicative of the causes from which the mental pain and suffering would be likely to arise from the injury received. There can be no doubt that the loss of the plaintiff's limbs would naturally cause mortification and anguish on the part of the plaintiff, and it is also quite certain that he would be to a considerable extent an object of curiosity, and to the thoughtless and unfeeling an object of ridicule. We think there was no error in the instructions excepted to." *Heddles v. Chicago & N. R. Co.*, 77 Wis. 228, referring to *Wilson v. Young*, 31 Wis. 574; *Craker v. Chicago, etc. R. Co.*, 36 id. 657, 677, 17 Am. Rep. 504; *Power v. Harlow*, 57 Mich. 107; *The Orislamme*, 3 Sawy. 397; *Atlantic, etc. R. Co. v. Wood*, 48 Ga. 565; *Toledo, etc. R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Ballou v. Farnum*, 11 Allen 73; *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. 320; *McMahon v. North Cent. R. Co.*, 39 Md. 438. To the same effect is *St Louis S. R. Co. v. Cleland*, 50 Tex. Civ. App. 499.

"We do not mean to say that, tried by an absolute standard, there is any such thing as compensation in money for the loss of an arm, or for the pain and suffering occasioned by being dismembered under the crushing wheel of a car. Only a qualified or relative compensation is possible, and the law, which is always practical, never visionary, contemplates the latter, not the for-

which will not probably be endured, as for that which might be undergone from the contemplation of what might be the result of the physical injury sustained; ⁵¹ nor for that which the plaintiff undergoes on account of the presence, circumstances or condition of others; ⁵² (as by a mother who has given birth to a child deformed in consequence of the defendant's negligence; if there is a right of action in such case it is in the child; if the injury is *damnum absque injuria* the rights of the mother are not enlarged); ⁵³ nor, in some courts, for the injured feelings which may arise in the mind as the result of the injury done, not being a part of the pain naturally attending the injury. ⁵⁴

mer. It recognizes the restrictions imposed by many considerations, such as the limited wealth of the country, and the necessity of sparing the existence of industrial contrivances and agencies for carrying on great departments of business." Bleckley, C. J., in *Western & A. R. Co. v. Young*, 83 Ga. 512.

"There must be more or less of permanent annoyance from the mutilation of a limb, irrespective of the diminished usefulness, and the jury had a right to take this into account." *Power v. Harlow*, *supra*.

Where a man of twenty-eight years lost his left arm and was made deaf in one ear, and it appeared that his earning power was decreased \$300 per year, a verdict for \$8,000 was sustained. "If," said the court, "pecuniary loss were the measure of damages, they are excessive; but how can the compensation for pain and for the inconvenience and mortification of going maimed through life be measured? In truth, money is no equivalent for such injuries, but it is the only reparation the law can give, and the amount must be left to the jury to fix, subject to correction in case of abuse." *Anglo-Am. P. & P. Co. v. Baier*, 31 Ill. App. 653.

A verdict for \$15,000 was sustained where a child of six years lost a leg and sustained other injuries. Admitting that the damages were large, the court observed: "Are they more than compensation? If the appellee is entitled to anything he is entitled to full compensation. Is that limited to making good the probable pecuniary loss to him from having but one leg to go upon, * * * or shall other deprivations which cannot be recited without the use of language which excludes arithmetic be taken into account? His life is wrecked, whether for business or pleasure. Hope is denied him." *Chicago City R. Co. v. Wilcox*, 33 Ill. App. 450.

⁵¹ *Illinois Cent. R. Co. v. Cole*, 165 Ill. 334.

⁵² *Atchison, etc. R. Co. v. Chance*, 57 Kan. 40; *Sullivan v. Old Colony St. R. Co.*, 197 Mass. 512, 125 Am. St. 378; *Manzer v. Phillips*, 139 Mich. 61; *Bahr v. Northern Pac. R. Co.*, 101 Minn. 314; *Maynard v. Oregon R. Co.*, 46 Ore. 15, 68 L.R.A. 477; *McGee v. Vanover*, 148 Ky. 737.

⁵³ *Prescott v. Robinson*, 74 N. H. 460, 17 L.R.A.(N.S.) 594, 124 Am. St. 987.

⁵⁴ *Chicago City R. Co. v. Taylor*,

In some courts "the mental pain that comes from the contemplation of a maimed body and the humiliation of going through life in a crippled condition, is too remote to be considered an element of damage. The mental pain that may be considered and allowed for is such as is the direct result or concomitant of the physical pain suffered."⁵⁵ It has been ruled that mental pain endured after physical suffering has ceased cannot be recovered for.⁵⁶ In Texas loss of capacity for the enjoyment of the pleasures of life is too vague a ground upon which to recover.⁵⁷ But in Indiana the appellate court approved an

170 Ill. 49; *Hosty v. Moulton W. Co.*, 39 Mont. 310; *Gulf, etc. R. Co. v. Dickens*, 54 Tex. Civ. App. 637. See quotation from *Ft. Worth B. R. Co. v. Turney*, (Tex. Civ. App.), 157 S. W. 274.

The mortification over the deformity is to be weighed. *Southern Bell Tel. & T. Co. v. Davis*, 12 Ga. App. 463. The situation of young children at a time when their mother was shocked by a tortious act is relevant to show the effect of it upon her, a shock or fright being the resulting injury. *Spearman v. McCrary*, 4 Ala. App. 473. The extent of the mental sufferings of a mother physically injured by an unanticipated event may be affected by the presence and exposure to danger of her children and another child committed to her care. *Spears v. Atlantic C. L. R. Co.*, 92 S. C. 297.

⁵⁵ *Batterson v. Chicago, etc. R. Co.*, 49 Mich. 184; *Chicago City R. Co. v. Anderson*, 182 Ill. 298, 80 Ill. App. 71; *Decatur v. Hamilton*, 89 id. 561; *Giffen v. Lewiston*, 6 Idaho 231; *Chicago City R. Co. v. Mauger*, 105 Ill. App. 579; *Latchtimaker v. Jacksonville T. & W. Co.*, 181 Fed. 276; *Southern Pac. Co. v. Hetzer*, 68 C. C. A. 26, 135 Fed. 272; *Chicago, etc. R. Co. v. Caul-*

field, 11 C. C. A. 552, 63 Fed. 396; *Salina v. Trosper*, 27 Kan. 544 (it seems); *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 15 L.R.A. (N.S.) 775 (in the absence of malice on defendant's part if the disfigurement does not render plaintiff objectionable nor cause him to be an object of pity or ridicule); *Chicago City R. Co. v. Schaefer*, 121 Ill. App. 334; *Same v. Mauger*, 105 id. 579; *Lake St. E. R. Co. v. Gormley*, 108 id. 59; *Indianapolis St. R. Co. v. Ray*, 167 Ind. 236; *Maynard v. Oregon R. Co.*, 46 Ore. 15, 68 L.R.A. 477; *Linn v. Duquesne*, 204 Pa. 551, 93 Am. St. 800. See *Nelson v. Western S. Co.*, 61 Wash. 672. The leading case holding as stated is *Southern Pac. Co. v. Helzer*, 68 C. C. A. 26, 135 Fed. 272, 1 L.R.A. (N.S.) 288, the opinion being by Judge Sanborn, following *Chicago, etc. R. Co. v. Caulfield*, 11 C. C. A. 552, 63 Fed. 396. *Contra*, *Gray v. Washington W. P. Co.*, 30 Wash. 665. See cases cited in note 2, § 1241.

⁵⁶ *Knickerbocker I. Co. v. Leyda*, 128 Ill. App. 66; *North Chicago St. R. Co. v. Duebner*, 85 Ill. App. 602.

⁵⁷ *Locke v. International, etc. R. Co.*, 25 Tex. Civ. App. 145.

instruction to the effect that the jury might consider the fact that the plaintiff was deprived of the pleasure and satisfaction in life that only those can enjoy who are possessed of a sound body and the free use of all its members.⁵⁸ This is in accord with the view held in Michigan, Washington and Missouri, California, Wisconsin, Maine, the Supreme Court of the United States and some others. In Michigan an instruction to the effect that the jury might consider the shame and mortification which the plaintiff suffered by being obliged to use crutches was approved.⁵⁹ This view is inconsistent with that expressed

⁵⁸ *American S. Co. v. Foust*, 12 Ind. App. 421, 431, 14 Am. Neg. Cas. 447; *Pittsburgh, etc. R. Co. v. Cozatt*, 39 Ind. App. 682.

⁵⁹ *Beath v. Rapid R. Co.*, 119 Mich. 512, *St. Louis S. R. Co. v. Leflar*, 104 Ark. 528; *Ryan v. Oakland G., L. & H. Co.*, 21 Cal. App. 14; *Barnett v. Chicago City R. Co.*, 167 Ill. App. 87; *Schmitz v. St. Louis, etc. R. Co.*, 119 Mo. 256, 12 Am. Neg. Cas. 226, 23 L.R.A. 250; *Gray v. Washington W. P. Co.*, 30 Wash. 665; *Merrill v. Los Angeles G. & E. Co.*, 158 Cal. 499, 139 Am. St. 134, 31 L.R.A.(N.S.) 559; *Abbott v. Detroit*, 150 Mich. 245 (discomfort, chagrin and mortification felt by reason of the injury); *Benson v. Superior Mfg. Co.*, 147 Wis. 20 ("diminished capacity for enjoying life" is preferable to "deprivation of the pleasures of life"); *Heddles v. Chicago, etc. R. Co.*, 77 Wis. 228; *McDermott v. Severe*, 202 U. S. 600, 50 L. ed. 1162; *United States Exp. Co. v. Wahl*, 94 C. C. A. 260, 168 Fed. 848.

It is said in *Coombs v. King*, 107 Me. 376: There is good reason for the rule. The disfigurement is a physical injury. It is a continuing injury. The mental suffering may continue with it. The mental suffering is a real injury. It proceeds

necessarily and inevitably from the physical injury. It is a natural consequence of the injury. Compensation, omitting this element, is not full compensation. One might be made repulsive to the sight for life with comparatively little physical injury, and yet, according to the rule contended for, be entitled to but little compensation. The reason given in some cases that the amount of mental pain caused by disfigurement necessarily varies so much with the character, temperament and circumstances of the injured person that no just measure of damages from it can be found applies equally well to physical pain though perhaps in a less degree. * * * There is good authority for the rule. In *McDermott v. Severe*, *supra*, the trial judge instructed the jury to "consider mental suffering, past and future, found to be the necessary consequence of the loss of the plaintiff's leg." It was objected that this instruction permitted a recovery for "future humiliation and embarrassment to mind and feelings because of the loss of the leg." The court sustained the instruction, saying, "where such mental suffering is a direct and necessary consequence of the physi-

in some cases to the effect that mental suffering cannot be recovered for after the cessation of physical pain. It is also inconsistent with that view to allow compensation for the mental suffering endured because of the incapacity of the injured person to earn a livelihood.⁶⁰ It ought to be and is probably the law that the termination of physical pain does not prevent the recovery for subsequent mental anguish where mentality and memory have been lessened by the wrong.⁶¹ The supreme court of Indiana has disapproved of the view above stated as having been held by the appellate court of that state.⁶² Thereafter the latter ruled that inability to enjoy life was not an independent element of damage in addition to the loss of time, nature and extent of the injuries, loss of health, ability to labor, and pain and suffering.⁶³ In a later case that court recognizes that disfigurement is a proper element of damages; but held that the anxiety and distress which may be recovered for must be limited to that experienced from the use of the injured member as the direct result of its condition.⁶⁴ A debatable point has recently been ruled by a federal court—that the effect of the anxiety and worry incident to the plaintiff's action for compensation is an element of damage.⁶⁵ In such cases the loss or decrease of capacity to pursue one's calling and earn money is universally accepted as a proper subject of compensation. This feature of the injury will be presently considered. The presumption that physical pain is accompanied by mental suffering obtains in favor of a person of unsound mind who has been injured physically; such suffering may be recovered for.⁶⁶ In actions based on the violation of statutes, such as civil damage acts, the

cal injury, we think the jury may consider it." See § 1241.

Impairment of the capacity to enjoy life is to be considered. *Warth v. Jackson County Court*, 71 W. Va. 184.

⁶⁰ *Citizens' R. Co. v. Branham* (Tex. Civ. App.), 137 S. W. 403 (writ of error denied by the supreme court).

⁶¹ *Nichols v. Oregon S. L. R. Co.*, 28 Utah 319.

⁶² *Pittsburgh, etc. R. Co. v. O'Conner*, 171 Ind. 686.

⁶³ *South Bend R. Co. v. Goller*, 46 Ind. App. 531.

⁶⁴ *Harrod v. Bisson*, 48 Ind. App. 549.

⁶⁵ *Oberg v. Northern Pac. R. Co.*, 136 Fed. 981.

⁶⁶ *Gulf, etc. R. Co. v. Holzheuser* (Tex. Civ. App.), 45 S. W. 188, citing *I. & G. N. R. Co. v. Leak*, 64 Tex. 654.

elements of damages are limited to such as are enumerated; where injury to person or property or means of support are the grounds of recovery there cannot be a recovery for any kind of mental suffering.⁶⁷ But if the act adds to the foregoing the words "or otherwise," a wife may recover for mental suffering caused by the disgrace and discomfort attendant upon her husband's drunkenness.⁶⁸ The feelings caused a wife by the public conviction of her husband for drunkenness and the publicity given to the fact of his participation in a saloon row are grounds for recovery; and such conviction may be shown though her action antedated it.⁶⁹ The statute does not include a young daughter of the person intoxicated if her action is based upon a single transaction which resulted in injury to such person.⁷⁰ An aggravation of the mental suffering of a wife may not be shown by proof that her children were present when she was informed of the conduct of her husband.⁷¹

§ 1244. Same subject; recovery for secondary consequences.

In an action for personal violence or negligent injury it is no defense that the blows or acts of the defendant aggravated a disease or brought about a result which the defendant might not have anticipated, though the plaintiff was aware of his susceptibility thereto.⁷² It is immaterial to the application of this

⁶⁷ Freese v. Tripp, 70 Ill. 496; Brantigam v. While, 73 id. 561; Koerner v. Oberly, 56 Ind. 284; Calloway v. Laydon, 47 Iowa 456, 29 Am. Rep. 489 (though caused by the threatening language or vulgar conduct of an intoxicated husband and directed to his wife); Mulford v. Clewell, 21 Ohio St. 191; Meidel v. Anthis, 71 Ill. 241; Jackson v. Noble, 54 Iowa 641.

⁶⁸ Radley v. Seider, 99 Mich. 431.

⁶⁹ Lucker v. Liske, 111 Mich. 683.

⁷⁰ Sissing v. Beach, 99 Mich. 439.

⁷¹ Manzer v. Phillips, 139 Mich. 61.

⁷² Moultrie v. Cook, 11 Ga. App. 649; Hilliard v. Chicago City R. Co., 163 Ill. App. 282; Dorn v.

Clarke-W. D. Co., 65 Ore. 516; St. Louis S. R. Co. v. Lewis, 91 Ark. 343; Jones v. Caldwell, 20 Idaho 5, 48 L.R.A.(N.S.) 119; Bethany v. Lee, 124 Ill. App. 397; Indiana Union T. Co. v. Jacobs, 167 Ind. 85; Hunter v. Durand, 137 Mich. 53; Smart v. Kansas City, 208 Mo. 162; West v. St. Louis S. R. Co., 187 Mo. 351; Murphy v. Southern Pac. Co., 31 Nev. 120; Hauler v. Public Service R. Co., 79 N. J. L. 404; Prescott v. Robinson, 74 N. H. 460, 17 L.R.A.(N.S.) 594, 124 Am. St. 987; Toledo, etc. T. Co. v. McFall, 28 Ohio C. C. 362; International, etc. R. Co. v. Duncan, 55 Tex. Civ. App. 440; Houston E. Co. v. Green, 48 Tex. Civ. App. 242; Galveston,

principle that the susceptibility of the plaintiff to the disease which followed his injury was the result of his prudent voluntary acts.⁷³ The wrong-doer must answer for any aggravation of the plaintiff's condition for which he is responsible, and that is the limit of his liability.⁷⁴ In a case in which the plaintiff

etc. *R. Co. v. Butshek*, 34 Tex. Civ. App. 194, 20 Am. Neg. Rep. 673; *Short v. Spokane*, 41 Wash. 257; *Sherman v. Indianapolis T. Co.*, 48 Ind. App. 623; *North German Lloyd S. S. Co. v. Roehl* (Tex. Civ. App.), 144 S. W. 322; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 16 L.R.A. 203; *Weiting v. Millston*, 77 Wis. 523; *Campbell v. Los Angeles T. Co.*, 137 Cal. 565; *Jordan v. Seattle*, 30 Wash. 298; *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209; *Coleman v. New York, etc. R. Co.*, 106 Mass. 160, 8 Am. Neg. Cas. 375; *Louisville, etc. R. Co. v. Jones*, 108 Ind. 551; *Shumway v. Walworth & N. Mfg. Co.*, 98 Mich. 411; *Hall v. Cadillac*, 114 Mich. 99; *Emery v. Boston & M. R. Co.*, 67 N. H. 434, 9 Am. Neg. Cas. 557; *Crouse v. Chicago & N. R. Co.*, 104 Wis. 473, 483, citing the text; *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 63 Fed. 942; *Vosburg v. Putney*, 86 Wis. 278; *Collins v. Janesville*, 99 Wis. 464; *Denver v. Hyatt*, 28 Colo. 129; *Mullin v. Flanders*, 73 Vt. 95 (applying the rule to a case of malpractice).

If the question of the aggravation of previous ailments is first raised on the trial by the defendant a recovery therefor is not prevented because it was not pleaded in the complaint. *Barker v. Rhode Island Co.*, 35 R. I. 406.

⁷³ *McCahill v. New York T. Co.*, 201 N. Y. 221, 48 L.R.A. (N.S.) 131; *Maguire v. Sheehan*, 59 L.R.A. 496, 54 C. C. A. 642, 117 Fed. 819,

citing *Turner v. Nassau E. R. Co.*, 41 App. Div. (N. Y.) 213; *Sullivan v. Marin*, 175 Mass. 422, 7 Am. Neg. Rep. 261.

⁷⁴ *Atlanta v. Hampton*, 139 Ga. 389; *Simpson v. Peoria R. Co.*, 179 Ill. App. 307; *Galveston, etc. R. Co. v. Hodnett* (Tex. Civ. App.), 155 S. W. 678; *Zolawenski v. Aberdeen*, 72 Wash. 95; *Southern Pac. Co. v. Cavin*, 75 C. C. A. 350, 144 Fed. 348, citing the text; *The Little Silver*, 189 Fed. 980; *Baltimore & O. R. Co. v. Morgan*, 35 App. Cas. (D. C.) 195; *Braunstein v. People's R. Co.*, 2 Boyce (Del.) 55; *Atlantic & B. R. Co. v. Douglas*, 119 Ga. 658; *Amann v. Chicago Con. T. Co.*, 148 Ill. App. 151; *Walters v. Missouri Pac. R. Co.*, 82 Kan. 739, 28 L.R.A. (N.S.) 1058; *Louisville & N. R. Co. v. Wilkins*, 143 Ky. 572; *Beaurle v. Michigan Cent. R. Co.*, 152 Mich. 345; *Leslie v. Jackson & S. T. Co.*, 134 Mich. 518; *Blonquist v. Minneapolis F. Co.*, 112 Minn. 143; *Ross v. Great Northern R. Co.*, 101 Minn. 122; *Mathew v. Wabash R. Co.*, 115 Mo. App. 468; *Murphy v. Southern Pac. Co.*, 31 Nev. 120; *Ft. Worth, etc. R. Co. v. Morrison* (Tex. Civ. App.), 139 S. W. 884; *Roberts v. Galveston, etc. R. Co.* (Tex. Civ. App.), 124 S. W. 230; *Rock Island v. Starkey*, 189 Ill. 515, 526; *Louisville & N. R. Co. v. Kingman*, 18 Ky. L. Rep. 82; *Schwingschlegl v. Monroe*, 113 Mich. 683; *Gulf, etc. R. Co. v. Brown*, 16 Tex. Civ. App. 93; *Bagley v. Mason*, 69 Vt. 175; *Montgomery & E. R. Co. v. Mallette*,

sued to recover for a second injury inflicted by the defendant, the recovery for the prior injury being based on the theory that it was permanent, and the second action being brought to recover damages for a like injury, the court said that it was important to get a clear view of the effect of the first judgment and the questions determined by it. Her complaint was broad enough in that action to permit a recovery for a permanent injury to the back and knee and the proof tended to sustain that claim. As the result of these injuries the jury could have found that she became incapacitated from teaching elocution and painting on china since she could not walk up and down the stage and gesticulate, and she was unable to carry anything on crutches which she was obliged to use after the first accident. The

92 Ala. 209, 216; Louisville & N. R. Co. v. Snyder, 117 Ind. 435, 10 Am. St. 60, 3 L.R.A. 434; Watson v. Rinderknecht, 82 Minn. 235; Chicago & E. R. Co. v. Binkopski, 72 Ill. App. 22. Compare Rawlings v. Clyde P. & M. Road Co., 158 Mich. 143.

A person who has lost an eye through the fault of the defendant may show that he, previous to the injury, had no use of the other eye, and, consequently, his total loss of sight; such evidence shows the damages sustained by the defendant's act. Drake v. Industrial Works, 174 Mich. 622.

In an action against a physician for malpractice he cannot escape responsibility because the plaintiff's condition is only in part attributable to his wrong. The jury must distinguish, as best they can, the pain, suffering and injuries or ill-health of the plaintiff, so far as they are chargeable to the defendant, from such as he is not responsible for. Gates v. Fleischer, 67 Wis. 504; Wenger v. Calder, 78 Ill. 275. See next note; Miller v. Frey, 49 Neb. 472.

The plaintiff may not recover for any aggravation of his injury resulting from his voluntary imprudence in the use of his injured member. Carpenter v. McDavitt, 53 Mo. App. 393; Raymond v. Haverhill, 168 Mass. 382.

A plaintiff addicted to intoxication, which was not a contributing cause of the injury, may recover for the injuries he would have sustained if sober, without showing the amount of the damages caused by the defendant independently of the intoxication. The jury may arrive at the damages according to the rule of Gates v. Fleischer, *supra*.

Nonobservance by an injured person of the directions of his physician will not necessarily prevent a recovery for damages subsequently accruing except in so far as they resulted from such nonobservance. Keyes v. Cedar Falls, 107 Iowa 509; Fullerton v. Fordyce, 144 Mo. 519, 533, 3 Am. Neg. Rep. 696; Du Bois v. Decker, 140 N. Y. 325, 27 Am. St. 529, 14 L.R.A. 429; McCracken v. Smathers, 122 N. C. 799.

verdict was general, and must be deemed to cover compensation for every element of damages embraced within the pleadings and proofs. Hence it is obvious that the plaintiff can recover in this action only for such additional injuries as may be properly and legally attributed to the second accident. For any new injury, the result of that accident, she may be awarded damages, and, therefore, as the injury to the wrist was new, she is entitled to recover for that. In so far as the old injuries were increased or aggravated by the second accident she may also recover, but since it was admitted that there was no new or additional injury to the knee, no damages can be awarded for that in this action. In so far as the old injuries were increased or aggravated by the second accident, she may also recover. And since the first judgment was for damages resulting from her disability to teach elocution or paint on china, her present disability to do these things cannot legally be attributed to the last accident. * * * It may be true that by the second accident she became disabled in some other way and was in consequence incapacitated from doing something else that she could have done before and subsequent to the first accident, and so far she had a right of recovery in the second action.⁷⁵ The rule of liability stated in the first sentence of this section rests on the principle that in actions for tort the party who commits a trespass or other wrongful act is liable for all the injury proximately resulting, although such injury could not have been contemplated as the probable result of the act done and may have been the indirect result thereof.⁷⁶ A wrongful act which subjects

⁷⁵ *Brooks v. Rochester R. Co.*, 156 N. Y. 244, 4 Am. Neg. Rep. 426. See *San Antonio T. Co. v. Corley* (Tex. Civ. App.), 154 S. W. 621.

⁷⁶ Per Taylor, J., in *Brown v. Chicago, etc. R. Co.*, 54 Wis. 354, 7 Am. Neg. Cas. 203, citing 1 Sedgw. Meas. Dam. 130, note; *Eden v. Luyster*, 60 N. Y. 252; *Hill v. Winsor*, 118 Mass. 251; *Lane v. Atlantic Works*, 111 id. 136; *Keenan v. Cavanaugh*, 44 Vt. 268, 1 Am. Neg. Cas. 434; *Little v. Boston, etc. R.*

Co., 66 Me. 239; *Collard v. South Eastern R. Co.*, 7 H. & N. 79; *Hart v. Western R. Co.*, 13 Metc. (Mass.) 99, 104; *Wellington v. Downer K. O. Co.*, 104 Mass. 64; *Metallic C. Co. v. Fitchburg R. Co.*, 109 id. 277, 12 Am. Rep. 689; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Kellogg v. Chicago, etc. R. Co.*, 26 Wis. 223, 7 Am. Rep. 69; *Patten v. Chicago, etc. R. Co.*, 32 id. 524, 36 id. 413, 7 Am. Neg.

the injured party to other and dependent causes which it sets in

Cas. 201; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Bowas v. Pioneer T. Line*, 2 Sawyer 21. See § 13; *Sharp v. Powell*, L. R. 7 C. P. 258; *Putnam v. Broadway, etc. R. Co.*, 55 N. Y. 108, 8 Am. Neg. Cas. 553, 14 Am. Rep. 190; *McGrew v. Stone*, 53 Pa. 436; *Servatius v. Pichel*, 34 Wis. 299; *Hughes v. McDonough*, 43 N. J. L. 461, 39 Am. Rep. 603. The text is quoted with approval in *Baltimore, etc. R. Co. v. Kemp*, 61 Md. 74, where it is held that predisposition to cancer is not an objection to a recovery for the suffering caused by it if the cancer was the natural and proximate consequence of the injury. The doctrine of the text is applied in *Louisville, etc. R. Co. v. Falvey*, 104 Ind. 409, 426; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 3 Am. Neg. Cas. 148; 49 Am. Rep. 168; *McNamara v. Clintonville*, 62 Wis. 270, quoting the text; *Phillips v. London, etc. R. Co.*, 42 L. T. Rep. 6; *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 12 L.R.A. 257; *Lafler v. Fisher*, 121 Mich. 60; *Postal Tel. C. Co. v. Hulsey*, 132 Ala. 444, 13 Am. Neg. Rep. 450; *Chukey v. Seattle E. Co.*, 27 Wash. 70; *Watson v. Rinderknecht*, 82 Minn. 235; *Woodward v. Boscobel*, 84 Wis. 226; *Crouse v. Chicago & N. R. Co.*, 104 Wis. 473, 483, citing the text; *Metropolitan St. R. Co. v. Hudson*, 51 C. C. A. 283, 113 Fed. 449. *Contra*, *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89, which has been overruled. See § 36.

In *Stewart v. Ripon*, 38 Wis. 591, *Lyon, J.*, said: "The public streets and sidewalks in a city are not constructed and maintained for the sole use of healthy and robust peo-

ple, but for the use of the infirm, the sick and the decrepit, as well. They may lawfully be traveled by every citizen without regard to age, sex or physical condition. If the city negligently permits such streets or sidewalks to remain out of repair and any person (who is himself free from negligence) is injured thereby the city is liable for the injury. It is chargeable with knowledge that people of different bodily condition travel its streets, and that among these are the weak, the decrepit and those with organic predisposition to disease. It is reasonable to expect that in certain cases, if an injury happen to one of the latter class, his full recovery therefrom may be retarded or prevented by such predisposition or tendency to disease. In the present case the defendant is chargeable with knowledge that persons with a constitutional tendency to scrofula (a very large class in any community) constantly travel its streets and sidewalks, and that such tendency to that disease might greatly aggravate a bodily injury. Hence it had reasonable grounds to expect that if one of that class were injured by reason of the admitted defect in the sidewalk, the disease might develop, and greatly retard and prevent a cure, as in this case. If these views are correct, it necessarily follows that the negligence of the defendant was the proximate cause of the whole injury for which the plaintiff recovered damages." See *Oliver v. La Valle*, 36 Wis. 592. The principle of the case quoted from has been often applied. *Alabama, etc. R. Co. v. Yarbrough*, 83 Ala. 238, 3 Am. St. 715; *Baltimore & L. T. Co. v. Cassell*, 66 Md. 418;

motion imposes liability for the effects upon the wrong-doer,⁷⁷

Tice v. Munn, 94 N. Y. 621; *Houston, etc. R. Co. v. Shafer*, 54 Tex. 641; *McNamara v. Clintonville*, 62 Wis. 207; *Ehrgott v. Mayor*, 96 N. Y. 264, 281, 48 Am. Rep. 622; *Denver, etc. R. v. Harris*, 122 U. S. 597; *Driess v. Frederick*, 73 Tex. 460.

A surgeon assumes to exercise the ordinary care and skill of his profession, and is liable for injuries resulting from his failure to do so; yet if the patient neglects to obey his reasonable instructions and thereby contributes to the injury complained of he cannot recover for such injury. *Geiselman v. Scott*, 25 Ohio St. 86.

In other places in this work the doctrine of remote and proximate cause has been sufficiently stated. A New York case is referred to here because it illustrates the proposition stated in the text and disproves a series of cases with which the author is unable to agree. The plaintiff, driving on a rainy night, came to a ditch in a street; the axle of his vehicle was broken, and he was dragged over the dashboard. Another carriage was procured and he drove to his home, several miles distant, in the rain and cold. His evidence tended to show that the diseases from which he subsequently suffered were the result of the strain and shock; while the defendant's evidence tended to show that they were caused by the exposure to the cold and rain. It was held that the exposure was the direct and proximate result of the accident. *Ehrgott v. Mayor*, 96 N. Y. 264, 48 Am. Rep. 622, disapproving *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111; *McMahon v. Field*, 7 Q. B. Div. 591; *Waller v. Midland Great West-*

ern R. Co., 12 Ir. L. T. Rep. 145; *Pullman P. C. Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89 (which has been overruled); *Indianapolis, etc. R. Co. v. Birney*, 71 Ill. 391; *Francis v. St. Louis T. Co.*, 5 Mo. App. 7.

The right to recover for the aggravation of a condition existing prior to the injury, and of which the plaintiff had knowledge, will depend upon the complaint; the right does not exist where the issue tendered and tried was based on the previous good health of the plaintiff. *Frick v. Washington W. P. Co.*, 72 Wash. 214.

In *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. 314, the plaintiff sustained injuries after the accident and before full recovery from its effects while riding in a vehicle which broke down, in consequence of which the partially healed bone received a jar and slipped. The recovery included the consequences of this accident. But in *Snow v. New York, etc. R. Co.*, 185 Mass. 321, 17 Am. Neg. Rep. 261, a passenger received injuries which caused sudden attacks of illness. She climbed into a sink and while standing there had such an attack and fell to the floor. The defendant was not liable for the resulting injury. And in *Vander Velde v. Leroy*, 140 Mich. 359, the prior injury was not the cause of a condition resulting from the slipping of a crutch used because of such injury.

⁷⁷ *Atlantic C. L. R. Co. v. Whitney*, 65 Fla. 72 (pain attendant upon wearing an artificial limb); *Hayward v. Metropolitan West Side E. R. Co.*, 174 Ill. App. 408; *Luisi v. Chicago Great Western R. Co.*, 155 Iowa 458; *Louisville & N. R. Co. v. Kemp*, 149 Ky. 344; *McGee v. Van-*

as where mistakes have been made, notwithstanding the exercise of ordinary care in the selection of a medical attendant for one injured; injuries caused by such mistakes are attributable to the original wrong-doer.⁷⁸ The aggravation of a previously existing condition may not be recovered for unless it is pleaded.⁷⁹ There may be a recovery for the consequences of the use of narcotics necessarily or properly given to alleviate pain, as the mental and physical pain and medical expenses necessarily following.⁸⁰ Where the injury sustained is of such a nature that an ordina-

over, 148 Ky. 737; *Alley v. Charlotte P. & F. Co.*, 159 N. C. 327; *Knox v. Robbins* (Tex. Civ. App.), 151 S. W. 1134; *Texas, etc. R. Co. v. Murray* (Tex. Civ. App.), 156 S. W. 594; *Gray v. Chicago, etc. R. Co.*, 153 Wis. 637; *Omnisky v. Weinhausen*, 113 Minn. 422; *Murphy v. Southern Pac. Co.*, 31 Nev. 120; *Prescott v. Robinson*, 74 N. H. 460, 17 L.R.A.(N.S.) 594, 124 Am. St. 987; *Wood v. New York Cent., etc. R. Co.*, 83 App. Div. (N. Y.) 604, 17 Am. Neg. Rep. 276; *Pyke v. Jamestown*, 15 N. D. 157; *Pankopf v. Hinkley*, 141 Wis. 146, 24 L.R.A.(N.S.) 1159; *Crane E. Co. v. Lipfert*, 11 C. C. A. 521, 528, 63 Fed. 942; *Seckinger v. Philibert & J. Mfg. Co.*, 129 Mo. 590; *Dickson v. Hollister*, 123 Pa. 421, 10 Am. St. 533; *Baltimore City P. R. Co. v. Kemp*, 61 Md. 74.

The plaintiff was injured in a collision. The car she was in was a suitable place for her to remain; but because of a statement made in her hearing that another approaching train was likely to produce a second collision, she left the car and came in contact with poison ivy. The defendant was responsible for the resulting injury. *Estes v. Missouri Pac. R. Co.*, 110 Mo. App. 725.

⁷⁸ *McGarrahan v. New York, etc. R. Co.*, 171 Mass. 211, 4 Am. Neg.

Rep. 284; *Freeman v. Wilson* (Tex. Civ. App.), 149 S. W. 413; *Bethany v. Lee*, 124 Ill. App. 397; *Joliet v. Le Pla*, 109 id. 336; *McIntyre v. Murphy*, 153 Mich. 342; *Elliott v. Kansas City*, 174 Mo. 554; *Rossier v. Metropolitan St. R. Co.*, 125 Mo. App. 159; *Wallace v. Pennsylvania R. Co.*, 222 Pa. 556, 128 Am. St. 817; *Houston, etc. R. Co. v. Hanks*, 58 Tex. Civ. App. 298; *Chicago City R. Co. v. Cooney*, 196 Ill. 466; *Hunt v. Boston T. Co.*, 212 Mass. 99; *Fields v. Mankato E. T. Co.*, 116 Minn. 218.

But the liability for such causes does not extend to consequences resulting from the lessened vitality of the person injured to withstand the effects of infection. *Winslow, C. J.*, said: If decreased powers of resistance resulting from an injury are to be considered as a link in the chain of causation between the injury and the disease developing years afterward, it is very evident that a large, if not an almost limitless, field is opened up for speculation by juries in a region where there can be no guide and no probability of just results. *Gray v. R. Co.*, *supra*.

⁷⁹ *Dorn v. Clarke-W. D. Co.*, 65 Ore. 516.

⁸⁰ *Summer v. Kinney* (Tex. Civ. App.), 136 S. W. 1192.

rily prudent person would submit to a dangerous operation for relief there may be a recovery for the suffering resulting.⁸¹ A second injury sustained while in the exercise of due care and under the instructions of a physician may be recovered for if it resulted from the original wrong.⁸² A second miscarriage resulting from an injury may be considered for the purpose of ascertaining the extent of the injury, but not as a basis of compensation for the specific damages following.⁸³ An injured person must use available means to lessen his injury; but he may be in the exercise of due diligence though he treats his injury himself; if he makes a mistake the wrong-doer must answer for the consequences.⁸⁴ An injured person who acts in good faith and without negligence may perform such duties as seem to him prudent, and if, in so doing he produces harm to himself, which had its origin in the act of the defendant, he may recover therefor.⁸⁵ The failure to furnish an injured servant any means of relief to which he has a legal right may be shown in so far as his suffering was thereby increased.⁸⁶

The plaintiff may show the specific direct effects of the injury without specially alleging them, as that he was thereby made subject to fits,⁸⁷ as well as the pain and disability which

⁸¹ *Missouri, etc. R. Co. v. Hagan*, 42 Tex. Civ. App. 133.

⁸² *Hoseth v. Preston M. Co.*, 49 Wash. 682.

⁸³ *Rapid Transit R. Co.*, 98 Tex. 553.

⁸⁴ *Texas & P. R. Co. v. Mosley* (Tex. Civ. App.), 124 S. W. 485.

⁸⁵ *Batton v. Public Service Co.*, 75 N. J. L. 857, 18 L.R.A.(N.S.) 640, 127 Am. St. 855, citing *Sullivan v. Tioga R. Co.*, 112 N. Y. 643; *Hope v. Troy & L. R. Co.*, 40 Hun 483, 110 N. Y. 643; *Lyons v. Erie R. Co.*, 57 N. Y. 489; *Brashear v. Philadelphia T. Co.*, 180 Pa. 392, 1 Am. Neg. Rep. 678; *Newark R. Co. v. McCann*, 58 N. J. L. 642, 33 L.R.A. 127; *Beauchamp v. Saginaw M. Co.*, 50 Mich. 163, 45 Am. Rep. 30; *Terre Haute R. Co. v. Buck*, 96 Ind. 346, 49 Am.

Rep. 168. See *Copeland v. Wabash R. Co.*, 175 Mo. 650.

⁸⁶ *Harding v. Ostrander R. & T. Co.*, 64 Wash. 224.

⁸⁷ *Norfolk & W. R. Co. v. Spears*, 110 Va. 110, citing the text; *Tyson v. Booth*, 100 Mass. 258; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 443; *Morgan v. Kendall*, 124 Ind. 454, 9 L.R.A. 445; *Rea v. St. Louis S. R. Co.* (Tex. Civ. App.), 73 S. W. 555, 17 Am. Neg. Rep. 272; *Sloan v. Edwards*, 61 Md. 89; *Hussey v. Ryan*, 64 id. 426; *H. & T. C. R. Co. v. Leslie*, 57 Tex. 83; *Kemp v. Baltimore City P. R. Co.*, 61 Md. 79; *Baltimore City P. R. Co. v. Baer*, 90 Md. 97; *Beath v. Rapid R. Co.*, 119 Mich. 512; *Garbaczewski v. Third Ave. R. Co.*, 5 App. Div. (N. Y.) 186, 9 Am. Neg. Cas. 655; *Wood v. New York*

followed.⁸⁸ Future pain may be recovered for under a pleading showing that the plaintiff suffered at the time of the trial and would continue to suffer, though it was not shown for how long.⁸⁹ Where the injury does not necessarily produce mental suffering its existence must be alleged.⁹⁰ The obviously probable effects of the injury may be given in evidence though not laid in the declaration.⁹¹ Thus, where one of the direct consequences of a wound was the loss of the power to have offspring, evidence of that fact was admissible though the declaration did not specifically designate that consequence.⁹² The postponement of a cure by reason of the malpractice of the defendant is a ground of damage.⁹³ If great bodily pain was

Cent., etc. R. Co., 83 App. Div. (N. Y.) 604, 17 Am. Neg. Rep. 276; *Montgomery v. Lansing City E. R. Co.*, 103 Mich. 46, 12 Am. Neg. Cas. 118, 29 L.R.A. 287; *St. Louis T. Co. v. Murmann*, 90 Mo. App. 555.

Under an allegation that an injury to the hand necessitated the amputation of three fingers it may be shown that since the action was begun it became necessary to amputate the remainder of the hand. *Pittsburgh, etc. R. Co. v. Blair*, 11 Ohio C. C. 579.

There cannot be a recovery for increased suffering because of a pre-existing ailment unless such suffering is pleaded. *Hall v. Cadillac*, 114 Mich. 99. *Contra*, *Delaplain v. Kansas City*, 109 Mo. App. 107.

⁸⁸ *Id.*; *Youngblood v. South Carolina & G. R. Co.*, 60 S. C. 9, quoting the text; *Cudahy P. Co. v. Broadbent*, 70 Kan. 535; *San Antonio, etc. R. Co. v. Beauchamp*, 54 Tex. Civ. App. 123; citing the text; *Pecos & N. T. Ry. Co. v. Huskey*, — Tex. Civ. App. —, 166 S. W. 493. See *Croco v. Oregon S. L. R. Co.*, *infra*.

⁸⁹ *Achey v. Marion*, 126 Iowa 47.

⁹⁰ *Lodwick L. Co. v. Taylor*, 39 Tex. Civ. App. 302.

⁹¹ *Ryan v. Oakland G., L. & H.*

Co., 21 Cal. App. 14; *Greenville v. Branch* (Tex. Civ. App.), 152 S. W. 478; *Avery v. Ray*, 1 Mass. 12; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 443; *Johnson v. McKee*, 27 Mich. 471, followed in *Montgomery v. Lansing City E. R. Co.*, *supra*, disapproving contrary expressions in other cases, and quoting the text; *Ankrum v. Marshalltown*, 105 Iowa 493; *Pt. Scott, etc. R. Co. v. Lightburn*, 9 Kan. App. 642; *Howard v. Stiles*, 54 Neb. 26; *Wabash R. Co. v. Savage*, 110 Ind. 156, 168, 8 Am. Neg. Cas. 224; *Bruce v. Beall*, 99 Tenn. 303; *San Antonio, etc. R. Co. v. Weigers*, 22 Tex. Civ. App. 344, citing the text; *Robinson v. Marino*, 3 Wash. 434, 441, 1 Am. Neg. Cas. 253, 28 Am. St. 50, citing the text; *Delie v. Chicago, etc. R. Co.*, 51 Wis. 400; *Stevenson v. Morris*, 37 Ohio St. 10, 41 Am. Rep. 481. See *Adcock v. Oregon R. Co.*, 45 Ore. 173.

⁹² *Denver, etc. R. v. Harris*, 122 U. S. 597, 30 L. ed. 1146. See *Jones v. Niagara Junction R. Co.*, 63 App. Div. (N. Y.) 607. The five preceding propositions are quoted in *Croco v. Oregon S. L. R. Co.*, 18 Utah 311, 318, 54 L.R.A. 285.

⁹³ *McCracken v. Smathers*, 122 N. C. 799.

caused by the injury an allegation of mental suffering is not necessary.⁹⁴ Under an allegation that the plaintiff suffered great bodily harm, became and still continued to be sick, sore and disabled; was obliged to spend large sums in attempting to cure himself, and was prevented for a long time from attending to his business the permanent character of the injury sustained may be proven.⁹⁵ Where it was alleged that the defendant sustained serious and permanent physical injuries internally and externally, was caused great pain, suffering and impairment of bodily health, it was competent to show that a miscarriage occurred seven months after the injury.⁹⁶ But under a general averment of mental suffering, anxiety and suspense there cannot be a recovery for such suffering occasioned by the postponement of the plaintiff's marriage.⁹⁷ If a miscarriage is produced by a physical injury damage cannot be recovered for the loss of the society, enjoyment and prospective services of the child, these not being elements of damage;⁹⁸ the miscarriage may be considered in awarding damages for pain and suffering, mental and physical, if these were aggravated by it.⁹⁹ A difference of opinion exists as to the need for

⁹⁴ *Ousley v. Hampe*, 128 Iowa 675.

⁹⁵ *Ehrgott v. Mayor*, 96 N. Y. 264, 48 Am. Rep. 622; *Hall v. Cadillac*, 114 Mich. 99. Compare *Kalemback v. Michigan Cent. R. Co.*, 87 Mich. 509.

The whole extent of the injury may be shown under an allegation of injury. *Barnett v. Schlapka*, 110 Ill. App. 672.

⁹⁶ *Partridge v. Dykins*, 28 Okla. 54, 34 L.R.A.(N.S.) 984; *Chicago City R. Co. v. Cooney*, 196 Ill. 466. See *Parker v. Ottumwa*, 113 Iowa 649.

⁹⁷ *Beath v. Rapid R. Co.*, 119 Mich. 512.

⁹⁸ *Finer v. Nichols*, 158 Mo. App. 539; *Tunnicliffe v. Bay Cities Con. R. Co.*, 102 Mich. 624, 4 Am. Neg. Cas. 175, 82 L.R.A. 142; *Butler v. Manhattan R. Co.*, 143 N. Y. 417,

42 Am. St. 738, 26 L.R.A. 46; *Lennox v. Interurban St. R. Co.*, 104 App. Div. (N. Y.) 110 (and the inability of the plaintiff to bear children cannot be shown with reference thereto). See *Bovee v. Danville*, 53 Vt. 190, stated in note to § 1243.

⁹⁹ *McGee v. Vanover*, 148 Ky. 737; *Raynor v. Tacoma R. & P. Co.*, 70 Wash. 133; *Finer v. Nichols*, *supra*; *Colorado Springs & I. R. Co. v. Nichols*, 41 Colo. 272, 20 L.R.A.(N.S.) 215; *Devine v. Brooklyn Heights R. Co.*, 131 App. Div. (N. Y.) 142; *Tunnicliffe v. R. Co.*, *supra*; *Oliver v. La Valle*, 36 Wis. 592; *Brown v. Chicago, etc. R. Co.*, 54 Wis. 342, 7 Am. Neg. Cas. 203; *Shartle v. Minneapolis*, 17 Minn. 308, 318; *Witrak v. Nassau E. R. Co.*, 52 App. Div. (N. Y.) 234; *Haw-*

proof of increased suffering where there is a premature birth over that which occurs when the birth is in due course of time. In Washington it is necessary to show by appropriate evidence that increased suffering resulted; mere proof of the premature delivery of a child, though it was dead as the result of an injury to the mother, is not sufficient.¹ In Kentucky and Minnesota there may be a recovery of substantial damages in such a case without such proof.² If there was no negligence in the treatment of a disease originally, but there was negligence in the later treatment, the jury must, as best they can, distinguish between the pain caused by the negligent treatment and that not so caused.³ It is not only the duty of an injured person to reasonably exert himself to obtain a cure for his hurt, but to exercise such control over himself as he is capable of commanding. If his mental suffering is increased by the neglect to use such control he cannot recover for it to the extent he could have prevented it.⁴

§ 1245. Same subject; rule where negligence only is alleged, and where wrong was wilful. Mental suffering alone, unconnected with any other legal wrong, will not, according to the great weight of authority, support an action based on negligence alone; it is only when, in the absence of wilfulness some act is done which will constitute a cause of action that such suffer-

kins v. Front St. C. R. Co., 3 Wash. 592, 600, 10 Am. Neg. Cas. 397, 28 Am. St. 72, 16 L.R.A. 808.

¹ Hawkins v. R. Co., *supra*, distinguished in Raynor v. R. & P. Co., *supra*.

² Plonty v. Murphy, 82 Minn. 268; Berger v. St. Paul City R. Co., 95 Minn. 84.

In Morris v. St. Paul City R. Co., 105 Minn. 276, 17 L.R.A.(N.S.) 598, the court said: The miscarriage resulted from defendant's negligent act, and it should be required to pay the damages which resulted naturally and directly therefrom. The fact that plaintiff would, in the natural course of events, suffer

more or less pain and anguish at the birth of her child cannot be considered. It is too remote, speculative and uncertain.

A woman has the right to bear a child in the natural way and time. If she is caused to give birth to it prematurely she may recover for the resulting mental and physical pain whether that be more or less than would have been endured if the wrong had not been done. Big Sandy R. Co. v. Blankenship, 133 Ky. 438, 23 L.R.A.(N.S.) 345, disapproving Hawkins v. R. Co., *supra*.

³ Adams v. Junger, 158 Iowa 449.

⁴ Dooley v. Boston E. R. Co., 201 Mass. 429.

ing can be considered.⁵ This is not a cause of action, but an aggravation of damages when it naturally ensues from the act complained of. In Massachusetts a town is liable in damages for an injury to the person resulting from a defect in a highway; but an action cannot be maintained on account of a risk or

⁵ *Chandler v. Illinois Cent. R. Co.*, 171 Ill. App. 240; *Samarra v. Allegheny Valley St. R. Co.*, 238 Pa. 469; *Kansas City S. R. Co. v. Rogers*, 203 Fed. 462; *United States S. Co. v. Parry*, 92 C. C. A. 159, 166 Fed. 407; *Tiller v. St. Louis, etc. R. Co.*, 189 Fed. 994; *St. Louis, etc. R. Co. v. Taylor*, 84 Ark. 42, 13 L.R.A.(N.S.) 159, quoting the text; *Western U. Tel. Co. v. Ford*, 8 Ga. App. 514; *Louisville & N. R. Co. v. Brown*, 127 Ky. 732, 13 L.R.A.(N.S.) 1135; *Morse v. Chesapeake & O. R. Co.*, 117 Ky. 11; *Indianapolis, etc. R. Co. v. Stables*, 62 Ill. 313; *St. Louis S. R. Co. v. Mitchell*, 25 Tex. Civ. App. 197; *Keyes v. Minneapolis, etc. R. Co.*, 36 Minn. 290; *Atchison, etc. R. Co. v. McGinnis*, 46 Kan. 109; *Sanderson v. Northern Pac. R. Co.*, 88 Minn. 162, 60 L.R.A. 403; *Sloane v. Southern California R. Co.*, 111 Cal. 668, 679, 32 L.R.A. 193, citing the text; *Haas v. Metz*, 78 Ill. App. 46; *Braun v. Craven*, 175 Ill. 401, 5 Am. Neg. Rep. 15, 42 L.R.A. 199; *West Chicago St. R. Co. v. Liebig*, 79 Ill. App. 567; *Kalen v. Terre Haute & I. R. Co.*, 18 Ind. App. 202, 63 Am. St. 343; *Butner v. Western U. Tel. Co.*, 2 Okla. 234, 243, citing the text; *Huffman v. T. & O. C. R. Co.*, 9 Ohio Dec. 748; *Cleveland City R. Co. v. Elert*, 19 Ohio C.C. 725; *San Antonio, etc. R. Co. v. Corley*, 87 Tex. 432, citing the text; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 56 Am. St. 604, 34 L.R.A. 781; *Victorian Railway Com'rs v. Coultas*, L. R. 13 App. Cas. 222; *Ewing v.*

Pittsburgh, etc. R. Co., 147 Pa. 40, 14 L.R.A. 666; *Johnson v. Wells, etc. Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Renner v. Canfield*, 36 Minn. 90, 1 Am. St. 654; *Haile v. Texas & P. R. Co.*, 9 C. C. A. 134, 60 Fed. 557, 23 L.R.A. 774. See §§ 21-24, 975-980.

In *Lee v. Burlington*, 113 Iowa 356, 86 Am. St. 379, the rule was applied in an action to recover for a horse whose death was caused by fright. The occurrence was said to be so unusual that it could not be considered the proximate result of the negligence.

Under a civil damage statute providing for the recovery by a wife who is injured in person or property or means of support or otherwise by the sale of liquor contrary thereto, there may be a recovery of damages for injury to her feelings. *Radley v. Seider*, 99 Mich. 431. The same statute includes others than wives; but the right to recover for injured feelings does not extend to an eleven-year-old daughter of an habitual drunkard, her suit being based upon a single transaction. The injury to the feelings which may be recovered for is the shame, mortification or disgrace arising from the fact of intoxication, and not the mental anguish suffered because of an injury received by the person who became intoxicated. *Sissing v. Beach*, 99 Mich. 439.

A married woman may recover for the shame, disgrace and mortification arising from the public conviction of her husband for drunkenness, though the trial occurred after

peril merely which has caused fright and mental suffering.⁶ "Though the bodily injury may have been very small, yet if it was a ground of action within the statute, and caused mental suffering, that suffering was a part of the injury for which he was entitled to damages."⁷ It was also held in an action on the case for simple negligence in blasting out a ledge within the located limits of a railroad, whereby rocks were thrown upon the plaintiff's land and buildings, that his mental anxiety in relation to his own personal safety or that of his child is not, in the absence of personal injury, an element of damage.⁸ "If the law were otherwise it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision, or by trains leaving the track, could maintain an action against the company."⁹ But the question is different when an injury produces a shock. "Shock is not fright; the latter may be a producing cause of the former, and where it is the sole producing cause there can be no recovery; but when it is associated with actual injury it may be considered, and where the injury and the fright concur and result in producing shock, out of which arises damage, it

her suit was begun. A newspaper article giving an account of a saloon row and of the husband's participation therein is admissible as bearing upon the plaintiff's mental anguish. *Lucker v. Liske*, 111 Mich. 683.

Under the Adair liquor law a wife may recover for sickness caused by nervousness occasioned by the verbal abuse of her by her husband while intoxicated. *Kear v. Garrison*, 13 Ohio C. C. 447.

⁶ *Canning v. Williamstown*, 1 Cush. 451. See §§ 21-24, 975-980.

⁷ *Id.*; *City T. Co. v. Robinson* (Ky. Super. Ct.) 12 Ky. L. Rep. 555; *O'Flaherty v. Nassau El. R. Co.*, 34 App. Div. (N. Y.) 74, affirmed without opinion, 165 N. Y. 624; *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195, 199; *McGee v. Vanover*, 148 Ky.

737; *Chesapeake & O. R. Co. v. Robbitt*, 151 Ky. 778.

⁸ *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303.

⁹ *Id.* In the note to this case in 36 Am. Rep. 306, the editor says, "there can be no doubt that mental suffering forms a proper element of damage in actions for intentional and wilful wrong, and in actions of negligence resulting in bodily injury; but whether it forms an independent ground of action, disconnected from these facts, is more doubtful." His note, however, does not afford an instance in which it was the ground of action. In all of the cases stated there was a legal cause of action independent of injury to feelings. See §§ 21-24, 975-980.

is sufficient upon which to base a recovery."¹⁰ A shock or injury to the nervous system occasioned by a tort is regarded as a physical injury producing suffering to the body rather than to the mind, though the mind be at the same time injuriously affected.¹¹ In a Maryland case the plaintiff offered evidence to show that the accident complained of caused a shock to his nervous system which injured the optic nerve and diminished his power to make calculations, and subsequently produced emaciation. This was held admissible, the shock not being made an independent ground for awarding damages, but only being considered in connection with other evidence to determine the extent of the injury suffered.¹² In Massachusetts simple negligence does not make the defendant liable for a bodily injury resulting from mere fright and mental disturbance;¹³ and such is the rule favored by the New York court of appeals.¹⁴ In the former state if a slight injury to the person is accompanied by a nervous shock caused by the same wrongful act as such injury, there may be a recovery for the consequences of such shock regardless of whether it was due to the visible injury or merely accompanied it.¹⁵ And it has also been held there that when "fright reasonably induces action which results in external

¹⁰ *Jones v. Brooklyn Heights R. Co.*, 23 App. Div. (N. Y.) 141; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 16 L.R.A. 203.

¹¹ *Sloane v. Southern California R. Co.*, 111 Cal. 668, 680, 32 L.R.A. 193; *St. Louis S. R. Co. v. Mitchell*, 25 Tex. Civ. App. 197; *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 60 L.R.A. 617, 13 Am. Neg. Rep. 197; *Spearman v. McCrary*, 4 Ala. App. 473; *Nettlehorst v. Mordaunt*, 173 Ill. App. 42; *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A. (N.S.) 545; *Simone v. Rhode Island Co.*, 28 R. I. 186, 9 L.R.A. (N.S.) 740, citing the text; *St. Louis S. R. Co. v. Murdock*, 54 Tex. Civ. App. 249. See *Armour v. Kollmeyer*, 16 L.R.A. (N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78; *Howe v. Chicago*, etc R.

Co., 139 Mich. 638, 18 Am. Neg. Rep. 145.

¹² *Baltimore City P. R. Co. v. Baer*, 90 Md. 97; *Thompson-S. Co. v. Warren*, 38 App. Cas. (D. C.) 310, distinguishing the case next cited. Compare *Washington & G. R. Co. v. Dashiell*, 7 App. Cas. (D. C.) 507, 514.

¹³ *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 5 Am. Neg. Rep. 367, 60 Am. St. 393, 38 L.R.A. 512; *White v. Sander*, 168 Mass. 296, 2 Am. Neg. Rep. 573.

¹⁴ *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 56 Am. St. 604, 34 L.R.A. 781.

¹⁵ *Homans v. Boston E. R. Co.*, 180 Mass. 456, 57 L.R.A. 291, 11 Am. Neg. Rep. 248, 91 Am. St. 324.

injury the defendant may be liable as well as when the impact is brought about without the intervention of the plaintiff's consciousness." ¹⁶

Such mental anxiety as comes from apprehension concerning the future of the family of an injured man is not a natural result of the injury, but depends upon circumstances independent of it, as the pecuniary condition and social relations of the sufferer. ¹⁷ In an action to recover for an indecent assault the injury done to the plaintiff's good name, honor and reputation cannot be considered. ¹⁸ The award for mental suffering will be determined by the circumstances. In a Canadian case in which no physical injury was sustained as the result of a trifling assault, the fright being but momentary, and the plaintiff having repelled all advances for a settlement or apology, and began and then abandoned a prosecution before a magistrate and sued for damages, the court refused to permit the recovery of a larger sum than would have been imposed as a fine if the prosecution had not been discontinued. ¹⁹ Juries have no discretion to allow interest upon the amount awarded for pain and suffering. ²⁰ Some courts favor recovery for mental suffering where the wrong done the sufferer was wilful, wanton or malicious, especially where its obvious purpose was to wound, humiliate or oppress another. ²¹ Mental suffering may be recovered for under a civil damage statute where the intoxicated husband assaulted his wife and accused her of infidelity, ²² and so may shame and mortification aside from personal injury. ²³

¹⁶ *Cameron v. New England Tel. & T. Co.*, 182 Mass. 310, 13 Am. Neg. Rep. 86. See *Philadelphia, etc. R. Co. v. Mitchell*, 107 Md. 600, 17 L.R.A.(N.S.) 974, stated in note to § 23a.

¹⁷ *Vandalia C. Co. v. Yemm*, 175 Ind. 524; *Gulf, etc. R. Co. v. Dickens*, 54 Tex. Civ. App. 637; *Texas Mexican R. Co. v. Douglass*, 69 Tex. 694.

¹⁸ *Atkins v. Gladwish*, 25 Neb. 390.

¹⁹ *Papineau v. Taber*, Montreal L. R. 2 Q. B. 107.

²⁰ *Western A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. 320, 11 Am. Neg. Cas. 350.

²¹ *Hickey v. Welch*, 91 Mo. App. 4, 14; *Cooper v. Hopkins*, 70 N. H. 271, 279; *Williams v. Underhill*, 63 App. Div. (N. Y.) 223. See § 21 *et seq.*

²² *Johnson v. Grondin*, 170 Mich. 447.

²³ *Rauhala v. Maki*, 172 Mich. 112.

The mental suffering inflicted upon a minor by its abduction is a ground for recovery.²⁴ An assault with intent to commit rape is a sufficient basis on which to award compensation for mental suffering though there was no pecuniary loss or physical injury.²⁵ Injury to the reputation of the plaintiff is not involved in an action for an assault accompanied by solicitation for sexual intercourse,²⁶ or though there be a ravishment, if the disclosure of the plaintiff's physical condition was not the result thereof.²⁷

§ 1246. Loss of time, injury to business, diminished capacity.

These heads of injury are similar and represent recoverable elements of damage where the facts show that they exist.²⁸

²⁴ *Brown v. Crockett*, 8 La. Ann. 30.

²⁵ *Pye v. Gillis*, 9 Ga. App. 725.

²⁶ *Kepler v. Hyer*, 48 Ind. 499; *Sletten v. Madison*, 122 Wis. 251.

²⁷ *Totten v. Totten*, 172 Mich. 565.

²⁸ *Ferguson & Wheeler Land, Lumber & Handle Co. v. Good*, 112 Ark. 260; *Vansant v. Kowalewski*, — Del. Super. Ct. —, 90 Atl. 421; *Reynolds v. Clark*, — Del. Super. Ct. —, 92 Atl. 873; *Brown v. Mayor & Council of Wilmington*, 4 Boyce (Del.) 492; *City of Key West v. Baldwin*, 69 Fla. 136; *Denbeigh v. Oregon-W. R. & N. Co.*, 23 Idaho 663; *Weil v. Hagan*, 161 Ky. 292; *Wachs v. New York Rys. Co.*, 84 Misc. (N. Y.) 632; *Knox v. Robbins* (Tex. Civ. App.), 151 S. W. 1134; *Southwestern B. & I. Co. v. Schmidt*, 226 U. S. 162, 57 L. ed. 170; *Birmingham R., L. & P. Co. v. Wright*, 153 Ala. 99; *Elba v. Bullard*, 152 Ala. 237; *Southern C. O. Co. v. Skipper*, 125 Ga. 368; *Foley v. Everett*, 142 Ill. App. 250; *Blue Grass T. Co. v. Ingles*, 140 Ky. 488; *Dorris v. Warford*, 124 Ky. 768, 9 L.R.A.(N.S.) 1090; *Abbott v. Detroit*, 150 Mich. 245;

Becker v. Lincoln R. E. Co., 118 Mo. App. 74, citing the text; *Beeler v. Butte & L. C. D. Co.*, 41 Mont. 465; *Rushing v. Seaboard A. L. R. Co.*, 149 N. C. 158; *St. Louis S. R. Co. v. Niblack*, 53 Tex. Civ. App. 619; *El Paso E. R. Co. v. Murphy*, 49 Tex. Civ. App. 586; *Chesapeake & O. R. Co. v. Hoffman*, 109 Va. 44; *Cole v. Seattle, etc. R. Co.*, 42 Wash. 462; *Chicago & E. R. Co. v. Holland*, 122 Ill. 461; *Indiana C. Co. v. Parker*, 100 Ind. 182, 14 Am. Neg. Cas. 422; *Louisville, etc. R. Co. v. Falvey*, 104 Ind. 409, 430; *Central P. R. Co. v. Kuhn*, 86 Ky. 578, 11 Am. Neg. Cas. 626, 9 Am. St. 309; *Morgan v. Curley*, 142 Mass. 107; *Huizenga v. Cutler & S. L. Co.*, 51 Mich. 272, 15 Am. Neg. Cas. 753, 16 Am. Neg. Cas. 4; *Wallace v. Western North Carolina R. Co.*, 104 N. C. 442; *Scott v. Montgomery*, 95 Pa. 444; *Giles v. Diamond State I. Co.*, 7 Houst. 453, 459, 13 Am. Neg. Cas. 772; *Murphy v. Hughes*, 1 Pennw. (Del.), 250, 262; *Mobile & O. R. Co. v. George*, 94 Ala. 199, 13 Am. Neg. Cas. 29; *Weber W. Co. v. Kehl*, 139 Ill. 644, 14 Am. Neg. Cas. 286; *Linton C. & M. Co. v. Persons*, 11 Ind. App. 264, 278, 14 Am. Neg.

They represent in part, and often chiefly, the pecuniary loss from personal injury. To the extent that it prevents the plaintiff from pursuing his accustomed employment or business it deprives him of pecuniary benefits which he would otherwise have realized. "The measure of damages for loss or impairment of earning capacity is the difference between the earning capacity before and after the accident, and this depends not only on the actual earning capacity, but on the use made of it." ²⁹ Where the jury is instructed that the plaintiff is entitled to recover for the time lost as a result of the injuries, and the time that he will lose in the future and also for his decreased

Cas. 479; *Ankrum v. Marshalltown*, 105 Iowa 493; *Standard O. Co. v. Tierney*, 92 Ky. 367, 14 L.R.A. 677, 36 Am. St. 595; *Rooney v. New York, etc. R. Co.*, 173 Mass. 222; *Moore v. Kalamazoo*, 109 Mich. 176; *Brooks v. Rochester R. Co.*, 156 N. Y. 244, 4 Am. Neg. Rep. 426; *McCracken v. Smathers*, 122 N. C. 799; *Knittel v. Schmidt*, 16 Tex. Civ. App. 7; *Vicksburg, etc. R. Co. v. Putnam*, 118 U. S. 545, 10 Am. Neg. Cas. 574, 30 L. ed. 257; *Washington G. R. Co. v. Patterson*, 9 App. Cas. (D. C.) 423; *Denver v. Hyatt*, 28 Colo. 129, 403; *McCullough v. Illinois S. Co.*, 148 Ill. App. 566.

Under a statute providing that any person who shall receive bodily injury or damage in his person or property through a defect in a highway may recover the amount of actual damages sustained by him by reason thereof, there cannot be a recovery for loss of time where the injury was to property. *Pearson v. Spartanburg County*, 51 S. C. 480.

The phrases "loss of time" and "diminished capacity to labor" are not equivalent to the extent that one wholly includes the other; hence a recovery for both is not objectionable on the ground that it is double. *Knittel v. Schmidt*, 16 Tex.

Civ. App. 7, 10; *Gulf, etc. R. Co. v. Warner*, 22 Tex. Civ. App. 167; *Galveston, etc. R. Co. v. Lynch*, 22 Tex. Civ. App. 336. See *Birmingham Railway, Light & Power Co. v. Colbert*, — Ala. —, 67 So. 513.

Inability to pursue the course in life the plaintiff might have chosen is included in the rule which permits recovery for diminished capacity to labor and earn money. *Missouri, etc. R. Co. v. Nesbit*, 40 Tex. Civ. App. 209.

Where damages are claimed for loss of time and inability to transact business there should be some evidence concerning the occupation, the earning capacity, and value of the time and services. *Hatcher v. Quincy Horse Railway & Carrying Co.*, 181 Ill. App. 30.

The recovery for decreased earning capacity in case of permanent injury should be restricted to nominal damages, unless the evidence affords data wherefrom compensatory damages may be estimated. *Birmingham Railway, Light & Power Co. v. Colbert*, — Ala. —, 67 So. 513; *Sloss-Sheffield Steel & Iron Co. v. Dunn*, 9 Ala. App. 524.

²⁹ *Cook v. Danaher L. Co.*, 61 Wash. 118.

capacity to earn in the future they should be further instructed that the value of plaintiff's time which he may lose in the future should be estimated on the basis of what he may be able to earn in his crippled condition.³⁰ If the injured person was under employment at fixed wages or salary the amount of loss during a reasonable term of engagement, or the temporary duration of such disability, may be readily determined,³¹ if the circumstances are not such as to permit of collusion between employer and employee, as where a husband is employed by his wife to take charge of a store for her. In such a case evidence to show the volume of the business done and the usual compensation paid in the neighborhood for such services as the husband rendered is admissible.³² Where the injured party was not employed at a fixed compensation but was conducting a business, the extent and nature of it may be shown; and in many cases, as when professional men and other laborers have an established patronage, their antecedent pecuniary rewards. These facts are not shown as affording a measure of damages, but to aid the jury in estimating a fair and just compensation for being prevented by the injury from engaging in or prosecuting such business or work.³³ If the plaintiff's earnings are

³⁰ *Missouri, K & T. Ry. Co. of Texas v. Beasley*, — Tex. Civ. App. —, 162 S. W. 950.

³¹ *Chicago Con. T. Co. v. Schritter*, 222 Ill. 364; *Bradenburg v. Ottawa E. R. C. Co.*, 19 Ont. L. R. 34; *Mauerman v. St. Louis, etc. R. Co.*, 41 Mo. App. 348; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Braithwaite v. Hall*, 168 Mass. 398.

If the injury has not prevented the plaintiff from working, but merely lessened his ability to work, the value of his time may be proven. *Baxter v. Chicago, etc. R. Co.*, 87 Iowa 488.

Expenses not connected with the plaintiff's employment are not to be regarded in ascertaining the difference between the wages he was

capable of earning before and after he was injured. *Missouri, etc. R. Co. v. Dickson*, 40 Tex. Civ. App. 550.

³² *McKenna v. Citizens' N. G. Co.*, 201 Pa. 146.

³³ *Hopkins v. Chicago City R. Co.*, 178 Ill. App. 656; *Stanley v. Taylor*, 160 Iowa 427; *Mitchell v. Chicago, etc. R. Co.*, 138 Iowa 283; *Alabama, etc. R. Co. v. Varbrough*, 83 Ala. 238, 3 Am. St. 715; *Carthage T. Co. v. Andrews*, 102 Ind. 138, 52 Am. Rep. 653; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 443; *Stafford v. Oskaloosa*, 64 Iowa 251; *Joslin v. Grand Rapids I. Co.*, 53 Mich. 322; *Griveaud v. St. Louis C. & W. R. Co.*, 33 Mo. App. 458, 466; *Alabama, etc. R. Co. v. Frazier*, 93 Ala. 45, 8 Am. Neg. Cas. 17; *Nebraska City*

the result of his personal skill and services the amount he has realized for a given time shows what he was worth to himself and what he was capable of earning, and affords the best basis from which the jury can estimate his loss from the inability to follow his vocation.³⁴ But this rule does not apply where his income

v. Campbell, 2 Black 590, 17 L. ed. 271; Atchison v. King, 9 Kan. 550; Nones v. Northouse, 46 Vt. 587; Ballou v. Farnum, 11 Allen 73; Wilson v. Young, 31 Wis. 574; Howes v. Ashfield, 99 Mass. 540; Tefft v. Wilcox, 6 Kan. 46; Lincoln v. Saratoga, etc. R. Co., 23 Wend. 425; Ransom v. New York, etc. R. Co., 15 N. Y. 415; Hill v. Winsor, 118 Mass. 251; Indianapolis v. Gaston, 58 Ind. 224; Morris v. Chicago, etc. R. Co., 45 Iowa 29, 11 Am. Neg. Cas. 536, 537; Clifford v. Dam, 44 N. Y. Super. Ct. 391; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434, 12 Am. Neg. Cas. 243, 97 Am. Dec. 722; Tomlinson v. Derby, 43 Conn. 562; Baldwin v. Western R. Co., 4 Gray 333; Jacques v. Bridgeport H. R. Co., 41 Conn. 61, 19 Am. Rep. 483; Rockwell v. Third Ave. R. Co., 64 Barb. 438, 53 N. Y. 625; Wade v. Leroy, 20 How. 34, 15 L. ed. 813; Potter v. Metropolitan R. Co., 28 L. T. (N.S.) 735; Ingram v. Lawson, 6 Bing. N. C. 212; Ripon v. Bittel, 30 Wis. 614, 617; Goodno v. Oshkosh, 28 id. 300; Rio Grande Western R. Co. v. Rubenstein, 5 Colo. App. 121, 9 Am. Neg. Cas. 125; Atlanta Con. St. R. Co. v. Beauchamp, 93 Ga. 6, 4 Am. Neg. Rep. 128; Broyles v. Prisoek, 97 Ga. 643, 11 Am. Neg. Cas. 333; Atlanta Consol. St. Ry. Co. v. Bates, 103 Ga. 333; Atchison, etc. R. Co. v. Chance, 57 Kan. 40; Chicago, etc. R. Co. v. Posten, 59 Kan. 449; Hickey v. New York Cent., etc. R. Co., 8 App. Div. (N. Y.) 123; Grinnell v. Taylor, 85 Hun 85, 92, 1 Am. Neg. Cas. 332;

Quinn v. O'Keefe, 9 App. Div. (N. Y.) 68, 75; Thomas v. Union R. Co., 18 App. Div. (N. Y.) 185; Wynne v. Atlantic Ave. R. Co., 14 N. Y. Misc. 394; Galveston, etc. R. Co. v. Cooper, 2 Tex. Civ. App. 42, 48, 6 Am. Neg. Cas. 624, citing the text; Illinois Cent. R. Co. v. Davidson, 22 C. C. A. 306, 76 Fed. 517, 7 Am. Neg. Cas. 449; Chicago, etc. R. Co. v. Scheinkoenig, 62 Kan. 57; Simpson v. Pennsylvania R. Co., 210 Pa. 101.

A jeweler may show the profits made during the months of the year preceding his injury and compare them with those of the months following. Chicago Union T. Co. v. Brethauer, 125 Ill. App. 204. See Chicago, etc. R. Co. v. Meech, 163 Ill. 310.

Where there is a clear disability the jury may award such sum for loss of past and future income as appears to them to be reasonable, irrespective of whether any definite income is proved or not, as such evidence is only a guide for the jury. Miller v. Delaware River Transp. Co., 85 N. J. L. 700.

³⁴ Stamp v. Abbott, 21 Pa. Dist. 629; Missouri, K. & T. Ry. Co. of Texas v. Beasley, 106 Tex. 171, 155 S. W. 183; Chicago Union T. Co. v. Brethauer, 223 Ill. 521, 114 Am. St. 352; Amann v. Chicago Con. T. Co., 148 Ill. App. 151; Sachra v. Manilla, 120 Iowa 562; Robinson v. St. Louis S. R. Co., 103 Mo. App. 110; Olin v. Bradford, 24 Pa. Super. Ct. 7; Ehr Gott v. Mayor, 96 N. Y. 264, 48 Am. Rep. 622; Waldie v.

has been made in trade or manufacturing, if the profits thereof are of such a nature that they are uncertain,³⁵ and unsafe as a

Brooklyn Heights R. Co., 78 App. Div. (N. Y.) 557; *Simoni v. New York, etc. R. Co.*, 36 Hun 214; *Parshall v. Minneapolis, etc. R. Co.*, 35 Fed. 649; *Wallace v. Pennsylvania R. Co.*, 195 Pa. 127, 52 L.R.A. 33, limiting observations made in *Goodhart v. Same*, 177 Pa. 1, 55 Am. St. 705; *Aiken v. Philadelphia*, 9 Pa. Super. Ct. 502; *Markowitz v. Metropolitan St. R. Co.*, 31 N. Y. Misc. 175.

One who fishes for a living may recover for the loss of time. *Lund v. Tyler*, 115 Iowa 236.

Loss of earning power may be shown by the existence of a fixed salary at a definite employment previous to the injury and incapacity to follow such employment thereafter. *Ruse v. Pittsburgh Rys. Co.*, 247 Pa. 295.

³⁵ *Walsh v. New York, etc. R. Co.*, 204 N. Y. 58, 37 L.R.A.(N.S.) 1137; *Chicago City R. Co. v. Flynn*, 131 Ill. App. 502; *Weir v. Union R. Co.*, 188 N. Y. 416; *Gombert v. New York Cent., etc. R. Co.*, 195 N. Y. 273, 133 Am. St. 794 (building contractor); *Kirk v. Seattle E. Co.*, 58 Wash. 283, 31 L.R.A.(N.S.) 991; *Wright v. Toronto R. Co.*, 20 Ont. L. R. 498; *Masterson v. Mount Vernon*, 58 N. Y. 391; *Marks v. Long Island R. Co.*, 14 Daly 61; *Bierbach v. Goodyear R. Co.*, 54 Wis. 208, 41 Am. Rep. 19; *Hewlett v. Brooklyn Heights R. Co.*, 63 App. Div. (N. Y.) 423; *Chicago, etc. R. Co. v. Posten*, 59 Kan. 449; *Blute v. Third Ave. R. Co.*, 29 App. Div. (N. Y.), 388; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. 1, 55 Am. St. 705; *Lombardi v. California St. R. Co.*, 124 Cal. 311; *Silshy v. Michigan C. Co.*, 95 Mich.

204, 16 Am. Neg. Cas. 84; *Pryor v. Metropolitan St. R. Co.*, 85 Mo. App. 367, 372; *Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 39 L. ed. 1006. See *Pill v. Brooklyn Heights R. Co.*, 6 N. Y. Misc. 267, 6 Am. Neg. Cas. 75.

In *Heer v. Warren-S. A. P. Co.*, 118 Wis. 57, 14 Am. Neg. Rep. 657, it was held, by a majority of the court, proper for a merchant who was suing to recover for personal injuries to show the average annual profits of his business for ten years prior to his injury. Numerous cases are cited to show that it is competent for the plaintiff to prove his capacity to labor before his injury, and if his work consisted in the management of a business, the character and magnitude thereof; "not that the jury is to allow any loss of such profits as damages, but to consider them, with other elements, as descriptive of the amount and grade of the services of which the injured man was capable. When that is ascertained the jurymen are to apply their judgment and common knowledge in deciding what money-earning capacity results from the ability to render such services." The holding of the court is probably not to be taken as favoring the view that the loss of earning capacity was to be measured by the profits made in the plaintiff's business, it being said in the opinion that the jury were not authorized to allow any damage by reason of lost or diminished profits, but merely for loss of earnings, and the verdict was taken as not having been rested on the evidence concerning loss of profits. The dissenting opinion of Marshall, J., is valuable

basis upon which to compute compensation for future disability. It has been said that "in no case has it been permitted, where the profits of business arise from the investment of capital, that evidence of such profits should be offered for the purpose of enhancing damages. It is only in cases where the earnings proceed entirely from the plaintiff's labor that the evidence" of them becomes admissible.³⁶ In determining whether a given case is within the rule the amount of the capital invested in the business conducted by the plaintiff is a material factor. In a recent case in the New York court of appeals these facts appeared: The plaintiff was engaged in canvassing for goods. His capital was about one thousand dollars; his office expenses about six hundred dollars a year; net income about three thousand dollars a year. It was said: The income as compared with capital is, of itself, an almost conclusive argument against the theory that the plaintiff was engaged in a business which yielded profits from capital invested. It will readily be seen that the investment of capital was a mere incident to the performance of services almost, if not quite, purely personal in their nature.³⁷ In the former

because of the collection of authorities and the vigor of the argument. The significance of the ruling lies in the fact that no other evidence than that indicated was before the jury as a basis upon which to assess damages for the plaintiff's future disability. Where the action is to recover for past disability only, the objections to such testimony are much less weighty and may not exist in many cases. See *Muench v. Heinemann*, 119 Wis. 441, 15 Am. Neg. Rep. 221.

The opinion of the majority of the court is approved in *Mitchell v. Chicago, etc. R. Co.*, 138 Iowa 283.

The profits made in conducting a pool room have been shown. *Frior v. Taylor*, 116 Md. 69.

Evidence of profits is not compe-

tent unless it has a substantial basis on which to rest. *Lehman v. Amsterdam C. Co.*, 146 Wis. 213.

³⁶ *Johnson v. Manhattan R. Co.*, 52 Hun 111, 9 Am. Neg. Cas. 605; *York v. Everton*, 121 Mo. App. 640; *Wright v. Toronto R. Co.*, 20 Ont. L. R. 498. See *People's P. R. Co. v. Lauderbach*, 4 Penny. (Pa.) 406, 10 Am. Neg. Cas. 109.

³⁷ *Kronold v. New York*, 186 N. Y. 40, 20 Am. Neg. Rep. 690; *Pill v. Brooklyn Heights R. Co.*, 6 N. Y. Misc. 267, 148 N. Y. 747. In *Ehrigott v. Mayor*, 96 N. Y. 264, 48 Am. Rep. 642, the cases of lawyers, physicians and dentists are put as illustrations of the rule that the investments they necessarily make do not prevent proof of their incomes as personal earnings. Han-

class of cases the recovery must be based on the value of the plaintiff's services in conducting the business with which he was connected.³⁸

Where the earnings of the plaintiff have been the reward of his personal skill the proof that future earnings will correspond to those previously received need not be very cogent in order that an award of damages, based on past earnings, may be sustained.³⁹ In *Phillips v. London, etc. R. Co.*, the plaintiff, a physician with a lucrative practice, as well as with a considerable income independently of it, recovered a verdict for 7,000*l.*, which was set aside and a new trial granted on the ground that the award was insufficient.⁴⁰ On a retrial the verdict was for 16,000*l.*, and was sustained. One of the principal elements of damage was the inability of the plaintiff to pursue his profession. For three years preceding the accident his net earnings had been about 5,000*l.* a year. It was contended that because of peculiar circumstances, the nature of which the following quotation from the summing up of Lord Coleridge, C. J., will disclose, that such earnings could not be considered in estimating damages. "But then it is said that is too much, because some of these are large payments which have come from nine clients, and in the nature of things it is not likely that these sums will recur. This 1,300*l.* from one person in three years, that 400*l.* from another in two years, and nearly 500*l.* from another in three, all these and other sums are not likely to recur. I do not see at all why the confidence of the gentlemen who made these large payments should diminish, or their generosity either, and I do not quite see why, in the class of patients this gentleman had, people who send 1,000*l.*, and 500*l.*, and so on (5,000*l.* in one case) to their doctor, with-

over *R. Co. v. Coyle*, 55 Pa. 396, is in accord with the principal case.

³⁸ *Lombardi v. California St. R. Co.*, *Silsby v. Michigan C. Co.*, 16 Am. Neg. Cas. 84; *Pryor v. Metropolitan St. R. Co.*; *Mitchell v. Chicago, etc. R. Co.*, *supra*.

³⁹ *Southwestern R. Co. v. Vellines*, 14 Ga. App. 674, citing the text.

Thus, a traveling salesman working on a commission basis may show his average earnings during a similar period of a year prior to that in which he was disabled, to show his earning capacity and the value of lost time. *Id.*

⁴⁰ 4 Q. B. Div. 406, 5 id. 78.

out inquiry, to pay for the number of visits that had been made. I do not see why the same gentleman should not pay 5,000*l.* over again. * * * It is a lucky thing, if Dr. Phillips should recover, that his practice is among patients who do not care about money. I do not really see why these should be the only people in the world who do these things, and who will continue to do them, and why, if they cease to do so, they should not be succeeded by others equally generous; but you must give it such weight as you think fit." The court of appeal did not find anything in these observations which authorized it to interfere with the judgment.⁴¹

It is said in an Iowa case⁴² that the damages for future disability are to be measured by the facts as they exist at the time the injury is sustained. This observation was not called for by the question before the court, which involved the admissibility of evidence to show that the plaintiff was in the line of promotion and that if promoted his earnings would be increased. Such evidence has been held inadmissible.⁴³ The capacity of the plaintiff to earn money is not to be measured by the employment he was engaged in at the time his right of action accrued; he may show he was able to earn more money at some other calling,⁴⁴ but the proof must be clear and not conjec-

⁴¹ 42 L. T. Rep. 6.

⁴² *Brown v. Chicago, etc. R. Co.*, 64 Iowa 652, 14 Am. Neg. Cas. 654, 655. See *Rapson v. Cubitt*, 1 Car. & M. 64, to the effect that it cannot be assumed that the plaintiff would have remained all his life in the position held when the injury was sustained.

⁴³ *Richmond & D. R. Co. v. Allison*, 86 Ga. 145, 11 L.R.A. 43; *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569 (in the absence of a rule that promotion would follow a vacancy).

⁴⁴ *Escher v. Carroll County*, 159 Iowa 627; *Central R. Co. v. Mote*, 131 Ga. 166; *Hughes v. Harbor & S. B. & S. Ass'n*, 131 App. Div. (N. Y.) 185; *Olin v. Bradford*, 24 Pa. Super. Ct. 7; *Rayburn v. Central*

Iowa R. Co., 74 Iowa 637, 14 Am. Neg. Cas. 680; *Trott v. Chicago, etc. R. Co.*, 115 Iowa 80; *McCullough v. Illinois S. Co.*, 148 Ill. App. 566.

It was held by the Iowa court in a later case that the true measure of damages was the impairment of ability to earn money generally, irrespective of the actual employment at the time of the injury, although the employment at such time and the wages earned therefrom could be considered, in estimating the damages. *O'Connell v. City of Davenport*, 164 Iowa 95.

And, regardless of evidence on the subject, it seems, the jury are not bound to estimate the income of which the plaintiff was probably deprived at the figure it was before

tural.⁴⁵ It is also competent for the plaintiff to show impairment of ability to work at a regular trade or business as well as impairment of ability to earn money at the particular line of work he was engaged in at the time of the injury.⁴⁶ Requests to give instructions, which ignored the plaintiff's power to acquire, but for the wrong done him, the mental or physical capacity to do more profitable work than he was able to do at the time, have been properly refused.⁴⁷ But in order that this question shall be considered by the jury there must be some evidence bearing upon it,⁴⁸ as that the plaintiff was fitting himself for a particular vocation for which the injury incapacitated him.⁴⁹ He may show he was competent to earn more money than he was earning when injured,⁵⁰ and that prospects of promotion were

the injury. *Haskett v. Chicago, etc. R. Co.*, 170 Ill. App. 140; *Davidson v. Montgomery Ward & Co.*, 171 id. 355.

Where the plaintiff was engaged in a new business, with opportunities for increasing his compensation by commissions as well as with chances of increase in salary, the court said: His earning power is not necessarily confined to, and to be measured absolutely by, the bare wages he was receiving at the time of the accident. *Miller v. Rhode Island Co. (R. I.)*, 82 Atl. 787. But a recovery has been confined to the wages fixed upon, excluding commissions which might have been earned in addition thereto. *Hass v. St. Louis, etc. R. Co.*, 128 Mo. App. 79.

⁴⁵ *Helmstetter v. Pittsburgh Rys. Co.*, 243 Pa. 422.

⁴⁶ *Evansville Furniture Co. v. Freeman*, 57 Ind. App. 576. See also *Marietta Glass Mfg. Co. v. Bennett*, — Ind. App. —, 106 N. E. 419.

Evidence as to the impaired ability of the plaintiff to earn money in some lines of business as a re-

sult of an accident is not necessarily overcome by proof that he has received his regular pay from his employer during the term of his disability and that since resuming his duties he has received a higher salary than before the accident. *Gulf, C. & S. F. Ry. Co. v. McKinnell*, — Tex. Civ. App. —, 171 S. W. 1091; *Gulf, C. & S. F. Ry. Co. v. McKinnell*, — Tex. Civ. App. —, 173 S. W. 937.

⁴⁷ *Houston, etc. R. Co. v. Boehm*, 57 Tex. 152; *Union Pac. R. Co. v. Young*, 19 Kan. 488, 15 Am. Neg. Cas. 127. See *St. Louis, etc. R. Co. v. Rogers*, 93 Ark. 564; *Warren, etc. R. Co. v. Waldrop*, 93 Ark. 127.

⁴⁸ *Georgia, etc. R. Co. v. Wright*, 130 Ga. 696; *Georgia C. O. Co. v. Jackson*, 112 Ga. 620; *Gulf, etc. R. Co. v. Gordon*, 70 Tex. 80.

⁴⁹ *Howard O. Co. v. Davis*, 76 Tex. 630, 17 Am. Neg. Cas. 615.

⁵⁰ *Chicago, etc. R. Co. v. Long*, 26 Tex. Civ. App. 601; *Schaufele v. Central R. Co.*, 6 Ga. App. 660.

It has been held that the test should be the earning capacity of the plaintiff rather than the compensation received when he was in-

open to him in a line of work in which he was experienced,⁵¹ or that he was fitting himself for a more profitable employment.⁵² It has been ruled that damages cannot be recovered because the disability bars the plaintiff from following a particular pursuit, aside from his vocation, unless he had earned money therein.⁵³ A more liberal view has been favored in some cases. Where the plaintiff was incapacitated from pursuing his musical studies the court said it was a matter of no little importance, and was proper for the consideration of the jury in awarding compensation;⁵⁴ and in another case it was held proper to consider the effect of the injury upon the voice of a person who was having it trained.⁵⁵ The possibility that an injured person who is disabled from performing manual labor may engage in intellectual pursuits and thereby increase his earnings does not affect his right to recover for diminished earning power in his chosen calling.⁵⁶ Where the leader of a theatrical troupe was injured on a train upon which the troupe was traveling the damage included the cost of maintaining himself and the troupe while he was disabled, the wages he paid and the value of the time he lost.⁵⁷ The allowance for loss of time must be limited to that for which the defendant was responsible. If illness followed the injury, and was not caused by it, there cannot be a recovery for loss of time resulting therefrom.⁵⁸ The damages

injured; such capacity may exist though the plaintiff was not then employed. *Southern Bell Tel. & T. Co. v. Shamos*, 12 Ga. App. 463.

⁵¹ *Myhra v. Chicago, etc. R. Co.*, 62 Wash. 1.

In an action by a minor the jury may consider the reasonable prospects of an increase in his earnings if he had not been injured though there is no evidence on the subject. *Betts v. Hancock*, 139 Ga. 198; *Buckry-Ellis v. Missouri Pac. R. Co.*, 158 Mo. App. 499; *Ferrier v. Schoenberg M. Co.*, 158 Mo. App. 533.

⁵² *St. Louis, etc. R. Co. v. Brogan*, 105 Ark. 533.

⁵³ *Freeland v. Brooklyn Heights R. Co.*, 54 App. Div. (N. Y.) 90, 8 Am. Neg. Rep. 526; *Atchison, etc. R. Co. v. Chance*, 57 Kan. 40.

⁵⁴ *Sceally v. Garratt*, 11 Cal. App. 138.

⁵⁵ *Rhinesmith v. Erie R. Co.*, 76 N. J. L. 783.

⁵⁶ *Ostrander v. Lausing*, 115 Mich. 224. Compare *Laird v. Chicago, etc. R. Co.*, 100 Iowa 336, 14 Am. Neg. Cas. 647.

⁵⁷ *Southern R. Co. v. Myers*, 32 C. A. 19, 87 Fed. 149.

⁵⁸ *Atchison, etc. R. Co. v. Rowe*, 56 Kan. 411, 15 Am. Neg. Cas. 133.

recoverable under these heads do not include injury to the plaintiff's professional reputation or the impairment of his social standing.⁵⁹ It is not sufficient reason for denying a recovery for loss of profits from a special contract made by the plaintiff with the proprietor of a theatre to perform as "a burlesque opera bouffe artist," that such performance required the artist to "show her limbs in silk stockings." The rights of those who earn their living in that way cannot be outlawed.⁶⁰

The possibility of the loss of earning power by a married woman in case she survives her husband is too remote a contingency to be considered in awarding her damages for a personal injury.⁶¹ Minors and married women whose only occupation is that of housekeeping and whose time belongs to their parents or husbands cannot recover for loss of earning capacity;⁶² but a child of ten years has been held entitled

⁵⁹ *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195.

⁶⁰ *Baumeister v. Markham*, 101 Ky. 122, 141, 72 Am. St. 397.

⁶¹ *Johnston v. New York & L. B. R. Co.*, 65 N. J. L. 421.

⁶² *Orr v. Wahlfeld Mfg. Co.*, 179 Ill. App. 235; *Farrar v. Wheeler*, 75 C. C. A. 386, 145 Fed. 482; *Donk C. & C. Co. v. Retzlloff*, 229 Ill. 194; *Richardson v. Nelson*, 221 Ill. 254, 20 Am. Neg. Rep. 297, 123 Ill. App. 550; *Wilder v. Great Western C. Co.*, 134 Iowa 451; *Andrews v. Chicago, etc. R. Co.*, 129 Iowa Iowa 162, 19 Am. Neg. Rep. 225; *Cincinnati, etc. R. Co. v. Troxell*, 143 Ky. 765; *Harris v. Crawley*, 161 Mich. 383, 4 N. C. C. A. 48; *Galveston, etc. R. Co. v. Jackson*, 31 Tex. Civ. App. 342; *Comer v. Ritter L. Co.*, 59 W. Va. 688, 6 L.R.A.(N.S.) 552; *Kruck v. Wilbur L. Co.*, 148 Wis. 76; *Stewart v. Ripon*, 38 Wis. 584; *Jordan v. Bowen*, 46 N. Y. Super. Ct. 355; *Gulf, C. & S. F. R. Co. v. Evansich*, 63 Tex. 54; *Texas & P. R. Co. v. Morin*, 66 id. 225; *Swift v. Holoubek*, 55 Neb.

228; *Clark Mile-End S. C. Co. v. Shaffery*, 58 N. J. L. 229, 16 Am. Neg. Cas. 716; *Gulf, etc. R. Co. v. Johnson*, 91 Tex. 569; *Atlanta & W. P. R. Co. v. Smith*, 94 Ga. 107; *Western U. Tel. Co. v. Woods*, 88 Ill. App. 375; *Baer v. Heffinger*, 152 Wis. 558; *Chicago City R. Co. v. Schefer*, 121 Ill. App. 334; *Bowe v. Bowe*, 26 Ohio C. C. 409; *Porter v. Delaware, etc. R. Co.*, 134 Fed. 155. *Contra*, under a statute. *Roberts v. Detroit*, 102 Mich. 64, 27 L.R.A. 572; *Lorf v. Detroit*, 145 Mich. 265; *Ferreira v. Diller*, 176 Ill. App. 447; *Warth v. Jackson County Court*, 71 W. Va. 184; *Denver, etc. R. Co. v. Young*, 30 Colo. 349; *Newell v. St. Louis T. Co.*, 108 Mo. App. 530; *Skow v. Green Bay & W. R. Co.*, 141 Wis. 21; *Atchison, etc. R. Co. v. McGinnis*, 46 Kan. 109; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47; *Minick v. Troy*, 19 Hun 253; *Reynolds v. Robertson*, 64 N. Y. 589; *Blacchinska v. Howard Mission, etc.*, 130 N. Y. 497, 15 L.R.A. 215; *Thomas v. Brooklyn*, 58 Iowa 438; *Fife v. Oshkosh*, 89

to recover for such loss.⁶³ A minor who has no parents and no one standing in *loco parentis* to him may recover for the loss of his time and decreased earning capacity;⁶⁴ as may one who has been turned loose by his only surviving parent to earn his living.⁶⁵ The emancipation of a minor removes the disability he was under in this respect;⁶⁶ and emancipation will be inferred from the fact that the father permitted the son to make contracts for his labor and to collect his earnings.⁶⁷ By individually participating in the

Wis. 540 (unless she was doing business in her own right, independently of her husband); Becker v. Albany R., 35 App. Div. (N. Y.) 46; Hall v. Manson, 90 Iowa 585; Frohs v. Dubuque, 109 Iowa 219; Holton v. Hicks, 9 Kan. App. 179, 186; Plummer v. Milan, 70 Mo. App. 598; Wallis v. Westport, 82 id. 522.

It is otherwise where a minor is residing with one under no obligation to support him. Ft. Worth St. R. Co. v. Witten, 74 Tex. 202.

It is held in Kansas that primarily the right to compensation for loss of time and expenses belongs to the child; it is a part of his capital with which to procure his maintenance, support and education. But as the parent, as his guardian or trustee, is responsible for all these, he or she is allowed to recover such compensation. This is a privilege which may be waived, and it is waived where the parent commences the action to recover such compensation in the name of and as the next friend of the child. Abeles v. Bransfield, 18 Kan. 16. In this case the mother was the only surviving parent. The petition claimed compensation for loss of time. To the same effect is Chesapeake & O. R. Co. v. Davis, 119 Ky. 641.

Suth. Dam. Vol. IV.—66.

The father of a minor estops himself from claiming the benefit of the latter's services by suing as his next friend and claiming damages therefor; hence they may be recovered in such action. American C. & F. Co. v. Hill, 226 Ill. 227. In Texas such effect does not follow unless the pleadings indicate an intention that it should. Texas & P. R. Co. v. Morin, 66 Tex. 225.

⁶³ Delaware, etc. R. Co. v. Devore, 52 C. C. A. 77, 114 Fed. 155, 15 Am. Neg. Rep. 701.

If the parents or one of them permits suit to be brought in the infant's name by himself or herself and acquiesces in the demand for the recovery of future earnings, the right of the parents or either of them thereto is relinquished. Chicago S. Co. v. Weiss, 203 Ill. 536; American C. & F. Co. v. Hill, 226 Ill. 227; Orr v. Wahlfeld Mfg. Co., *supra*.

⁶⁴ Manufacturers' F. Co. v. White, 228 Ill. 187; Lynchburg C. Mills v. Stanley, 102 Va. 590, 16 Am. Neg. Rep. 145.

⁶⁵ Gulf C. Co. v. Abernathy, 54 Tex. Civ. App. 137.

⁶⁶ Central R. Co. v. McNab, 150 Ala. 332.

⁶⁷ Donk C. & C. Co. v. Retzloff, 133 Ill. App. 277.

action of a minor for injuries sustained his parents estop themselves from recovering for his lessened earning capacity during minority; and he may recover therefor.⁶⁸ A minor suing to recover for a permanent injury may show what he was earning when injured as a basis upon which the jury may fix his damages.⁶⁹ Under the statutes of some states married women may earn wages, and if injured can recover according to the same criterion of compensation as a man or an unmarried woman.⁷⁰ It is immaterial, so far as her earnings are concerned, what use was made of them.⁷¹ Where the earnings of a married woman

⁶⁸ *Ballentine v. Illinois Cent. R. Co.*, 157 Ill. App. 295.

⁶⁹ *McClain v. Lewiston Interstate F. & R. Ass'n*, 17 Idaho 63.

⁷⁰ *Cumberland Tel. & T. Co. v. Overfield*, 127 Ky. 548; *South Covington & C. St. Ry. Co. v. Bolt*, 22 Ky. L. Rep. 906; *Nelson v. Metropolitan St. R. Co.*, 113 Mo. App. 459.

Under a statute giving a married woman authority to carry on business as a *feme sole* and to appropriate the proceeds of her labor a loss of earning capacity incident to a personal injury is a loss for which she may recover. *Texas & P. R. Co. v. Humble*, 38 C. C. A. 502, 97 Fed. 837; *Sanborn, C. J.*, dissenting. Such seems to be the rule under similar statutes. *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 352; *Harmon v. Old Colony R. Co.*, 165 Mass. 100, 30 L.R.A. 658, 52 Am. St. 499; *Jordan v. Middlesex R. Co.*, 138 Mass. 425; *Smith v. Chicago & A. R. Co.*, 119 Mo. 246, 252, 4 Am. Neg. Cas. 746. In his dissenting opinion Judge Sanborn says these authorities seem to rest on a supposed distinction between loss of service and diminution of the capacity to labor, and to hold that the husband may recover for the former and the wife for the latter; but

there is and can be no practical distinction between them. The loss of service is the measure of the impairment of the capacity and the proof of it, and to permit the husband to recover for the loss of service and the wife for impairment of capacity to render it is to allow two recoveries for the same damages. See *Blaechinska v. Howard Mission*, 130 N. Y. 497, 15 L.R.A. 215.

Under a statute empowering a married woman to do business on her own account, if her labor is intended to aid the husband in the support of the family, the loss of it must be recovered for by him. *Plummer v. Milan*, 70 Mo. App. 598.

A married woman who is earning a livelihood may recover for loss of earning capacity. *Patterson v. Springfield Traction Co.*, 178 Mo. App. 250.

In Illinois loss of time by a married woman is an element of damages in an action by her. *West Chicago St. R. Co. v. Carr*, 170 Ill. 478.

If the husband is not entitled to his wife's services the complaint by her must allege the fact. *Uransky v. Dry D. Co.*, 118 N. Y. 304, 16 Am. St. 759.

⁷¹ *Hendricks v. St. Louis T. Co.*, 124 Mo. App. 157.

and property purchased therewith are hers she may, either in an action by her or in a joint action with her husband, recover for the impairment of her capacity to conduct business.⁷² A wife who has been abandoned by her husband may recover for the loss of her separate earnings;⁷³ and if she supports herself may recover if a contract between her and her husband so provides.⁷⁴ Independently of statutes, the impairment of the power of a married woman to work is an injury to her personal rights wholly apart from any pecuniary benefit the exercise of the right might bring, and if her ability to do so has been lessened by the injury sustained she may recover,⁷⁵ regardless of whether the right to work was exercised or not.⁷⁶

A father may recover for the loss of the services of an adult married daughter who was a member of his household and who had been carnally assaulted.⁷⁷ An injured person may recover for lost time though he was not employed when injured; it will not be presumed he would have remained idle.⁷⁸ "The ability of a person to care for himself and the practice of doing so, instead of hiring the services of others, gives a value to his time, even if he is earning nothing, and, if so, the deprivation of such ability by the wrongful act of another imposes upon the wrongdoer the obligation to compensate him for the value of the time he can no longer employ in his own service."⁷⁹ The right to recover is not affected by an adjudication of the plaintiff's

⁷² *Normile v. Wheeling T. Co.*, 57 W. Va. 132, 68 L.R.A. 901.

⁷³ *Becker v. Lincoln R. E. Co.*, 118 Mo. App. 74.

⁷⁴ *Boyle v. Saginaw*, 124 Mich. 348, and local cases cited. See *Bailey v. Centerville*, 108 Iowa 20, 26.

Such contracts are not valid everywhere. *Blaechinska v. Howard Mission*, 130 N. Y. 497, 15 L.R.A. 215.

⁷⁵ *Perrigo v. St. Louis*, 185 Mo. 274; *Colorado Springs & I. R. Co. v. Nichols*, 41 Colo. 272, 20 L.R.A. (N.S.) 215; *Gagnon v. Klauber-W.*

D. Mach. Co., 174 Fed. 477; *Cubbage v. Estate of Youngerman*, 155 Iowa 39; *Cullar v. Missouri, etc. R. Co.*, 84 Mo. App. 340; *Becker v. Lincoln R. E. Co.*, 118 Mo. App. 74; *Perrigo v. St. Louis*, 185 Mo. 276.

⁷⁶ *McNeil v. Cape Girardeau*, 153 Mo. App. 424; *Millmore v. Boston E. R. Co.*, 198 Mass. 370.

⁷⁷ *Palmer v. Baum*, 123 Ill. App. 584.

⁷⁸ *Missouri, etc. R. Co. v. Flood*, 35 Tex. Civ. App. 197, 17 Am. Neg. Rep. 673.

⁷⁹ *Kline v. Santa Barbara C. R. Co.*, 150 Cal. 741.

bankruptcy after his injury.⁸⁰ A double recovery is authorized by a charge which specifies as elements of damages in favor of a minor the capacity to earn money during his life after attaining majority and also his power or capacity to pursue the course of life he might have thereafter pursued but for the injury.⁸¹ The rule that the damages recoverable should not exceed the amount upon which the legal interest would equal the value of the injured party's past and probable future earnings has no application to a plaintiff suing for an injury to himself; it is only applied in actions to recover for the death of the party injured.⁸² The expense necessarily incurred by a disabled person in procuring competent help to carry on his business and do the work which he would have performed but for the disability may be recovered.⁸³ The probability of the early death of the injured person does not affect the recovery for lessened capacity; that is measurable by the present value of his earnings during his life expectancy if there had been no injury.⁸⁴ A person incapacitated from making use of his property with which he earned his livelihood may show that he sold it at less than its value.⁸⁵ A recovery for lost time covers the expense of living during the period of disability unless such expense was increased by the injury;⁸⁶ to the extent it was increased there may be a recovery.⁸⁷

⁸⁰ *Sibley v. Nason*, 196 Mass. 125, 12 L.R.A.(N.S.) 1173, 124 Am. St. 520.

⁸¹ *Stamford O. M. Co. v. Barnes*, 55 Tex. Civ. App. 420; *International, etc. R. Co. v. Butcher*, 98 Tex. 462; *Missouri, etc. R. Co. v. Nesbitt*, 40 Tex. Civ. App. 209.

⁸² *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 2 Am. Neg. Cas. 196, 17 L.R.A. 71; *Morrison v. Long Island R. Co.*, 3 App. Div. (N. Y.) 205; *Gregory v. New York, etc. R. Co.*, 55 Hun 303, 9 Am. Neg. Cas. 585. See *Rooney v. New York, etc. R. Co.*, 173 Mass. 222, 6 Am. Neg. Rep. 78; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. 1, 55 Am. St. 705.

⁸³ *North Chicago St. R. Co. v.*

Zeiger, 182 Ill. 9, 74 Am. St. 157, 78 Ill. App. 463; *Ashcraft v. Chapman*, 38 Conn. 230; *Olin v. Bradford*, 24 Pa. Super. Ct. 7; *Willis v. Second Ave. T. Co.*, 189 Pa. 430, 5 Am. Neg. Rep. 245. See *Kendall v. Albia*, 73 Iowa 241, and § 1248.

⁸⁴ *Prairie Creek C. M. Co. v. Kittrell*, 106 Ark. 138.

⁸⁵ *Beebe v. Greene*, 34 R. I. 171.

⁸⁶ *Graeber v. Derwin*, 43 Cal. 495.

Evidence that a sick person is kept and cared for at a private house other than at his home justifies a finding that he is there upon expense. *McGarrahan v. New York, etc. R. Co.*, 171 Mass. 211.

⁸⁷ *Irrgang v. Ott*, 9 Cal. App. 440.

§ 1247. **Same subject; pleading.** Loss of earnings is a kind of damage which is not regarded as a necessary consequence of such acts as are usually involved in actions to recover for personal injuries of a temporary nature and is not generally covered by the usual allegation of damages.⁸⁸ The adjudications are not in accord as to the particularity with which such loss must be pleaded. An allegation that the plaintiff was injured to such extent as to cause great pain and suffering states an impairment of his general capacity to labor;⁸⁹ and so of an allegation that the plaintiff has been deprived of the means of his support.⁹⁰ A general allegation of permanent disability to labor by reason of the injuries complained of embraces such a claim for damages.⁹¹ The use of language in the past tense does not make it

⁸⁸ *Farrington v. Cheponis*, 82 Conn. 258; *Jacksonville E. Co. v. Batches*, 54 Fla. 192; *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455, 464, 9 Am. Neg. Cas. 537, 10 L.R.A. 36; *Pryor v. Metropolitan St. R. Co.*, 85 Mo. App. 367; *Paquin v. St. Louis & S. R. Co.*, 90 id. 118, 128, 13 Am. Neg. Rep. 582; *Krueger v. Chicago & A. R. Co.*, 94 Mo. App. 458; *Cincinnati, etc. R. Co. v. McElroy*, 146 Ky. 668, 2 N. C. C. A. 619; *Dunn v. Gunn*, 149 Ala. 583; *Blue Grass T. Co. v. Ingles*, 140 Ky. 488; *Wojtylak v. Kansas & T. C. Co.*, 188 Mo. 260; *Ingles v. Metropolitan R. Co.*, 145 Mo. App. 241; *Moellman v. Gieze-H. L. Co.*, 134 Mo. App. 485; *Gordon v. Northern Pac. R. Co.*, 39 Mont. 571; *Barron v. Same*, 16 N. D. 277; *Ft. Worth, etc. R. Co. v. Morrison* (Tex. Civ. App.), 129 S. W. 1157; *Lodwick L. Co. v. Taylor*, 39 Tex. Civ. App. 302. See *Texas & P. R. Co. v. Barnwell* (Tex. Civ. App.), 133 S. W. 527; *Campbell v. City of Chillicothe*, 175 Mo. App. 436.

⁸⁹ *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 352, 12 Am. Neg. Cas. 229; *Koehne v. New York, etc.*

R. Co., 32 App. Div. (N. Y.) 419; *Millmore v. Boston E. R. Co.*, 198 Mass. 370.

⁹⁰ *Smith v. Chicago & A. R. Co.*, 119 Mo. 246.

⁹¹ *Union Pac. R. Co. v. Shovell*, 39 Colo. 436; *Nashville, etc. R. Co. v. Miller*, 120 Ga. 453, 67 L.R.A. 87; *Terre Haute E. Co. v. Watson*, 33 Ind. App. 124; *Cutter v. Des Moines*, 137 Iowa 643; *Jordan v. Cedar Rapids, etc. R. Co.*, 124 Iowa 177; *Ingles v. R. Co.*, *supra*; *Hitchings v. Maryville*, 134 Mo. App. 712; *Goodloe v. Metropolitan St. R. Co.*, 120 Mo. App. 194; *Brake v. Kansas City*, 100 Mo. App. 611; *San Antonio T. Co. v. Probandt*, 59 Tex. Civ. App. 265; *Loofbourow v. Utah L. & R. Co.*, 33 Utah 480, citing the text; *Bartley v. Forlicht*, 49 Mo. App. 214, 5 Am. Neg. Cas. 599; *Frobisher v. Fifth Ave. T. Co.*, 81 Hun 544; *Mabrey v. Cape Girardeau & G. R. Co.*, 92 Mo. App. 596; *San Antonio T. Co. v. Cassanova* (Tex. Civ. App.), 154 S. W. 1190.

All such damages as naturally and necessarily flow from the injuries alleged are general and need not be specially pleaded. So where

improper to permit the recovery of the value of lost time after the complaint was filed if it contains other supported allegations showing such loss after it was filed; there may be a recovery for the loss so sustained up to the time of the trial.⁹² In the case of a crippled minor damages may be recovered for the impairment of his capacity to earn a livelihood after he shall attain his majority though no specific allegation is made as to his inability to do so.⁹³ The *quantum* of damage arising from the loss of earnings need not be alleged;⁹⁴ but an allegation in respect to them limits the recovery.⁹⁵ Under an averment that the plaintiff was prevented from attending to his usual business and from earning and receiving large gains and profits evidence to show his income before and after the injury is proper, so far as that was not affected by any special engagement.⁹⁶ Proof of the loss of earnings may be made under an allegation that the plaintiff was compelled to remain away from his business for six weeks, deprived of the use of his foot and otherwise injured.⁹⁷ But an averment that the plaintiff was

it may be said that, in the common experience of men, pain, loss of time and diminished capacity will naturally and necessarily result from the character of the injuries received, specific allegations of them need not be made. *Greenville v. Branch* (Tex. Civ. App.), 152 S. W. 478.

⁹² *Lindsay v. Kansas City*, 195 Mo. 166; *Stutzke v. Consumers' I. & F. Co.*, 156 Mo. App. 1.

⁹³ *Schmitz v. St. Louis, etc. R. Co.*, 119 Mo. 256, 23 L.R.A. 250, 12 Am. Neg. Cas. 226; *Ferrier v. Shoenberg M. Co.*, 158 Mo. App. 533.

The recovery for lost time must be limited to the period alleged. *Louisville & N. R. Co. v. Moore*, 150 Ky. 692.

⁹⁴ *Gerdes v. Christopher & S. A. I. & F. Co.*, 124 Mo. 347, 369; *Cooney v. Southern E. R. Co.*, 80 Mo. App. 226; *Mabrey v. Cape Gi-*

ardeau, etc. Co., 92 Mo. App. 596; *Ft. Worth, etc. St. R. Co. v. Hawes*, 48 Tex. Civ. App. 487 (services of injured wife); *International, etc. R. Co. v. Cruseturner*, 44 Tex. Civ. App. 181.

⁹⁵ *Radtke v. St. Louis B. & B. Co.*, 229 Mo. 1; *Impkamp v. St. Louis T. Co.*, 108 Mo. App. 655.

⁹⁶ *Chicago Union T. Co. v. Bretbauer*, 223 Ill. 521, 114 Am. St. 352; *Moran v. New York City R. Co.* (Misc.), 94 N. Y. Supp. 302; *Chicago & E. R. Co. v. Meech*, 163 Ill. 305; *North Chicago St. R. Co. v. Brown*, 178 Ill. 187; *Illinois S. Co. v. Ryska*, 200 Ill. 280.

⁹⁷ *Carples v. New York & H. R. Co.*, 16 App. Div. (N. Y.) 158, 2 Am. Neg. Rep. 426; *Doherty v. Lord*, 8 N. Y. Misc. 227. See *Gurley v. Missouri Pac. R. Co.*, 122 Mo. 141; *Russell v. Metropolitan St. R.*

compelled to neglect his business is not equivalent to a statement that time or earnings were lost; it would not necessarily follow from it that his employer made any deduction from his wages or required the substitution of another in his place.⁹⁸

It is probably necessary to state any particular facts in the condition of the plaintiff which would afford a more precise measure or evidence of his loss than his general ability to earn money.⁹⁹ The fact that the injury disabled the plaintiff at the best season of the year for the practice of his specialty must be specially alleged.¹ In a Connecticut case,² under the allegation that in consequence of the injury the plaintiff was "prevented

Co., 35 N. Y. Misc. 293; Atlanta St. R. Co. v. Jacobs, 88 Ga. 647, 2 Am. Neg. Cas. 451.

⁹⁸ Keen v. St. Louis, etc. R. Co., 129 Mo. App. 301.

⁹⁹ Fuller v. Bowker, 11 Mich. 204; Silsby v. Michigan C. Co., 95 Mich. 204, 16 Am. Neg. Cas. 84; Chicago & E. R. Co. v. Meech, 163 Ill. 305; North Chicago St. R. Co. v. Barber, 77 Ill. App. 257. See Buckbee v. Third Ave. R. Co., 64 App. Div. (N. Y.) 360.

In the absence of a specific and direct averment that the plaintiff was a practicing physician and of the amount of damages sustained by the loss of his practice, if it is inferentially stated he was such and the petition counts specially on his loss of earnings as a physician, that element of damage is well pleaded. Mason v. St. Louis, etc. R. Co., 75 Mo. App. 1.

Under an allegation of special damages showing only loss of commissions from the plaintiff's employer at the time of the injury, he being the successor of a company for which the plaintiff had previously worked in the same capacity and under the same contract, evidence of his earnings while so employed is admissible. Illinois Cent.

R. Co. v. Davidson, 22 C. C. A. 306, 76 Fed. 517, 7 Am. Neg. Cas. 449.

It is said in Southern Pac. Co. v. Hall, 41 C. C. A. 50, 54, 100 Fed. 760, that an allegation that the plaintiff has been wholly deprived of earning wages by manual labor for his support was sufficient to admit evidence that he was a carpenter by trade and had been engaged in mining. "Moreover, in actions for personal injuries, the plaintiff, although there is no specific averment in his complaint as to his previous trade or calling, may introduce testimony as to what his business or occupation was, as such evidence is always material and pertinent upon the question of damages."

Under an allegation showing employment under a special contract the plaintiff may prove his past and probable future earnings and profits thereunder. Illinois Cent. R. Co. v. Rothschild, 134 Ill. App. 504.

¹ Louisville & N. R. Co. v. Reynolds, 24 Ky. L. Rep. 1402.

² Tomlinson v. Derby, 43 Conn. 562, approved, *arguendo*, in Luessen v. Oshkosh E. L. & P. & P. Co., 109 Wis. 94; Smith v. Whittlesey, 79 Conn. 189.

from attending to his ordinary business," evidence that he was at the time of the injury earning \$100 a month in carting and sawing timber was inadmissible. In another case³ it was held, under a like averment, that the plaintiff could not show any particular employment requiring special skill and training.⁴ This case and *Baldwin v. Western R. Co.* would seem to be in conflict with the numerous cases which hold that the injured party may show the nature and extent of the business he had been accustomed to do.⁵ If the petition claims damages for loss of time because of permanent disability (which is essential),⁶ as by alleging that the plaintiff will in future continue to suffer and lose health,⁷ the plaintiff may prove his skill as a mechanic, the employment he was engaged in and the wages received, though such facts were not alleged.⁸ But under an allegation that the plaintiff was an operator in a mill evidence of her ability to earn money as an accompanist on the piano is not relevant to show the extent of the injury.⁹ If the nature of the plaintiff's trade has "been specially stated and the effect

³ *Taylor v. Monroe*, 43 Conn. 36.

⁴ Citing 2 Greenlf. Ev., § 254; 1 Chitty's Pl. (4th ed.) 328, 346; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201; *Squier v. Gould*, 14 Wend. 159; *Baldwin v. Western R. Co.*, 4 Gray 333. The Connecticut cases cited, also the Massachusetts case and the New York case are followed in *Fitchburg R. Co. v. Donnelly*, 30 C. C. A. 580, 87 Fed. 135; *Wabash Western R. Co. v. Friedman*, 146 Ill. 583, is in accord with the cases cited.

Under an allegation that the plaintiff was greatly hindered and prevented from doing and performing his work and business and looking after and attending to his necessary affairs at home, there cannot be a recovery for the loss of hay ungathered because help could not be obtained to secure it. *Heiser v. Loomis*, 47 Mich. 16.

⁵ See § 1246, n. 33; *Moore v. Kalamazoo*, 109 Mich. 176.

"The rule is that under the plea of general damages and to prove a loss of earning capacity, it is permissible to show what wages, salary or emoluments would be open to the plaintiff in a business, vocation, trade or profession which he understands, and which he would have the right and ability to follow were it not for his incapacitating injuries." *Zibbell v. Southern Pac. Co.*, 160 Cal. 237.

⁶ *Houston & T. Cent. R. Co. v. Lindsey*, 51 Tex. Civ. App. 67.

⁷ *Hansell-E. F. Co. v. Clark*, 214 Ill. 399.

⁸ *Flanagan v. Baltimore & O. R. Co.*, 83 Iowa 639; *Lesser v. St. Louis & S. R. Co.*, 85 Mo. App. 326.

⁹ *Morris v. Winchester R. A. Co.*, 73 Conn. 680, 694.

also upon his ability to pursue it of the injuries received, nothing more was required to justify proof of the extent to which he was thus specially damaged, and in showing that it was proper to inquire what wages pattern-makers customarily received for the best-paying kind of work in that trade, and that he had previously been able and accustomed to do such work, but could no longer.”¹⁰ In Minnesota under a general allegation of damages proof may be made of the wages the plaintiff received before and after the injury, and that he received no more before and no less after than he was able to earn.¹¹

In *Luck v. Ripon*¹² objection was made on two grounds to proof of damage for injury to a woman in consequence of which she was unable to pursue her business of midwife: first, that the complaint failed to set out what the particular business of the plaintiff was; and second, she was not qualified to practice physic and surgery” so as to recover compensation for her services as such under a statute. Taylor, J., for the court, said of the first objection: “When the complaint states facts showing that the injury has been such as to render it impossible for the injured party to pursue his ordinary business and damages are claimed for loss of time in such business, the plaintiff should be permitted to show upon the trial what his business is and what damages he has suffered by reason of inability to pursue the same. Ordinarily the business of the plaintiff will be known to the defendant and he will not be surprised at the introduction of evidence upon that subject. If, however, the defendant has no knowledge of such business and desires to be informed thereof in order to be prepared for trial, he must move to make the complaint more definite and certain in that particular. He will not be justified in lying by until the trial and then claiming that he is unable to meet that issue for want of notice.”¹³ Of

¹⁰ *Finken v. Elm City B. Co.*, 73 Conn. 423.

¹¹ *Palmer v. Winona R. & L. Co.*, 78 Minn. 138, 83 Minn. 85.

¹² 52 Wis. 196.

An employee who has sustained injury through the negligence of his employer may recover on account of

pain, physical injury and decreased power to labor, although no proof has been made of the value of his services in any capacity. *Georgia Southern R. Co. v. Neel*, 68 Ga. 609, 14 Am. Neg. Cas. 218; *Augusta v. Owens*, 111 Ga. 464.

¹³ *Columbia, etc. R. Co. v. Haw-*

the second objection he said: "Without discussing the question whether a female who practices the business of a midwife is practicing 'physic or surgery' within the meaning of said section, it is sufficient answer to the objection, * * * first, that in this action the plaintiff is not seeking to recover any compensation for her services as a midwife; and second, that the statute does not make it unlawful to practice either physic or surgery without having a diploma. In pursuing her business as a midwife the plaintiff was violating no law of this state, but was pursuing a lawful and laudable business. If she earned and received money for her services, she had a perfect right to such money. If her injuries deprived her of the income she derived from such lawful employment, there does not seem to be any more reason for saying she has not been damaged by her injury to the extent she has been deprived of such income than there would be for saying that she had not been damaged if she had been deprived of an income as a teacher, artist, seamstress, or in any other lawful employment. The income of most men and women, whether professional or otherwise, does not depend in any great measure on the fact that they can enforce payment for services rendered by an action at law, but rather upon that sense of justice which in most men is more potent than the constraints of the law, that the laborer is worthy of his hire. It does not follow by any means that a man will not have any income in the pursuit of a lawful employment because he cannot enforce his claim to compensation for services by an action at law."¹⁴ It is necessary to allege the permanency of the injuries if a recovery is sought because of prospective loss of time.¹⁵ The recovery for loss of time is independent of the permanency of the injury, and may be in addition to the award for permanent or temporary impairment of earning power; but

thorne, 3 Wash. T. 353, 17 Am. Neg. Cas. 821; Flanagan v. Baltimore & O. R. Co., 83 Iowa 639; Frobisher v. Fifth Ave. T. Co., 81 Hun 544, 5 Am. Neg. Cas. 599; Union Pac. R. Co. v. Shovell, 39 Colo 436.

¹⁴ Holmes v. Halde, 74 Me. 28, 43 Am. Rep. 567; Phillips v. London, etc. R. Co., 42 L. T. Rep. 6; McNamara v. Clintonville, 62 Wis. 207.

¹⁵ Scott v. Chicago Great Western R. Co., 113 Iowa 381; Peterson v. Wadley, etc. R. Co., 117 Ga. 390.

the former should end when the latter begins, otherwise the damages will be duplicated.¹⁶

§ 1248. **Same subject; evidence.** All evidence tending to show the character of the plaintiff's ordinary pursuits, his ability to engage therein, and the extent to which the injury has and will prevent him from following them is admissible.¹⁷ In other words, the inquiry is as to the comparative capacity of the plaintiff to earn money at the time of and after the injury.¹⁸ He may show the character of the business he had established; that he gave it his personal attention and oversight, and the

¹⁶ *Blue Grass T. Co. v. Ingles*, 140 Ky. 488.

¹⁷ *Ridge v. Norfolk Southern R. Co.*, 167 N. C. 510; *Marien v. Walsh*, 64 Ore. 583; *District of Columbia v. Woodbury*, 136 U. S. 450, 459, 34 L. ed. 472, 475; *Birmingham R., L. & P. Co. v. Moore*, 148 Ala. 115; *City E. R. Co. v. Smith*, 121 Ga. 663; *Knox v. American R. M. Co.*, 236 Ill. 437, 127 Am. St. 291, quoting the text; *Graham v. Mattoon City R. Co.*, 234 Ill. 483, citing the text; *Flynn v. Chicago City R. Co.*, 158 Ill. App. 405; *Cleveland, etc. R. Co. v. Hadley*, 170 Ind. 204, 16 L.R.A. (N.S.) 527; *Palmer v. Cedar Rapids, etc. R. Co.*, 124 Iowa 424; *Dean v. Wabash R. Co.*, 229 Mo. 425; *Cole v. St. Louis T. Co.*, 183 Mo. 81; *Kirby v. St. Louis, etc. R. Co.*, 146 Mo. App. 304; *Eastwood v. Klammm*, 83 Neb. 546; *Brown v. Blaine*, 41 Wash. 287.

Though there is no allegation showing what the plaintiff's business is he may show his inability to do any business because such evidence tends to show the extent or permanent nature of his injury. *Denver City T. Co. v. Cowan*, 51 Colo. 64.

The plaintiff may testify whether he can attend to his duties as conveniently and agreeably as before

he was injured. *Dunn v. Gunn*, 149 Ala. 583.

But evidence that a school teacher intended to study and take a degree and thus obtain larger wages which had been promised should not be considered in estimating the damages. *Cable v. Central Vermont Ry. Co.*, 216 Fed. 712.

The plaintiff's status as a wage earner must be shown. *Clemens v. Gem Fibre P. Co.*, 153 Mich. 495.

For permanent injuries the plaintiff should be compensated for the loss of the money he would probably have earned if the injuries had not occurred, and the jury may consider evidence as to reasonable prospects of increased earnings. *Georgia Ry. & Elec. Co. v. Carroll*, 143 Ga. 93.

¹⁸ *Chicago & J. E. Co. v. Spence*, 213 Ill. 220, 104 Am. St. 213; *McClain v. Lewiston Interstate F. & R. Ass'n*, 17 Idaho 63, 25 L.R.A. (N.S.) 691.

A general loss of earning capacity of one engaged in a gainful occupation is established by proof of actual absence from business, of time spent in a hospital, and of other illness and of physical and mental suffering. *Detroit, M. & T. S. L. Ry. v. Kimball*, 128 C. C. A. 565, 211 Fed. 633.

importance of these thereto;¹⁹ the length of time he had been engaged in the business; the particular duties and work he performed, and the value of his services therein.²⁰ He may show that he had been engaged in a certain business, and that before the injury he had been planning to re-engage in the same business.²¹ The jury should be informed of the age, health, occupation or business, habits of industry and manner of living of the plaintiff;²² and if he is a professional man his capacity and expertness in his profession may be shown.²³ The plaintiff may not, however, show that he has no other support than that derived from his daily labor.²⁴ Evidence of the requirement of a physical test by railroads as a condition for employment is admissible to show the consequences of impaired efficiency of, and the improbability of securing employment by, a railroad switchman although it is not shown that the defendant requires any such test.²⁵ It may be shown that a minor was economical, and obedient to his parents.²⁶ The weight of authority favors the admission of testimony showing that the plaintiff was sober and industrious,²⁷ though as to the last characteristic it has been said that the issue is as to what he lost, and whether he was industrious or not was immaterial; the only effect of testi-

¹⁹ *Stynes v. Boston E. R. Co.*, 206 Mass. 75, 30 L.R.A.(N.S.) 737; *Escher v. Carroll County*, 146 Iowa 738.

²⁰ *Union D. & R. Co. v. Londoner*, 50 Colo. 22, 33 L.R.A.(N.S.) 433.

The plaintiff may state his average daily earnings at his trade previous to the injury extending over a long period of time. *Wells Fargo & Co. v. Benjamin*, — Tex. Civ. App. —, 165 S. W. 120.

The regular salary gratuitously paid to an employee during the period of disability is some evidence as to the real value of his services. *Western & A. R. Co. v. Sellers*, 15 Ga. App. 369.

²¹ *Pierce v. Seattle Elec. Co.*, 83 Wash. 141.

²² *Wallace v. Pennsylvania Co.*, 219 Pa. 327.

²³ *Macon R. & L. Co. v. Mason*, 123 Ga. 773, 18 Am. Neg. Rep. 355.

²⁴ *Scott v. McPherson*, 168 Cal. 783.

²⁵ *Paris & G. N. R. Co. v. Flanders*, — Tex. Civ. App. —, 165 S. W. 98.

²⁶ *Cameron M. & E. Co. v. Anderson*, 98 Tex. 156, 1 L.R.A.(N.S.) 198, 16 Am. Neg. Rep. 599, 34 Tex. Civ. App. 229.

²⁷ *Metropolitan St. R. Co. v. Kennedy*, 27 C. C. A. 136, 82 Fed. 158; *Texas Mexican R. Co. v. Douglas*, 73 Tex. 325; *Buxton v. Ainsworth*, 153 Mich. 315; *Osterholm v. Boston*, etc. M. Co., 40 Mont. 508.

mony on that point being to excite sympathy for him.²⁸ It has been ruled that the reputation of a medical practitioner may be shown, as well as the reputed character of his practice.²⁹ Under an allegation of diminished capacity to labor one who has testified that he had become unable to do in person all his work may also testify as to the cost of help employed by him; such evidence tends to show decreased ability and the extent thereof.³⁰ But in Massachusetts it has been said that the cost of labor is relevant only on the issue of incapacity; it was the earning power of the plaintiff which was involved, not that of the person who did the work in question.³¹ Where the injury is permanent and is reasonably calculated to impair the previously capable physical or mental status of the plaintiff at least nominal damages should be awarded, although there is no positive evidence tending to show that the plaintiff had any business or work at or prior to the injury, or that he was prevented by his injuries from engaging in any business or work after the injury.³²

²⁸ *Davis v. Kornman*, 141 Ala. 479.

²⁹ *Jacques v. Bridgeport H. R. Co.*, 41 Conn. 6, 19 Am. Rep. 483; *Conklin v. Consolidated R. Co.*, 196 Mass. 302.

This ruling is open to objection. The injured party would not lose his right to compensation for being prevented by his injury from pursuing his practice merely because it was "claimed" or reported that his practice was unlawful. Reputation is not proof that in fact one's practice is unlawful, nor was it legitimate proof to controvert the plaintiff's evidence of the amount that practice had yielded.

In *Baldwin v. Western R. Co.*, 4 Gray 335, it was held that testimony that the person who was driving the carriage in which the plaintiff rode at the time of the accident, by common reputation, was a careless driver, was rightly rejected. It might have been competent for the

defendant to show that he was in fact unskilful and careless. But evidence on this point must come from those who can testify to the fact from their own knowledge. It cannot be proved by reputation.

³⁰ *McGonnell v. Pittsburgh R. Co.*, 234 Pa. 396; *Macon Con. St. R. Co. v. Barnes*, 113 Ga. 212; *Pronskévitch v. Chicago & A. R. Co.*, 232 Ill. 136; *Wellmeyer v. St. Louis T. Co.*, 198 Mo. 527; *Sample v. United R. Co.*, 152 Mo. App. 18; *Grady v. St. Louis T. Co.*, 102 Mo. App. 212; *Batten v. Same*, 102 Mo. App. 285; *Moran v. New York City R. Co.* (Misc.), 94 N. Y. Supp. 302; *Shoemaker v. Sonju*, 15 N. D. 518. See *Kendall v. Albra*, 73 Iowa 241. There should be evidence of the value of the services rendered. *Hintz v. Wagner*, 25 N. D. 110.

³¹ *Stynes v. Boston E. R. Co.*, 206 Mass. 75, 30 L.R.A.(N.S.) 737.

³² *Birmingham Railway, Light &*

Where there is claimed to be a permanent disability or decrease of capacity for work evidence should be given which will enable the jury to determine whether the injury is permanent, the health and condition of the plaintiff before, as compared with his health consequent upon, the injury; or how far and for what time it is calculated to have a disabling effect.³³ Expert testimony, while competent, is not essential; the permanence of an injury may be inferred from the time it has continued and its seriousness.³⁴ The duration of the capacity and ability to labor may be ascertained by the usual mode of computing the probable length of life; but the proof must be taken subject to the conditions surrounding the plaintiff. Hence the existence of disease tending to shorten life may be shown, and it

Power Co. v. Friedman, 187 Ala. 562.

³³ *Manistee M. Co. v. Hobdy*, 165 Ala. 411, 138 Am. St. 73; *Alabama, etc. R. Co. v. Yarbrough*, 83 Ala. 238, 12 Am. Neg. Cas. 33, 3 Am. St. 715; *Joliet v. Conway*, 119 Ill. 489; *Geveke v. Grand Rapids & I. R. Co.*, 57 Mich. 589; *McMahon v. Northern Cent. R. Co.*, 39 Md. 438; *Bal-lou v. Farnum*, 11 Allen 73; *Lincoln v. Saratoga, etc. R. Co.*, 23 Wend. 425; *Tefft v. Wilcox*, 6 Kan. 46; *Kansas Pac. R. Co. v. Painter*, 9 Kan. 620; *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434, 12 Am. Neg. Cas. 243, 97 Am. Dec. 722; *Tomlinson v. Derby*, 43 Conn. 562; *Luck v. Ripon*, 52 Wis. 196; *Jacques v. Bridgeport H. R. Co.*, 41 Conn. 61, 19 Am. Rep. 483; *Cleveland, etc. R. Co. v. Sutherland*, 19 Ohio St. 151; *George v. Haverhill*, 110 Mass. 506; *Brooks v. Rochester R. Co.*, 10 N. Y. Misc. 88; *Wallace v. Pennsylvania R. Co.*, 195 Pa. 127; *Waters v. Atlantic R. Co.*, 9 Pa. Dist. 473; *Galveston, etc. R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 48, 6 Am. Neg. Cas. 624; *Southern Pac. Co. v. Hall*, 41 C. C. A. 50, 100 Fed.

760; *Denver v. Sherret*, 31 C. C. A. 499, 509, 88 Fed. 226.

³⁴ *Macon R. & L. Co. v. Streyer*, 123 Ga. 279; *Southern R. Co. v. Clariday*, 124 Ga. 958.

It has been said it is not erroneous to charge on the subject of the permanent nature of the plaintiff's injuries though the evidence on that question is not strong. "It was in evidence that the plaintiff's injuries were received nearly a year before the case was tried, that she had suffered continuously since that time, and that her suffering had not ceased or abated. We know of no law which confines the jury to medical expert testimony in considering a case of this kind, nor can we conceive of any reason why they may not draw their own inferences as to the permanence of an injury from the length of time and seriousness with which it has continued." *Macon R. & L. Co. v. Streyer*, *supra*; *Lewis v. Portland R., L. & P. Co.*, 59 Ore. 314; *Southern R. Co. v. Clariday*, *supra*.

A physician may answer hypothetical questions concerning the permanent nature of injuries. *Kan-*

must also be borne in mind that the mortality tables show the merely probable continuance of life, not the duration of the ability to work or earn money in old age.³⁵ The questions involved are the age, condition, station in life, occupation, health and surroundings of the plaintiff.³⁶ The probable duration of life may be shown by evidence of the characteristics of the plaintiff without such tables.³⁷

In considering the extent of disability regard must be had to all avenues of occupation open to the plaintiff, intellectual as well as physical;³⁸ to his earning capacity as it may be aided by the use of an artificial limb,³⁹ to his earnings since the injury,⁴⁰ and to the fact that earning capacity usually decreases very rapidly after middle age has been reached.⁴¹ The defendant cannot show, after the plaintiff has given evidence of the difference between his earnings before and after the injury, that such difference would have been less if the plaintiff had been employed elsewhere.⁴² The proof of lessened earning

sas City, etc. R. Co. v. Butler, 143 Ala. 262.

³⁵ Greer v. Louisville & N. R. Co., 94 Ky. 169, 177, 15 Am. Neg. Cas. 191, 42 Am. St. 345; Elliott v. Sawyer, 107 Me. 195. See § 455 as to mortality tables.

³⁶ Wolf v. Schmidt & Sons B. Co., 236 Pa. 240.

The age of the plaintiff and whether he is married or single may be considered in estimating the damages. Ferguson & Wheeler Land, Lumber & Handle Co. v. Good, 112 Ark. 260.

³⁷ St. Louis, etc. R. Co. v. Glossup, 88 Ark. 225.

³⁸ Thoresen v. St. Paul & T. L. Co., 73 Wash. 99; Northern Pac. R. Co. v. Wendel, 84 C. C. A. 232, 156 Fed. 336; Morrison v. Northern Pac. R. Co., 34 Wash. 70; Halloran v. New York, etc. R. Co., 211 Mass. 132; Laird v. Chicago, etc. R. Co., 100 Iowa 336, 14 Am. Neg. Cas. 647.

In the case of a youth proof of incapacity to follow certain occupations is a good basis for a recovery. Beaudin v. Bay City, 136 Mich. 333, 16 Am. Neg. Rep. 108.

³⁹ Hamilton v. Pittsburgh, etc. R. Co., 104 Ill. App. 207. See Seaboard A. L. R. v. Reid, 6 Ga. App. 18; Leeson v. Saw-Mill Phoenix, 41 Wash. 423.

⁴⁰ Henke v. Deere & M. Co., 175 Ill. App. 240; Southern C. & F. Co. v. Bartlett, 137 Ala. 234; Bockelcamp v. Lackawanna, etc. R. Co., 232 Pa. 66; Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 16, 55 Am. St. 705; Linton C. & M. Co. v. Persons, 11 Ind. App. 264, 14 Am. Neg. Cas. 479, 15 Ind. App. 69; Birkel v. Chandler, 26 Wash. 241, 12 Am. Neg. Rep. 487.

⁴¹ Vowell v. Issaquah C. Co., 31 Wash. 103; Stone v. Seattle, 33 Wash. 644.

⁴² Omaha, etc. R. Co. v. Ryburn, 40 Neb. 87, 12 Am. Neg. Cas. 237.

power need not be clear and indubitable.⁴³ In the absence of a fixed compensation for services the age of the person injured, his situation in life, condition of health and habits of industry, and the profits derived from the management of a business resulting from the personal attention and labor of the owner, as distinguished from profits arising from invested capital, are relevant facts.⁴⁴ As is elsewhere indicated⁴⁵ damages are not recoverable for the shortening of the plaintiff's life, and this principle has been extended to the loss of any earnings he might have made during the period his life has been shortened; but the fact that life has been shortened is competent to show the extent of his injury, disability and bodily and mental suffering.⁴⁶

The question of earning power is not one for expert testimony. "An expert in banking or merchandising might form an opinion about what a man possessing given business qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn, or what his services were reasonably worth, prior to the time of the injury. In settling this question they should consider not only his past earnings, or the fair value of services such as he was able to render, but his age, state of health, business habits, and manner of living."⁴⁷ The basis on which this calculation must rest is not the possibility as judged by the expert witness but the cold commonplace facts as proved by those who knew them. It does not follow, as a necessary conclusion, that the services of the plaintiff were worth no more at the time of his injury than the sum he was receiving, but the fact that he accepted service at that price was an important one, and was persuasive, though not conclusive, evidence that the price was considered by himself a fair one."⁴⁸ A witness who has observed another may testify as to the quan-

⁴³ *McGonnell v. Pittsburgh R. Co.*, 234 Pa. 396.

⁴⁴ *Simpson v. Pennsylvania R. Co.*, 210 Pa. 101.

⁴⁵ § 1241.

⁴⁶ *Krakowski v. Aurora, etc. R. Co.*, 167 Ill. App. 469.

⁴⁷ *McHugh v. Schlosser*, 159 Pa. 480, 39 Am. St. 699, 23 L.R.A. 574.

⁴⁸ *Goodhart v. R. Co.*, *supra*.

tity of work he has been able to do since he was injured.⁴⁹ If the injury is a broken limb an X-ray photograph, properly taken and shown to be an accurate representation of the condition of the injured member, is competent evidence.⁵⁰ Where a limb has been lost or other severe physical disability sustained no effect will be given to an exception based upon the absence of proof of impaired physical ability, the plaintiff having been engaged in manual labor;⁵¹ and so in the case of a permanently injured infant.⁵² Where a boy, whose earnings had been those of a messenger, was permanently disabled, it was not improper to charge that his loss of earnings must be estimated, the only evidence on that point being his age. In such a case there could be no proof which would approximate his earnings as a man.⁵³ The plaintiff may show that he had learned no business or trade and the extent of his education;⁵⁴

⁴⁹ *Lindsay v. Kansas City*, 195 Mo. 166; *Mobile L. & P. Co. v. Walsh*, 146 Ala. 295.

⁵⁰ *Bruce v. Beall*, 99 Tenn. 303. See § 454.

⁵¹ *Dean v. Kansas City, etc. R. Co.*, 199 Mo. 386; *Texarkana, etc. R. Co. v. Toliver*, 37 Tex. Civ. App. 437; *Prior v. Eggert*, 39 Wash. 481; *Chicago, etc. R. Co. v. Warner*, 108 Ill. 538, 14 Am. Neg. Cas. 348, 401; *Fisher v. Jansen*, 30 Ill. App. 91, aff'd 128 Ill. 549; *Schmitz v. St. Louis, etc. R. Co.*, 55 Mo. App. 576; *De La Vergne R. M. Co. v. Stahl*, 24 Tex. Civ. App. 471.

⁵² *Ft. Worth, etc. R. Co. v. Winingner* (Tex. Civ. App.), 151 S. W. 586; *Buckry-Ellis v. Missouri Pac. R. Co.*, 158 Mo. App. 499; *Ferrier v. Shoenberg M. Co.*, 158 Mo. App. 533; *Strudgeon v. Sand Beach*, 107 Mich. 496.

Where a child of seven years lost a leg and sued to recover, the court said: Evidence as to the probable earnings of the infant plaintiff after attaining an age when he might reasonably be expected to undertake
Suth. Dam. Vol. IV.—67.

regular occupation or employment would necessarily consist of conjecture on the part of the witness. There is no ground for the introduction of evidence in the nature of expert testimony, and the ascertainment must be left to the common experience of the jury. Any other rule would deny to all infants the recovery of any damages whatever on account of the diminution of future earning capacity which must necessarily result from the loss of a limb, and would work not only hardship, but injustice also. *McDermott v. Severe*, 25 App. Cas. (D. C.) 276; *Stotler v. Chicago & A. R. Co.*, 200 Mo. 107. But it is said in another case, part of a boy's foot being lost: We do not mean to say it is possible to give evidence constituting certain data or standard for exact measurement, still there ought to be some evidence forming a basis for approximate estimate. *Comer v. Ritter L. Co.*, 59 W. Va. 688, 6 L.R.A. (N.S.) 552.

⁵³ *Baker v. Irish*, 172 Pa. 528.

⁵⁴ *McCoy v. Milwaukee St. R. Co.*,

and may testify to the extent to which his ability to work has been impaired.⁵⁵

In many cases where a claim is made for loss of time there cannot be a recovery if the plaintiff does not prove the value of the time lost or facts upon which an estimate of its worth can be made.⁵⁶ A basis for awarding compensation is supplied by proof of the age of the plaintiff, his probable duration of life or the value of his labor before or after the injury.⁵⁷ In

88 Wis. 56; *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 13 Am. Neg. Cas. 70; *Graham v. Mattoon City R. Co.*, 234 Ill. 483, citing the text; *Consolidated Kansas City S. & R. Co. v. Taylor*, 48 Tex. Civ. App. 605.

⁵⁵ *Atlanta, etc. R. Co. v. Haralson*, 133 Ga. 231, 21 Am. Neg. Rep. 597; *Patton v. Sanborn*, 133 Iowa 650; *Houston & T. Cent. R. Co. v. Fanning*, 40 Tex. Civ. App. 422, 20 Am. Neg. Rep. 688; *Chesapeake & O. R. Co. v. Hoffman*, 109 Va. 44.

The plaintiff's opinion as to the percentage of his lessened capacity is inadmissible because a conclusion. *Dunn v. Gunn*, 149 Ala. 583.

⁵⁶ *Smith v. Chicago City R. Co.*, 165 Ill. App. 190; *Lyman v. Chicago City R. Co.*, 176 Ill. App. 27; *Krakowski v. Aurora, etc. R. Co.*, 167 Ill. App. 469; *Sloss-S. S. & I. Co. v. Stewart*, 172 Ala. 516; *Diamond R. Co. v. Harryman*, 41 Colo. 415, 15 L.R.A.(N.S.) 775; *Smith v. Whittlesey*, 79 Conn. 189; *Macon R. & L. Co. v. Vining*, 120 Ga. 511; *Tarr v. Oregon S. L. R. Co.*, 14 Idaho 192, 125 Am. St. 151; *Coalgate v. Isherwood*, 7 Ind. T. 130; *Pierce v. Bidwell T. Co.*, 153 Mich. 323; *Panos v. American O. & F. Co.*, 147 Mo. App. 570; *Ingles v. Metropolitan R. Co.*, 145 Mo. App. 241; *Lyons v. New York City R. Co.*, 49 N. Y. Misc. 517; *Camparetti v. Union R. Co.*, 95 App.

Div. (N. Y.) 66; *Metz v. Metropolitan St. R. Co.*, 82 App. Div. (N. Y.) 168; *St. Louis S. R. Co. v. Acker*, 44 Tex. Civ. App. 560; *Leeds v. Metropolitan G. L. Co.*, 90 N. Y. 26; *Staal v. Grand St. & N. R. Co.*, 107 id. 625, 6 Am. Neg. Cas. 273; *McKenna v. Citizens' N. G. Co.*, 198 Pa. 31; *Niendorff v. Manhattan R. Co.*, 4 App. Div. (N. Y.) 46, 8 Am. Neg. Cas. 555; *Mammerberg v. Metropolitan St. R. Co.*, 62 Mo. App. 563; *Saperstone v. Rochester R. Co.*, 25 App. Div. (N. Y.) 285; *Britton v. Street R. Co.*, 90 Mich. 159, 4 Am. Neg. Cas. 123.

The rule is recognized in Georgia except where permanent diminution of capacity is shown, in which event there may be a recovery therefor in connection with the recovery for pain although no pecuniary value is shown; the loss of capacity is in the nature of pain. *Atlanta, etc. R. Co. v. Haralson*, 133 Ga. 231, 21 Am. Neg. Rep. 597.

A wife suing under a civil damage statute is not to be turned out of court because she fails to show the exact amount her husband contributed to her support. *Bowden v. Voorheis*, 135 Mich. 648.

⁵⁷ *Gainesville, etc. R. Co. v. Lacy*, 86 Tex. 244; *Missouri Valley B. & I. Co. v. Ballard*, 53 Tex. Civ. App. 110. See *Benson v. Altoona E. R. Co.*, 228 Pa. 290.

Slight evidence is sufficient. *St.*

some cases the evidence may be directed to the capacity of the plaintiff to earn, rather than to what he had earned; and there need not be direct or specific testimony that he had received compensation for his services or was capable of earning a specific amount.⁵⁸ In the case of an ordinary laborer the jurors may be presumed to be reasonably familiar with the value of his services, and many measure it by their knowledge and experience.⁵⁹ The same rule has been applied to the value of the services of a nurse,⁶⁰ to the earnings of a peddler who supported his family by his sales,⁶¹ of a merchant,⁶² of a farmer, though the cases are not in accord,⁶³ and to those of a housekeeper.⁶⁴ The nature and value of the services of a wife to her husband may be ascertained by the jury from their general knowledge, based upon the age, assistance, comfort and society she would be expected to render and the conditions in which they lived.⁶⁵ Expert testimony is competent to show the ability of the plain-

Louis, etc. R. Co. v. Leamons, 82 Ark. 504.

⁵⁸ Storrs v. Los Angeles T. Co., 134 Cal. 93; Washington v. Pacific E. Co., 14 Cal. App. 685.

⁵⁹ Nelson v. United R. Co., 176 Mo. App. 423; Loe v. Chicago, etc. R. Co., 57 Mo. App. 350; Cleveland & S. T. Co. v. Ward, 6 Ohio C. C. (N.S.) 385; Melone v. Sierra R. Co., 151 Cal. 113. *Contra*, Carlile v. Bentley, 81 Neb. 715.

In Cumberland Tel. & T. Co. v. Overfield, 127 Ky. 548, the court quoted from Fisher v. Jansen, 128 Ill. 549 thus: A party personally injured from negligence may recover of the defendant damages for his inability to labor or transact business in the future without any evidence of his success in business prior to his injury, or the extent of his earnings. Direct proof of any specific pecuniary loss is not indispensable to a recovery.

⁶⁰ Murray v. Missouri Pac. R. Co., 101 Mo. 236, 20 Am. St. 601.

⁶¹ Fernstein v. Jacobs, 15 N. Y. Misc. 474. See Fordyce v. Withers, 1 Tex. Civ. App. 540, 10 Am. Neg. Cas. 305.

⁶² Wayne v. St. Louis & N. R. Co., 165 Ill. App. 353.

⁶³ Jennings v. Appleman, 159 Mo. App. 12. *Contra*, St. Louis S. R. Co. v. Acker, *supra*.

The nature of the general supervision of farm work by a farmer is such that definite proof of the actual value thereof is hard to make. It is sufficient to show the extent of the operations and the work the plaintiff usually performed. Wood v. Chicago, etc. R. Co., 119 Mo. App. 78.

⁶⁴ Chicago, etc. R. Co. v. Cleaver, 48 Tex. Civ. App. 294; Ft. Worth, etc. St. R. Co. v. Hawes, 48 Tex. Civ. App. 487.

⁶⁵ Texas Tel. & T. Co. v. Scott (Tex. Civ. App.), 127 S. W. 587; Gainesville, etc. R. Co. v. Lacy, 86 Tex. 244; San Antonio, etc. R. Co. v. Jackson, 38 Tex. Civ. App. 201,

tiff in his line of work.⁶⁶ Opinions as to what he might have earned in vocations in which he had not engaged are not admissible.⁶⁷ In case of injury to one who was a member of a partnership evidence as to the value of his services to the firm before the injury and of the amount agreed upon by him and his co-partners as to their value thereafter is not admissible.⁶⁸ In Iowa a person permanently disabled may show that he has no means of support except such as he earned.⁶⁹ The better rule is otherwise.⁷⁰ An injured tradesman may show how long he has followed his trade and the wages he had earned each year, though they were on a paper basis part of the time.⁷¹ The plaintiff may prove his average earnings before and after the injury was sustained,⁷² without making proof of his qualifications for

and cases cited. Compare *St. Louis & N. O. R. Co. v. Johnson*, 38 Tex. Civ. App. 322. 124 Ky. 345, 8 L.R.A.(N.S.) 1228; *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 436, 97 Am. Dec. 722;

⁶⁶ *Cleveland, etc. R. Co. v. Hadley*, 170 Ind. 204.

⁶⁷ *Atchison, etc. R. Co. v. Chance*, 57 Kan. 40.

⁶⁸ *Mt. Adams, etc. R. Co. v. Isaacs*, 18 Ohio C. C. 177.

⁶⁹ *Stafford v. Oskaloosa*, 64 Iowa 251; *Yeager v. Spirit Lake*, 115 Iowa 593; *Hunt v. Chicago, etc. R. Co.*, 26 Iowa 363, 14 Am. Neg. Cas. 605; *Moore v. Central R.*, 47 Iowa 689, 14 Am. Neg. Cas. 657.

⁷⁰ *Trinity & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690. See § 1254.

⁷¹ *Finken v. Elm City B. Co.*, 73 Conn. 421.

⁷² *Chicago, etc. R. Co. v. Hale*, 99 C. C. A. 379, 176 Fed. 71; *Elba v. Bullard*, 152 Ala. 237; *Dunn v. Gunn*, 149 Ala. 583; *St. Louis S. R. Co. v. Jackson*, 93 Ark. 119 (for his personal labor and by the management of other laborers); *Bonneau v. North Shore R. Co.*, 152 Cal. 406, 125 Am. St. 68; *Comstock v. Connecticut R. & L. Co.*, 77 Conn. 65; *New Castle v. Grubbs*, 171 Ind. 482 (before); *Gregory v. Slaughter*,

Maryland, etc. R. Co. v. Brown, 109 Md. 304; *Panos v. American C. & F. Co.*, 147 Mo. App. 570 (which may sustain an inference as to his physical condition when such earnings were made); *Tanzer v. New York City R. Co.*, 46 N. Y. Misc. 86; *Rushing v. Seaboard A. L. R. Co.*, 149 N. C. 158; *Chicago, etc. R. Co. v. Stibbs*, 17 Okla. 97; *San Antonio F. Co. v. Drish*, 38 Tex. Civ. App. 214 (earnings at different times and places and from different employers); *Murdock v. New York & B. Desp. Exp. Co.*, 167 Mass. 549, 1 Am. Neg. Rep. 263; *Paul v. Omaha & St. L. R. Co.*, 82 Mo. App. 500; *Symons v. Metropolitan St. R. Co.*, 27 N. Y. Misc. 502; *Brown v. Oregon-W. R. & N. Co.*, 63 Ore. 396 (it is immaterial that the earnings were made on a commission basis and there was no fixed term of employment); *Barnes v. Danville St. R. & L. Co.*, 235 Ill. 566, 126 Am. St. 237.

The value of a physician's practice during the period of the pre-

the employment he was engaged in or that he earned the money received.⁷³ It is not ground for excluding such evidence that the complaint does not allege engagement in any particular employment or the loss of any specific earnings.⁷⁴ The market value of the plaintiff's services in the vocation he was in may be testified to by him.⁷⁵ The wages received upon a special occasion are not a fair test of his earning capacity.⁷⁶ Those paid by a former employer may be shown if he had promised to re-employ the plaintiff.⁷⁷ In order that wages previously received may support a judgment it must be shown that they were paid under a definite contract, or facts must appear which warrant the inference that those usually paid were lost.⁷⁸ Testimony as to the wages received for five years prior to within a few months of the time the injury was inflicted is not too remote,⁷⁹ though the plaintiff had changed employments and was receiving less remuneration when injured than formerly.⁸⁰ But such testimony must be confined to a reasonable length of time prior to the injury.⁸¹ And such testimony has been held improper

vious year corresponding to that of his disability is the best evidence of the loss of his earnings. *Sluder v. St. Louis T. Co.*, 189 Mo. 107, 5 L.R.A.(N.S.) 186.

The previous earnings of one who sold goods on commission may not be proved unless they were made under substantially similar conditions as governed his employment when injured; and if he paid his own expenses these must be shown before evidence of his earnings is received. *Diamond R. Co. v. Harryman*, 41 Colo. 415, 15 L.R.A.(N.S.) 775. There are sufficient reasons for going further and excluding evidence of previous earnings if the compensation was in part contingent. *Haas v. St. Louis, etc. R. Co.*, 128 Mo. App. 79.

⁷³ *Amann v. Chicago Con. T. Co.*, 243 Ill. 263.

⁷⁴ *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 17 Am. Neg. Rep. 323.

⁷⁵ *Lake Shore, etc. R. Co. v. Teeters*, 166 Ind. 335, 20 Am. Neg. Rep. 309, and cases cited.

⁷⁶ *Carlile v. Bentley*, 81 Neb. 715.

⁷⁷ *Wilson v. Chicago City R. Co.*, 154 Ill. App. 632.

⁷⁸ *Anderson v. Young*, 98 Minn. 355.

⁷⁹ *Sias v. Reed City*, 103 Mich. 312; *El Paso E. R. Co. v. Murphy*, 49 Tex. Civ. App. 586; *Southern R. Co. v. Stockdon*, 106 Va. 693.

In *Bourke v. Butte E. & P. Co.*, 33 Mont. 267, evidence of the wages received in a distant state some time before the injury was inflicted was admitted.

Earning capacity and ability to work at the time of the injury must be shown. *Buck v. McKeesport*, 223 Pa. 211.

⁸⁰ *West Chicago St. R. Co. v. Dougherty*, 209 Ill. 241.

⁸¹ *West Pratt C. Co. v. Andrews*, 150 Ala. 368.

where the plaintiff was, five years before his injury, engaged in an occupation much more remunerative than that he was subsequently employed in, there being no evidence to show he had in view or prospect a similar occupation.⁸² If the services of the plaintiff had a market value in the kind of business in which he was engaged the fact may be proved,⁸³ although he had not actually worked for others, but had been engaged in business on his own account.⁸⁴ The kind of work done before the accident may be shown in connection with evidence of subsequent ability to do the same work.⁸⁵ The plaintiff may show that his contract of employment provided for an increase of salary in a short time if his work proved satisfactory,⁸⁶ and what wages would have been open to him in a business he understood, though he had not engaged in it recently, the right and ability to resume it being his;⁸⁷ that a certain sum had been offered or paid as wages about the time in question,⁸⁸ and the wages fixed by a contract in effect at such time, though it was canceled by the plaintiff before the trial.⁸⁹ The salary which would be open

⁸² *Houston & T. Cent. R. Co. v. Gee*, 27 Tex. Civ. App. 414 (emoluments of office held years prior to the injury); *Chicago & J. E. Co. v. Spence*, 213 Ill. 220, 104 Am. St. 213; *Hobel v. Mahoning & S. R. & L. Co.*, 229 Pa. 507.

⁸³ *Zibbell v. Southern Pac. Co.*, 160 Cal. 237.

⁸⁴ *Harmon v. Old Colony R. Co.*, 168 Mass. 377, 2 Am. Neg. Rep. 719, 30 L.R.A. 658; *Matteson v. New York Cent. R. Co.*, 35 N. Y. 487, 493, 9 Am. Neg. Cas. 618, 91 Am. Dec. 67.

⁸⁵ *Colorado Springs & I. R. Co. v. Nichols*, 41 Colo. 272, 20 L.R.A. (N.S.) 215.

⁸⁶ *Bryant v. Omaha, etc. R. & B. Co.*, 98 Iowa 483; *Daniel v. Atlantic C. L. R. Co.*, 145 N. C. 51.

⁸⁷ *Peterson v. Seattle T. Co.*, 23 Wash. 615, 643, 53 L.R.A. 586; *Cook v. Chehalis River L. Co.*, 48 Wash. 619. See § 71.

The experience of the plaintiff in the various kinds of work he has followed is relevant to show his capacity to earn money; his recovery is not limited to his earnings in the kind of work he was engaged in when injured. *Birmingham R., L. & P. Co. v. Simpson*, 177 Ala. 475, citing local cases.

But it is said in a more recent case that earning capacity should be measured by what was being received when the injury was sustained, unless it is shown that the employment then followed was temporary; otherwise the damages would be speculative. *Smith v. Hewitt-L. L. Co.*, 55 Wash. 357.

⁸⁸ *Montgomery v. Seaboard A. L. R.*, 73 S. C. 503; *Western R. v. Wallace*, 170 Ala. 584.

⁸⁹ *Parker v. Boston & M. R.*, 84 Vt. 329.

to a railway mail clerk upon promotion under civil service rules, if he passed the required examination, may be proved.⁹⁰ It is not competent to show how much the plaintiff might have made by trading;⁹¹ nor the gross receipts of his business,⁹² nor that prior to the injury he had arranged to go into business,⁹³ nor the profits which might have been made from the labor of others.⁹⁴ The cases are not agreed concerning the extent to which capital must be employed to make evidence of the profits of a business incompetent. If the amount is substantial such evidence is generally excluded;⁹⁵ but if it is small and a mere incident or vehicle for the performance of services almost personal in their nature the profits of the business may be shown.⁹⁶ Some cases do not take a distinction as to the amount of the capital. It has recently been ruled that evidence of the nature and extent of the plaintiff's business and the general rate of profit made therein is receivable for consideration in the exercise of the discretion vested in the jury, as well as the relative profits made before and after the accident.⁹⁷ Such evidence may be received to show the earning power of the plaintiff, especially if the business demands and receives his individual efforts.⁹⁸ The profits made in conducting an established boarding house may be shown, they being due to the plaintiff's ability and being ascertainable with reasonable certainty.⁹⁹ The rule of exclusion is not strictly applied where the recovery sought is for diminished capacity. Thus, one engaged in buying and selling live-stock for a continuous local market has been permitted to show

⁹⁰ *Williams v. Spokane Falls & N. R. Co.*, 42 Wash. 597.

⁹¹ *Wilkie v. Railroad*, 128 N. C. 113; *Fuller v. Illinois Cent. R. Co.*, 158 Ill. App. 198; *Gottheim v. Nassau E. R. Co.*, 60 N. Y. Misc. 69; *Wallace v. Pennsylvania R. Co.*, 195 Pa. 127, 52 L.R.A. 33. Compare *Osterholm v. Boston, etc. M. Co.*, 40 Mont. 508.

⁹² *Hobel v. Mahoning & S. R. & L. Co.*, 229 Pa. 507.

⁹³ *United R. & E. Co. v. Riley*, 109 Md. 327.

⁹⁴ *Crossen v. Chicago & J. E. R. Co.*, 158 Ill. App. 42.

⁹⁵ *Chicago, R. I. & P. R. Co. v. Hale*, 108 C. C. A. 490, 186 Fed. 626, rev'g 99 C. C. A. 379, 176 Fed. 71.

⁹⁶ *Fraser v. Buffalo*, 123 App. Div. (N. Y.) 159.

⁹⁷ *Shaw v. Southern Pac. R. Co.*, 157 Cal. 240.

⁹⁸ *Wallace v. Pennsylvania R. Co.*, 195 Pa. 127, 52 L.R.A. 33; *McLane v. Pittsburg R. Co.*, 230 Pa. 29.

⁹⁹ *Comstock v. Connecticut R. & L. Co.*, 77 Conn. 65.

the income realized prior and subsequent to the injury.¹ The plaintiff may show that his business has decreased because of the effect of the injury upon his disposition;² but it is not open to him to show what was paid him for doing an act forbidden by law.³ The prospective musical talent and attainments of the plaintiff may be shown if ability to follow his inclination has been affected.⁴ The plaintiff may state what his time would have been reasonably worth if he had been in his usual health.⁵ In an action by a young child it may be shown what employment his father followed and the remuneration he received; the probability the child would have adopted his father's vocation was strong enough to authorize such testimony.⁶ The scope of the evidence on a re-trial is not limited by that given on the first trial if the injuries developed thereafter.⁷ The defendant may prove any facts concerning the plaintiff's habits or conduct which may throw light on the probability of his securing employment and the character and continuity of the same; but cannot go into proof of the plaintiff's character or repute.⁸ In an action by a minor to recover for

¹ *Jordan v. Cedar Rapids, etc. R. Co.*, 124 Iowa 177.

² *St. Louis, etc. R. Co. v. Osborne*, 95 Ark. 310.

³ *Murray v. Interurban St. R. Co.*, 118 App. Div. (N. Y.) 35.

⁴ *Gulf, etc. R. Co. v. Sauter*, 46 Tex. Civ. App. 309; *Rhinesmith v. Erie R. Co.*, 76 N. J. L. 783; *Scally v. Garratt*, 9 Cal. App. 194.

⁵ *City E. R. Co. v. Smith*, 121 Ga. 663; *Schlumbrecht v. Chicago City R. Co.*, 153 Ill. App. 254 (in conducting his own business); *Howard v. McCabe*, 79 Neb. 42; *St. Louis S. R. Co. v. Horne* (Tex. Civ. App.), 130 S. W. 1025; *Gulf, etc. R. Co. v. Bell*, 24 Tex. Civ. App. 579, 594, 8 Am. Neg. Rep. 159.

⁶ *Fishburn v. Burlington & N. R. Co.*, 127 Iowa 483, 17 Am. Neg. Rep. 270.

⁷ *West Chicago St. R. Co. v. Dougherty*, 209 Ill. 241.

⁸ *Kingston v. Ft. Wayne & E. R. Co.*, 112 Mich. 40, 40 L.R.A. 131; *St. Louis, etc. R. Co. v. Smith*, 34 Tex. Civ. App. 612. See § 94.

Any facts concerning the condition of the plaintiff which bear upon the extent of his physical and mental injuries may be shown. *Spears v. Atlantic Coast Line R. Co.*, 92 S. C. 297.

One who has received his salary during the time of alleged disability must show that it was a gratuity, otherwise it will be presumed to have been for compensation for services rendered. *Moon v. St. Louis T. Co.*, 247 Mo. 227.

The defendant may show the amount earned by the plaintiff since he was injured and that it had offered him employment at a stated wage. *Holland v. McRae O. & F. Co.*, 134 Ga. 678.

permanent injuries evidence of his diminished capacity to labor is not to be excluded because his earnings during minority would belong to his father.⁹ An injured person who has resumed his employment may not show that he did so because of the needs of his family.¹⁰

§ 1249. **Same subject; measure of recovery.** The recovery for loss of time or decreased capacity will depend on the nature of the business or calling of the injured party, or the pecuniary value of his lost time, or of lost or diminished capacity.¹¹ The measure of damages is not the market value of the average wages of a man of the plaintiff's capacity working in the same employment; but the difference in the value of what he earned before the injury, the wages then paid him being reasonable, and what he was able to earn thereafter.¹² As we have seen, a

⁹ *Western & A. R. Co. v. Davis*, 139 Ga. 493.

¹⁰ *Trosper C. Co. v. Crawford*, 152 Ky. 214.

¹¹ *Smith v. Pennsylvania R. Co.*, 246 Pa. 370; *Chicago v. Elzeman*, 71 Ill. 131; *McLaughlin v. Corry*, 77 Pa. 109, 18 Am. Rep. 432; *Hammond v. Mukwa*, 40 Wis. 36; *Hall v. Fond du Lac*, 42 id. 274; *Indianapolis v. Gaston*, 58 Ind. 224; *Pennsylvania R. Co. v. Dale*, 76 Pa. 47; *Morris v. Chicago, etc. R. Co.*, 45 Iowa 29, 11 Am. Neg. Cas. 536, 537; *Chicago v. Jones*, 66 Ill. 349; *Chicago v. Langlass*, id. 361; *Nichols v. Brunswick*, 3 Cliff. 81; *Lombard v. Chicago*, 4 Biss. 460; *Gale v. New York, etc. R. Co.*, 13 Hun 1, 12 Am. Neg. Cas. 365; *Howes v. Ashfield*, 99 Mass. 540; *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. 818. See § 1246.

In the absence of evidence the recovery should be for a nominal sum. *Birmingham R., L. & P. Co. v. Harden*, 156 Ala. 244, citing this section. See § 1248.

¹² *Braithwaite v. Hall*, 168 Mass. 38, 1 Am. Neg. Rep. 623. See *Noel*

v. Redruth F. Co. [1896], 1 Q. B. 453, for the rule under the Employers' Liability Act, 1880; *Denbeigh v. Oregon-W. R. & N. Co.*, 23 Idaho 663.

The loss of earning power, not the amount the plaintiff was likely to earn, during the remainder of his life or disability, is the standard by which he must recover. *Reitler v. Pennsylvania R. Co.*, 238 Pa. 1.

In *St. Louis, I. M. & S. Ry. Co. v. McMichael*, 115 Ark. 101, it was held that in determining what was a just compensation for injuries and pecuniary losses sustained by the plaintiff the jury should take into consideration his "age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, personal expenses for treatment, rate of wages, earning power, and probable increase or diminution of that power with the lapse of time, pain and suffering which he has endured and shall continue to endure, and mental

minor owing service to his father cannot recover for loss of time or inability to labor or earn money during minority.¹³ But if no claim was made by the parent for the diminished ability of a minor son the latter may after the parent's death and during his minority recover therefor for the period after such death.¹⁴ A minor may recover for his loss of time if the parent waives his claim thereto, though the waiver be made after suit begun.¹⁵ Where it is sought to recover for a minor's loss of earning power after he shall attain majority the value of the use of the money he may recover should be considered. It is to be presumed, at least in the case of a child, that if he had not been injured his capacity to earn money after his twenty-first year would not exceed that of ordinary men.¹⁶

We have also seen that a married woman cannot recover for a similar loss except pursuant to a statute because her husband is entitled to her services.¹⁷ A wife may recover for all the injurious effects of the wrong apart from the mere loss of service and society to which the husband is entitled, and, in some jurisdictions, the expense of medical treatment and nursing. Physical disability is a personal loss apart from its effect upon earning power.¹⁸ An injury which impairs the capacity of a married woman to labor is classified with pain and suffering.¹⁹ The compensation to be awarded is not to be measured by her pecuniary earnings, for they as a general rule belong to the husband, and the right of action for their loss is in him; "but the wife herself has such an interest in her working capacity as that she can recover something, in a proper case, for its

anguish on account of the disfigurement of his person."

The plaintiff's lessened earning capacity must be tested by his regular occupation where he temporarily worked at a lucrative trade for the purpose of reconquing his fortunes, and was engaged in his regular occupation at the time of the injury. *San Antonio Traction Co. v. Crisp*, — Tex. Civ. App. —, 162 S. W. 422

¹³ § 1246, n. 62.

¹⁴ *Missouri, etc. R. Co. v. Tona-*

hill, 16 Tex. Civ. App. 625, 3 Am. Neg. Rep. 287.

¹⁵ *Judd v. Ballard*, 66 Vt. 668. See next to last preceding note.

¹⁶ *St. Louis, etc. R. Co. v. Waren*, 65 Ark. 619.

¹⁷ § 1246, n. 62.

¹⁸ *Cullar v. Missouri, etc. R. Co.*, 84 Mo. App. 340; *Montague v. Hanson*, 38 Mont. 376.

¹⁹ *Southern R. Co. v. Hutcheson*, 136 Ga. 591.

impairment or destruction, and what she is to be allowed ought to be more or less according to the nature of the injury and the length of time during which the pain and deprivation is going to continue," which amount is left to the discretion of the jury.²⁰ The cases are not agreed as to the ground upon which damages in such cases may be recovered, though the later ones are almost if not quite a unit in favor of allowing compensation for the disability to labor. It seems plain that wrongful interference with any capacity or function of a human being should be compensated for, aside from any existing need for the exercise of such capacity or function. The vicissitudes of life may call upon any person to put forth every effort to serve himself or those who are dependent upon him. In many if not all cases of serious personal injury the public may have an interest, and its welfare may require that the injured person be compensated for the wrong done him, thus in a measure lessening the demand which may be made upon the public. Impaired ability to work is in itself an injury and deprivation, distinct from any loss of earnings it entails and the sufferer is entitled to compensation for it. It may be treated as part of the mental suffering resulting from the injury and as due to the consciousness of impaired power to care for one's self.²¹ In the nature of the case the sum which will compensate for such damage is not ascertainable by mathematical computation; it must be fixed by the jury with respect to the evidence and the probabilities, and should be sufficient to compensate therefor.²²

²⁰ Metropolitan St. R. Co. v. Johnson, 90 Ga. 500, 11 Am. Neg. Cas. 350; Atlanta St. R. Co. v. Jacobs, 88 Ga. 647, 2 Am. Neg. Cas. 451; Hamilton v. Great Falls St. R. Co., 17 Mont. 334; Atlanta v. Hampton, 139 Ga. 389; Atkinson v. Taylor, 13 Ga. App. 100.

²¹ Becker v. Lincoln R. E. & B. Co., 118 Mo. App. 74; Perrigo v. St. Louis, 185 Mo. 276; Jordan v. Middlesex R. Co., 138 Mass. 425.

²² Filer v. New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327, 5 Am.

Neg. Cas. 151; Minick v. Troy, 19 Hun 253; Denver v. Sherret, 31 C. A. 499, 509, 88 Fed. 226; Rogan v. Montana Cent. R. Co., 20 Mont. 503. See § 1243.

Many of the older cases fail to recognize the right of recovery for the mere impairment of the ability to labor where the proceeds of the labor performed by the injured person belong to another. See Uran-sky v. Dry Dock, etc. R. Co., 118 N. Y. 304, 16 Am. St. 759.

In Jordan v. R. Co., *supra*, the

According to some courts if the plaintiff was engaged at wages when injured and his employer continued to pay them during the period of disability, there can be no recovery for loss of wages;²³ but on this question there is a disagreement, especially if the payments were made as a gratuity, though that is not always the basis for the opposing view.²⁴ The gross sum which might have been earned is not the measure of recovery, but the present value of the sum that might have been earned during the plaintiff's expectancy of life, or the continuance of his disability.²⁵ The permanent loss of earning capacity may be arrived at by estimating as near as may be the plaintiff's probable yearly earnings during his life and giving him such sum as would purchase a life annuity equal to the difference between the amount which he would have earned each year if he had not been injured and that which he could earn each year in his injured condition.²⁶

court charged: The plaintiff's capacity to earn is her own, and, if entitled to recover at all, she is entitled to recover for any diminution of her capacity to labor that is shown to have resulted from the injury; and this is to be determined upon the whole evidence, and not by any special theory of computation.

²³ *Travis v. Louisville & N. R. Co.*, 183 Ala. 415; *Pittsburgh, etc. R. Co. v. Fagin*, 3 Ohio N. P. (N.S.) 30 (Cincinnati Superior Ct., general term); *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209; *De La Vergne R. M. Co. v. Stahl*, 24 Tex. Civ. App. 471; *Drinkwater v. Dinsmore*, 80 N. Y. 390, 36 Am. Rep. 624; *Ephland v. Missouri Pac. R. Co.*, 57 Mo. App. 147, 4 Am. Neg. Cas. 440; *Lee v. Western U. Tel. Co.*, 51 Mo. App. 375. Compare *Elmer v. Fessenden*, 154 Mass. 427.

²⁴ *Western & A. R. Co. v. Sellers*, 15 Ga. App. 369 (gratuity); *Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560 (regardless of whether payment was made under the contract or as a favor); *International, etc. R.*

Co. v. Haddox, 36 Tex. Civ. App. 385; *Illinois Cent. R. Co. v. Porter*, 117 Tenn. 13; *Rundle v. Slate Belt E. St. R. Co.*, 33 Pa. Super. Ct. 233. See § 158.

²⁵ *Reitler v. Pennsylvania R. Co.*, 238 Pa. 1; *Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 207, 84 Fed. 772; *Coley v. North Carolina R. Co.*, 128 N. C. 534, 542, 57 L.R.A. 817; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. 1, 17, 55 Am. St. 705; *St. Louis, etc. R. Co. v. Farr*, 6 C. C. A. 211, 56 Fed. 994; *Miller v. Sadowsky*, 138 Mich. 502. See *Peterson v. Roessler & H. C. Co.*, 131 Fed. 156.

The expectancy of a man seriously mutilated cannot be assumed to be that of a normal man. *Yazoo, etc. R. Co. v. Wallace*, 91 Miss. 492.

²⁶ *Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 623, 73 Fed. 634; *Colusa Parrot M. & S. Co. v. Monahan*, 89 C. C. A. 256, 162 Fed. 276, citing the text; *Bourke v. Butte E. & P. Co.*, 33 Mont. 267, citing the text; *Houston, etc. R. Co.*

In applying this rule regard must be had to the element of advancing age and the decrease of earning power which accompanies it if physical strength is a material factor in the earning power of the plaintiff.²⁷ It follows from this that the permanent nature of an injury does not authorize the recovery of a sum which represents the value of the life of the person injured.²⁸ A member of a firm is entitled to recover the value of his time without regard to the extent of his interest as a partner.²⁹ It is immaterial to the right to recover that the plaintiff contemplated leaving the employment he was engaged in when injured. The jury are not bound to award damages with respect to the incapacity to pursue a particular line of work, but may award it with reference to incapacity to earn money in any avocation the injured party might pursue in the future.³⁰ The expense of keeping a servant to do what the plaintiff would have done but for the injury may be recovered.³¹ Allowance must be made for the ordinary periods of disability and the decline of earning power attendant upon age.³²

Under civil damage statutes the recovery by a wife for the loss of support is not governed by the time the intoxication of the husband continued. If her means of support are totally destroyed their full value may be recovered, and if but partially the recovery must be limited accordingly.³³

§ 1250. Expenses for surgical and medical aid, etc. Such expenses and also the cost of medicines and nursing, when necessary and reasonably incurred, are part of the injury and may be recovered under proper pleadings and evidence.³⁴ The rule

v. Willie, 53 Tex. 318, 37 Am. Rep. 756. See McKenzie v. North Coast C. Co., 55 Wash. 495, 28 L.R.A. (N.S.) 1244.

²⁷ Lewis v. Northern Pac. R. Co., 36 Mont. 207; Moyses v. Same, 41 Mont. 272.

²⁸ Birmingham, R., L. & P. Co. v. Wright, 153 Ala. 99.

²⁹ Kendall v. Albia, 73 Iowa 241.

³⁰ El Paso E. R. Co. v. Murphy, 49 Tex. Civ. App. 586; Murray v. Chicago, etc. R. Co., 152 Iowa 732;

Houston & T. Cent. R. Co. v. McCullough, 22 Tex. Civ. App. 208.

³¹ Willis v. Second Ave. T. Co., 189 Pa. 430, 5 Am. Neg. Rep. 245.

³² Denbeigh v. Oregon-W. R. & N. Co., 23 Idaho 663.

³³ Selders v. Brothers, 88 Neb. 61.

³⁴ St. Louis, I. M. & S. Ry. Co. v. McMichael, 115 Ark. 101; Girardo v. Wilmington & Philadelphia Traction Co. — Del. Super. Ct. —, 90 Atl. 476; Igle v. People's Ry. Co., — Del. Super. Ct. —, 93

which makes such expenditures an element of the damages is based upon the doctrine of avoidable consequences. It is the duty of the person injured to exercise reasonable precautions in

Atl. 666; McGowan v. Wilmington & P. Traction Co., — Del. Super. Ct. —, 92 Atl. 1015; Reynolds v. Clark, — Del. Super. Ct. —, 92 Atl. 873; Brown v. Mayor & Council of Wilmington, 4 Boyce (Del.) 492; City of Key West v. Baldwin, 69 Fla. 136; Hatcher v. Quincy Horse Railway & Carrying Co., 181 Ill. App. 301; Acton v. Smith, 150 Ky. 703; Waehs v. New York Rys. Co., 84 Misc. (N. Y.) 632; Kennedy v. Spokane, etc. R. Co., 73 Wash. 387; Southern R. Co. v. Davis, 132 Ga. 812; Same v. Broughton, 128 Ga. 814; Elba v. Bullard, 152 Ala. 237; Central R. Co. v. McNab, 150 Ala. 332; Birmingham R., L. & P. Co. v. Moore, 148 Ala. 115; Melone v. Sierra R. Co., 151 Cal. 113; Sturm v. Consolidated C. Co., 155 Ill. App. 1; Flaherty v. St. Louis T. Co., 207 Mo. 318; Jones v. New York Cent. etc. R. Co., 99 App. Div. (N. Y.) 1; Rushing v. Seaboard A. L. R. Co., 149 N. C. 158; Scurlock v. Boone, 142 Iowa 684; Ramsdell v. Grady, 97 Me. 319; St. Louis, etc. R. Co. v. Dodgin (Tex. Civ. App.), 127 S. W. 847; Kirk v. Seattle E. Co., 58 Wash. 283, 31 L.R.A.(N.S.) 991; Chicago City R. Co. v. Henry, 218 Ill. 92; Mirrieles v. Wabash R. Co., 163 Mo. 470; Sheehan v. Edgar, 58 N. Y. 631, 12 Am. Neg. Cas. 400; Beardsley v. Swann, 4 McLean 333; Missouri, etc. R. Co. v. Weaver, 16 Kan. 456, 8 Am. Neg. Cas. 274; Forbes v. Loftin, 50 Ala. 396; Klein v. Thompson, 19 Ohio St. 569; Chicago v. Jones, 66 Ill. 349; Same v. Langlass, id. 361; Same v. O'Brennan, 65 id. 160; Peoria B. Ass'n v.

Loomis, 20 id. 235, 71 Am. Dec. 263; The Canadian, 1 Brown, Adm. 11; Indianapolis, etc. R. Co. v. Birney, 71 Ill. 391; St. Louis, etc. R. Co. v. Cautrell, 37 Ark. 519, 40 Am. Rep. 105; Chicago & E. R. Co. v. Holland, 122 Ill. 461; Wall v. Livezey, 6 Colo. 465, 9 Am. Neg. Cas. 124; Indiana C. Co. v. Parker, 100 Ind. 182, 14 Am. Neg. Cas. 422; Central P. R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. 309, 11 Am. Neg. Cas. 626; Phillips v. London, etc. R. Co., 42 L. T. Rep. 6; Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589; Scott v. Montgomery, 95 Pa. 444; Hulehan v. Green Bay, etc. R. Co., 68 Wis. 520, 17 Am. Neg. Cas. 903, 919, 920; Hart v. Railroad Co., 33 S. O. 427, 10 L.R.A. 794; Alabama G. S. R. Co. v. Siniard, 123 Ala. 557; Stewart v. Philadelphia, W. & B. R. Co., 8 Houst. 450, 13 Am. Neg. Cas. 743; Jones v. Belt, 8 Houst. 562; Consolidated C. Co. v. Haeini, 146 Ill. 614, 628, 14 Am. Neg. Cas. 310; Golder v. Lund, 50 Neb. 867; Farley v. Charleston B. & V. Co., 52 S. C. 222; Washington & G. R. Co. v. Patterson, 9 App. Cas. (D. C.) 423; Cousins v. Lake Shore & M. S. R. Co., 96 Mich. 386; Smith v. Chicago & A. R. Co., 108 Mo. 243, 4 Am. Neg. Cas. 699; Robertson v. Wabash R. Co., 152 Mo. 382; Friend v. Ingersoll, 39 Neb. 717, 727; Page v. Delaware & H. C. Co., 34 App. Div. (N. Y.) 618; Andrews v. Toledo, etc. R. Co., 19 Ohio C. C. 699; Houston, etc. R. Co. v. Rowell, 92 Tex. 147; Missouri, etc. R. Co. v. Belew, 22 Tex. Civ. App. 264; Alabama, etc. R. Co. v. Davis, 119 Ala. 572; Rhyner v.

order to render the injury as light as possible. Failing to perform that duty, he cannot recover for consequences which might by its performance have been avoided. Hence the expense incurred in going to a place where a person bitten by a dog may receive the Pasteur treatment as a preventive of hydrophobia may be recovered without proof showing it was necessary to take such treatment.³⁵ There is another equally good reason for the existence of the rule—such expenses are the natural and proximate consequence of a serious physical injury. Such damages are generally treated as special, because they do not necessarily result from all personal injuries,³⁶ but in case of severe bodily injury the assistance of physicians is so obviously necessary as to be provable under a general allegation of damages.³⁷ Where the damages are considered to be special the

Menasha, 107 Wis. 201. See *Western G. Const. Co. v. Danner*, 38 C. C. A. 528, 97 Fed. 882. See *Vansant v. Kowalewski*, — Del. Super. Ct. —, 90 Atl. 421.

Services and expenditures are capable of pecuniary measurement and must be specially proved. *Barton v. Southwick*, 185 Ill. App. 24.

A claim for money expended for "nursing and medical attendance" covers expenditures for medicines used by physicians in giving such attendance. *Knapp v. Sioux City & P. R. Co.*, 71 Iowa 41.

Under an allegation that plaintiff has suffered great expense, injury to bedding by the application of medicine to the wounded part may be proved. *Fox v. Chicago, etc. R. Co.*, 86 Iowa 368, 17 L.R.A. 289, 14 Am. Neg. Cas. 671.

There cannot be a recovery of the cost of an artificial limb purchased in consequence of the defendant's wrongful act unless such cost is specially pleaded. *Southern Pac. Co. v. Hall*, 41 C. C. A. 50, 100 Fed. 760.

The admission of evidence as to

the amount of a bill paid to a hospital for care while injured is not error where it is also shown that such charge is reasonable. *Parkhill v. Bekin's Van & Storage Co.*, 169 Iowa 455.

The plaintiff should state the facts relative to expenses which have been incurred, and should not give an estimate thereof. *Perrine v. Southern Bitulithic Co.*, — Ala. —, 66 So. 705.

³⁵ *Ayers v. Macoughtry*, 29 Okla. 339, 5 N. C. C. A. 729.

³⁶ *Smart v. Wabash R. Co.*, 164 Mo. App. 61; *O'Leary v. Rowan*, 31 Mo. 117; *Jesse v. Shuck*, 11 Ky. L. Rep. 463; *Macon v. Paducah St. R. Co.*, 23 Ky. L. Rep. 46; *Illinois Cent. R. Co. v. Hanberry*, 23 Ky. L. Rep. 1867; *Smith v. Whittlesey*, 79 Conn. 189; *Bender v. Louisville R. Co.*, 144 Ky. 166; *Moellman v. Gieze-H. L. Co.*, 134 Mo. App. 485; *Nelson v. Metropolitan St. R. Co.*, 113 Mo. App. 659. See § 421.

³⁷ *Shoemaker v. Sonju*, 15 N. D. 518; *Folsom v. Underhill*, 36 Vt. 581, 10 Am. Neg. Cas. 144; *Evansville & T. H. R. Co. v. Holcomb*, 9

amount incurred or paid for such services need not be alleged;³⁸ but if they are alleged the recovery is limited accordingly.³⁹ Where such expenses have been incurred by the injured party, so that he is liable therefor, he is entitled to recover for them though they have not been paid,⁴⁰ or their payment cannot be

Ind. App. 198; *Hopkins v. Atlantic*, etc. R. Co., 36 N. H. 9, 72 Am. Dec. 287; *Laing v. Calder*, 8 Pa. 479, 49 Am. Dec. 533; *Pennsylvania, etc. C. Co. v. Graham*, 63 Pa. 290, 3 Am. Rep. 549. But see *Illinois Cent. R. Co. v. Hanberry*, *supra*.

³⁸ *Smart v. Wabash R. Co.*, *supra*; *Kupferschmid v. Southern E. R. Co.*, 70 Mo. App. 438; *Detrich v. Metropolitan St. R. Co.*, 125 Mo. App. 608. See *Louisville & N. R. Co. v. Barnwell*, 131 Ga. 791; *Toledo E. St. R. Co. v. Tucker*, 13 Ohio C. C. 411. *Contra*, *Lexington & E. R. Co. v. Fields*, 152 Ky. 19; *San Antonio T. Co. v. Cassanova* (Tex. Civ. App.), 154 S. W. 1190; *Louisville & N. R. Co. v. Moore*, 150 Ky. 692 (either absolutely or approximately).

³⁹ *Blue Grass T. Co. v. Ingles*, 140 Ky. 488; *Blomquist v. Minneapolis F. Co.*, 112 Minn. 143; *South Covington & C. R. Co. v. Raymer*, 132 Ky. 187, 132 Am. St. 177; *Houston E. Co. v. Green*, 48 Tex. Civ. App. 242; *Haake v. Dulle M. Co.*, 168 Mo. App. 177.

⁴⁰ *Baker v. Taylorville R., L. H. & P. Co.*, 164 Ill. App. 232; *Ubeda y Salazar v. San Juan L. & T. Co.*, 4 Porto Rico Fed. 533; *Wilson v. Chicago City R. Co.*, 144 Ill. App. 604 (liability is enough); *Indianapolis St. R. Co. v. Haverstick*, 35 Ind. App. 281, 111 Am. St. 163; *Sotebier v. St. Louis T. Co.*, 203 Mo. 702; *Curtis v. McNair*, 173 Mo. 270; *Gibbs v. Poplar Bluff L. & P. Co.*, 142 Mo. App. 19 (even if an infant); *Wilbur v. Southwest*

Missouri E. R. Co., 110 Mo. App. 689; *Zilke v. Johnson*, 22 N. D. 75; *Gries v. Zeck*, 24 Ohio St. 329, 1 Am. Neg. Cas. 236; *Donnelly v. Hufschmidt*, 79 Cal. 74; *Styles v. Decatur*, 131 Mich. 443; *McLaughlin v. San Francisco, etc. R. Co.*, 113 Cal. 590 (but there cannot be a recovery of the sum for which liability has been incurred under an allegation that it had been paid); *Ward v. Haws*, 5 Minn. 440; *Chicago & E. R. Co. v. Cleminger*, 178 Ill. 536; *Mueller v. Kuhn*, 59 Ill. App. 353; *Richardson v. Chasen*, 10 Q. B. 756; *Consolidated C. Co. v. Scheiber*, 65 Ill. App. 304; *Chicago & A. R. Co. v. Harrington*, 77 id. 499, 503, quoting the text; *Flanagan v. Baltimore & O. R. Co.*, 83 Iowa 639 (but see *Bowsher v. Chicago, etc. R. Co.*, 113 Iowa 16, 21; *San Antonio & A. P. R. Co. v. Moore*, 31 Tex. Civ. App. 371; *Abilene v. Wright*, 4 Kan. App. 708; *Lammiman v. Detroit Citizens' St. R. Co.*, 112 Mich. 602, 3 Am. Neg. Rep. 52; *Gorham v. Kansas City & S. R. Co.*, 113 Mo. 408, 421; *Friend v. Ingersoll*, 39 Neb. 717, 727, citing the text; *Omaha St. R. Co. v. Emminger*, 57 Neb. 240; *Clarke v. Westcott*, 2 App. Div. (N. Y.) 503; *Chacey v. Fargo*, 5 N. D. 173; *Parker v. South Carolina & G. R. R.*, 48 S. C. 364, 382, 1 Am. Neg. Rep. 681; *Wilson v. Southern Pac. Co.*, 13 Utah 352, 360, 12 Am. Neg. Cas. 626, 57 Am. St. 766; *Denver, etc. R. Co. v. Lorentzen*, 24 C. C. A. 592, 79 Fed. 291. *Contra*, *Standard D. & D. Co. v. Hill*, 92 C. C. A. 83, 166

compelled because of the statute of limitations,⁴¹ or the physician relies upon a third person for payment,⁴² or the plaintiff is not liable because an infant,⁴³ or they have been voluntarily paid by another,⁴⁴ or the services were rendered gratuitously.⁴⁵ This ruling has been and is questioned for carrying the allowance for compensation beyond the actual injury.⁴⁶ Proving a

Fed. 99. Compare *Haywood v. Kuhn*, 168 Mo. App. 56.

⁴¹ *Houston, etc. R. Co. v. Gerald* (Tex. Civ. App.), 128 S. W. 166.

⁴² *Houston, etc. R. Co. v. Gray* (Tex. Civ. App.), 137 S. W. 729.

⁴³ *Forbes v. Loftin*, 50 Ala. 396; *Central R. Co. v. McNab*, 150 Ala. 332; *Fry v. Hillan* (Tex. Civ. App.), 37 S. W. 359.

⁴⁴ *Shoemaker v. Central R. of New Jersey*, — N. J. —, 89 Atl. 518 (father for daughter); *Klein v. Thompson*, 19 Ohio St. 569.

But it has been held that a wife may not recover for physician's and nurse's bills where the bills have been paid by the husband. *Antrim v. Noonan*, 186 Ill. App. 360.

⁴⁵ *Indianapolis v. Gaston*, 58 Ind. 227; *Brosnan v. Sweetser*, 127 id. 1; *Ohliger v. Toledo*, 20 Ohio C. C. 142; *In re D. S. Gregory & The George Washington*, 2 Bene. 226; *Berringer v. Dubuque St. R. Co.*, 118 Iowa 135; *Yeager v. Spirit Lake*, 115 Iowa 593.

⁴⁶ *Duke v. Missouri Pac. R. Co.*, 99 Mo. 347; *Morris v. Grand Ave. R. Co.*, 144 Mo. 500; *Alabama, etc. R. Co. v. Davis*, 119 Ala. 572, 586; *Birmingham R., L. & P. Co. v. Humphries*, 172 Ala. 495; *Rio Grande S. R. Co. v. Campbell*, 44 Colo. 1; *Schmitt v. Kurrus*, 234 Ill. 578; *Thompson v. Dering C. Co.*, 158 Ill. App. 289; *Vedder v. Delaney*, 122 Iowa 583; *Heater v. Delaware, etc. R. Co.*, 90 App. Div. (N. Y.) 495; *Bowe v. Bowe*, 5 Ohio Suth. Dam. Vol. IV.—68.

C. C. (N.S.) 233; *Nelson v. Western S. N. Co.*, 52 Wash. 177.

In *Drinkwater v. Dinsmore*, 80 N. Y. 390, 36 Am. Rep. 624, Earl, J., delivering the opinion of the court, on the point that the injured party was entitled to nothing for loss of wages where they were paid to him during his disability, referred to the exclusion of evidence offered for the purpose of mitigation where money had been received on an accident insurance by reason of the injury in question, and of the receipt of money on other insurance in cases of suit for wrongful destruction or conversion of property. He said: "In such cases proof of the insurance actually paid would not tend to show that the damage claimed was not actually occasioned by the wrong-doer; but it would simply show that compensation had been received by the injured party, in whole or in part, from some other party,—not that the wrong-doer had made satisfaction which alone could give him a defense. Here the proof was offered, not in mitigation or satisfaction of any damage actually done the plaintiff, but to show that he did not suffer the damage claimed, to wit, the loss of wages. Before the plaintiff could recover for the loss of wages, he was bound to show that he lost the wages in consequence of the injuries, and how much they were. The defendant had the right to show that he lost no wages, or that they

claim for medical services against the plaintiff in bankruptcy, though it be assumed his discharge will bar it, does not prevent its recovery; the plaintiff may treat it as a debt of honor.⁴⁷ There cannot be a recovery on account of expenses incurred if the petition only claims reimbursement for moneys expended.⁴⁸ If payment has not been made and cannot be compelled because of the incapacity of the person who has rendered medical services to sue therefor, the amount of his charge cannot be recovered.⁴⁹ If the services have been paid for it is immaterial that

were not as much as he claimed. He had the right to show, if he could, that for some particular reason the plaintiff would not have earned any wages if he had not been injured, or that he was under such a contract with his employer that his wages went on without service, or that his employer paid his wages from mere benevolence. In either case, upon such showing, the plaintiff could not claim that the defendant's wrong caused him to lose his wages, and the loss of wages could form no part of his damage. So the expense of nursing may be recovered as an item of damage, if properly incurred. But the defendant may show that no such expense was incurred, as that the plaintiff was nursed by a sister of charity. So the doctor's bill may in such a case be recovered. But plaintiff must show what he paid the doctor, or was bound to pay. The defendant may show that the plaintiff was doctored at a charity hospital, or at the expense of the town or county, or gratuitously. In such case the doctor's bill could not be an element of his damage."

In *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. 818, the plaintiff was a minor. It was held that there was no error in refusing to allow her to recover for

moneys paid out or incurred by her brother in her behalf for medical attendance and medicines. It may be that the physician so in attendance and the person so furnishing the medicines, respectively, might have recovered therefor as for necessities, but those things gave her no right of action for moneys voluntarily paid and voluntarily incurred by her brother or her father.

⁴⁷ *Sibley v. Nason*, 196 Mass. 125, 12 L.R.A.(N.S.) 1173, 124 Am. St. 520.

⁴⁸ *Elam v. Majestic C. & C. Co.*, 155 Ill. App. 375; *Gibbs v. Poplar Bluff L. & P. Co.*, 142 Mo. App. 19; *Stanley v. Chicago, etc. R. Co.*, 112 Mo. App. 601; *Missouri K. & T. R. Co. of Texas v. Reasor*, 28 Tex. Civ. App. 302 (writ of error denied by supreme court).

⁴⁹ *Chicago v. Honey*, 10 Ill. App 535; *Dixon v. Bell*, 1 Stark. 287; *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443.

Notwithstanding a statute prohibits a recovery for medical services rendered by one not licensed to practice, in an action to which the person who has practiced is not a party the presumption is he was qualified to practice. *Golder v. Lund*, 50 Neb. 867, 871; *Chicago v. Wood*, 24 Ill. App. 40.

A specific objection to the com-

he who rendered them could not have enforced collection therefor.⁵⁰ Although the plaintiff is insolvent and is allowed to sue as a poor person, and has not paid for medical expenses they may be recovered.⁵¹

The measure of recovery for medical attention is not the usual charge of the particular physician who is on the witness stand, (though it has been held that proof of the amount paid is proper as some evidence of the value of the services)⁵² but the usual and reasonable charge of the local profession generally,⁵³ unless the sum paid or charged is less than that.⁵⁴ If the evidence shows the number of the physician's visits to the plaintiff and the number of treatments given him elsewhere there is a basis for awarding compensation therefor.⁵⁵ But in Pennsylvania testimony as to the value of medical services is not dispensed

petency of the physician to practice his profession must be made. *Chicago & E. R. Co. v. Holland*, 122 Ill. 461.

⁵⁰ *Allen v. Durham T. Co.*, 144 N. C. 288.

⁵¹ *Patterson v. Springfield Traction Co.*, 178 Mo. App. 250.

⁵² *Brown v. Blaine*, 41 Wash. 287; *Barren v. Liedloff*, 95 Minn. 474.

⁵³ *Coffey v. Sutton*, 175 Ill. App. 331; *Nelson v. Metropolitan St. R. Co.*, 113 Mo. App. 659; *Montgomery v. Shirley*, 159 Ala. 239; *Birmingham R. L. & P. Co. v. Moore*, 148 Ala. 115; *McCarthy v. Spring Valley C. Co.*, 243 Ill. 185; *Thompson v. Dering C. Co.*, 158 Ill. App. 289; *Steeve v. Smith*, 153 id. 630; *Elzig v. Bales*, 135 Iowa 208; *Vedder v. Delaney*, 122 Iowa 583; *Lucas v. United R. Co.*, 154 Mo. App. 16; *York v. Everton*, 121 Mo. App. 640; *Storm v. Butte*, 35 Mont. 385; *Armstrong v. Auburn*, 84 Neb. 842; *Allen v. Durham T. Co.*, 144 N. C. 288; *Freeman v. Fuller* (Tex. Civ. App.), 127 S. W. 1194; *International, etc. R. Co. v. Lane* (Tex. Civ. App.), 127 S. W.

1066; *Dallas Con. E. St. R. Co. v. Ison*, 37 Tex. Civ. App. 219, 17 Am. Neg. Rep. 277; *Parker v. Boston & M. R.*, 84 Vt. 329; *Tuohy v. Columbia S. Co.*, 61 Ore. 527; *Chicago City R. Co. v. Wall*, 93 Ill. App. 411, 416; *Bowsher v. Chicago, etc. R. Co.*, 113 Iowa 16. See *Parkhill v. Bekin's Van & Storage Co.*, 169 Iowa 455.

If the services rendered are of a nature likely to be familiar to the jury and the evidence of the charge is not questioned, its reasonableness may be determined without evidence. *Flanagan v. Baltimore & O. R. Co.*, 83 Iowa 639; *Sachrai v. Manilla*, 120 Iowa 562.

A physician may state what remedies he used in treating an injured person. *Southern R. Co. v. Hobbs*, 151 Ala. 335.

⁵⁴ *Schmitt v. Kurrus*, 234 Ill. 578; *Birmingham R., L. & P. Co. v. Humphries*, *infra*.

⁵⁵ *Scullane v. Kellogg*, 169 Mass. 544; *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 5 L.R.A. 544. But see *Nelson v. Metropolitan St. R. Co.*, *supra*.

with though they be described by the physician.⁵⁶ In Illinois the value of such services must be specifically shown.⁵⁷ The presumption which arises after proof of the need, and employment of, medical aid, that expense was connected therewith,⁵⁸ does not excuse the failure to produce evidence showing the connection between the services rendered and the injury, as also the amount paid and to whom.⁵⁹ Generally the reasonableness of the charge is determinable by the local standard; but if the services were performed at a place remote from that where the injury was sustained the standard of that place is the basis to gauge the fairness of the charge by.⁶⁰ As bearing upon the expense of professional assistance it may be shown that the operation to which the plaintiff submitted was attended with great difficulty and danger and that but few persons performed such operations.⁶¹ Traveling expenses of the plaintiff and his attendant, incurred upon the advice of a physician, may be recovered, after deducting therefrom such sum as would have been necessarily expended if the plaintiff had remained at home.⁶² In Massachusetts evidence that a practicing physician or surgeon attends and gives professional aid to a patient justifies a finding that he does so for a pecuniary reward to be paid by the patient.⁶³

The value of services rendered by women in the house where

The bill of a physician and its admitted correctness by the plaintiff is some evidence it was reasonable. *Abbitt v. St. Louis T. Co.*, 104 Mo. App. 534.

Generally, opinions as to value are not binding on the jury; they may put their own estimate upon the value of services in view of their nature and character and the attendant circumstances though there is no evidence that the amount asked or allowed was reasonable. *Georgia R. & E. Co. v. Tompkins*, 138 Ga. 596.

⁵⁶ *Brown v. White*, 202 Pa. 297, 58 L.R.A. 321, 12 Am. Neg. Rep. 132.

⁵⁷ *Krakowski v. Aurora, etc. R. Co.*, 167 Ill. App. 469; *Lyman v. Chicago City R. Co.*, 176 Ill. App. 27.

⁵⁸ *Webster v. Seattle, etc. R. Co.*, 42 Wash. 364.

⁵⁹ *Amann v. Chicago Con. T. Co.*, 243 Ill. 263.

⁶⁰ *Vedder v. Delaney*, 122 Iowa 583.

⁶¹ *Normile v. Wheeling T. Co.*, 57 W. Va. 132, 68 L.R.A. 901.

⁶² *Kirk v. Seattle E. Co.*, 58 Wash. 283, 31 L.R.A.(N.S.) 991.

⁶³ *McGarrahan v. New York, etc. R. Co.*, 171 Mass. 211, 4 Am. Neg. Rep. 284.

the plaintiff was while being treated for his injury may be fixed by the jurors, without detailed proof, on their own knowledge and experience, the length of time they were rendered being shown.⁶⁴ It is not a valid reason for not allowing the recovery of the amount paid for the services of a trained nurse that there were persons in the plaintiff's family who could have given him the care and attention needed without expense, unless it is proven that they were competent to do so.⁶⁵ Proof of the sum paid or agreed upon is some evidence of the value of the services rendered, and authorizes the consideration of the item in assessing damages.⁶⁶ A married woman cannot recover the physician's and nurse's bills as items of damage because she is not liable for them,⁶⁷ unless by virtue of a statute.⁶⁸ The same rule applies to a minor living with his parents,⁶⁹ unless he has

⁶⁴ *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 20 Am. St. 601; *Scurlock v. Boone*, 142 Iowa 684, citing the text; *Drogmund v. Metropolitan St. R. Co.*, 122 Mo. App. 154 (on rehearing). *Contra*, *Heater v. Delaware, etc. R. Co.*, 90 App. Div. (N. Y.) 495; *Lawson v. Seattle & R. R. Co.*, 34 Wash. 500, 16 Am. Neg. Rep. 253.

⁶⁵ *Kendall v. Albia*, 73 Iowa 241.

⁶⁶ *Birmingham R., L. & P. Co. v. Humphries*, 172 Ala. 495, citing the text; *Vedder v. Delaney*, *supra*; *Colwell v. Manhattan R. Co.*, 57 Hun 452, 5 Am. Neg. Cas. 511. *Contra* as to the amount paid for medicines; their reasonable value must be shown. *Galveston, etc. R. Co. v. Hodnett* (Tex. Civ. App.), 155 S. W. 678.

⁶⁷ *Pearll v. Bay City*, 174 Mich. 643; *Barker v. Rhode Island Co.*, 35 R. I. 406; *Warth v. Jackson County Court*, 71 W. Va. 184; *Indiana Union T. Co. v. McKinney*, 39 Ind. App. 86; *Gilson v. Cadillac*, 134 Mich. 189; *Pomerene v. White*, 70 Neb. 177; *Kimmel v. Interurban St. R. Co.* (Misc.), 87 N.

Y. Supp. 466; *Centralia v. Ayres*, 133 Ill. App. 290 (expense of servant); *Engelman v. Metropolitan St. R. Co.*, 133 Mo. App. 514; *Tompkins v. West*, 56 Conn. 478; *Lewis v. Atlanta*, 77 Ga. 756, 4 Am. St. 108; *Moody v. Osgood*, 50 Barb. 628; *State v. Detroit*, 113 Mich. 643; *Rogers v. Orion*, 116 Mich. 324, 5 Am. Neg. Rep. 271; *Belyea v. Minneapolis, etc. R. Co.*, 61 Minn. 224; *Becker v. Albany R.*, 35 App. Div. (N. Y.) 46; *Mount Adams & E. P. R. Co. v. Wyson*, 2 Ohio Dec. 65.

It is presumed credit was given the husband. *Montgomery St. R. Co. v. Smith*, 146 Ala. 316.

⁶⁸ *Elba v. Bullard*, 152 Ala. 237.

⁶⁹ *Porter v. Delaware, etc. R. Co.*, 134 Fed. 155; *Butler v. Metropolitan St. R. Co.*, 117 Mo. App. 354; *Tucker v. Buffalo C. Mills*, 76 S. C. 539, 121 Am. St. 957; *Newbury v. Getchel & M. L. & Mfg. Co.*, 100 Iowa 441, 457, 14 Am. Neg. Cas. 568, 62 Am. St. 582; *Burke v. Ellis*, 105 Tenn. 702; *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. 818.

paid the bill, or is legally bound to pay it,⁷⁰ as where the father refuses or is unable to provide for medical attendance.⁷¹ But the fact that a minor has not paid such expenses does not everywhere preclude him from recovering such as he incurred; he is not bound to disaffirm his contract for the benefit of the defendant.⁷² But the presumption that the husband is liable for medical services rendered his wife is overcome by proof that she expended money or incurred liability therefor on her own account, in which case she may recover therefor.⁷³ In some states married women, by virtue of statutes, may recover the sum reasonably paid for medical services,⁷⁴ or such sum incurred.⁷⁵ A wife has recovered where her husband was not a resident of the state and they had not lived together for six years, she having supported herself during that time,⁷⁶ and where the services were rendered solely on her credit.⁷⁷ Under a statute providing that neither husband nor wife shall be entitled to compensation for labor or services rendered for the other a husband cannot recover for the services of his wife in nursing him.⁷⁸ In the absence of a statute a mother has recov-

⁷⁰ *Stotler v. Chicago & A. R. Co.*, 200 Mo. 107; *Bowe v. Bowe*, 26 Ohio C. C. 409; *Giovagnoli v. Ft. Orange Const. Co.*, 148 App. Div. (N. Y.) 489; *Judd v. Ballard*, 66 Vt. 668.

⁷¹ *Harris v. Crawley*, 161 Mich. 383, 3 N. C. C. A. 48.

⁷² *National F. Co. v. Green*, 50 Colo. 307, 3 N. C. C. A. 751.

⁷³ *Green v. Muskegon T. & L. Co.*, 171 Mich. 18; *Indianapolis T. Co. v. Kidd*, 167 Ind. 402, 7 L.R.A. (N.S.) 143; *Krisinger v. Creston*, 141 Iowa 154; *Gilson v. Cadillac*, *supra*; *Tinkle v. St. Louis*, etc. R. Co., 212 Mo. 445; *Board of Com'rs v. Castetter*, 7 Ind. App. 309, 321.

⁷⁴ *Hill v. Sedalia*, 64 Mo. App. 494.

⁷⁵ *Chacey v. Fargo*, 5 N. D. 173, 179; *West Chicago St. R. Co. v.*

Carr, 170 Ill. 478; *Hickey v. Welch*, 91 Mo. App. 4; *Struble v. DeWitt*, 89 Neb. 726 (as where she receives compensation for services rendered others than members of her family).

⁷⁶ *Lammiman v. Detroit Citizens' St. R. Co.*, 112 Mich. 602, 3 Am. Neg. Rep. 52; *Boyle v. Saginaw*, 124 Mich. 348.

⁷⁷ *Lacas v. Detroit City R. Co.*, 92 Mich. 412, 4 Am. Neg. Cas. 138.

Evidence as to the charges of a physician for services is admissible in an action by a married woman for personal injuries where the debt is against the plaintiff and one for which she is personally liable. *Cowgill v. City of St. Joseph*, 180 Mo. App. 327.

⁷⁸ *Peoria, etc. R. Co. v. Johns*, 43 Ill. App. 83, 14 Am. Neg. Cas. 404.

ered for the value of her time given to an injured child,⁷⁹ as has a father for nursing done his infant by his wife and daughter.⁸⁰ A non-manumitted minor son cannot recover for the services rendered him by his mother in the absence of a contract or other special circumstances.⁸¹ In a number of states a husband cannot recover for the nursing and attendance furnished by members of his own household unless there is an express contract to that effect.⁸² But the weight of authority is in favor of the opposing view.⁸³ This doctrine is rested on the theory that the wrong-doer has no right to the services of the members of the plaintiff's family. The ordinary wages paid for care and attendance measures the recovery,⁸⁴ not the sum which the person who rendered the services could have earned at other work, though that was given up for the purpose of enabling him to perform them.⁸⁵ Hindrance in the performance of profes-

⁷⁹ *Morgan v. Dallas County*, 103 Iowa 57; *Simone v. Rhode Island Co.*, 28 R. I. 186, 9 L.R.A.(N.S.) 740.

⁸⁰ *Blackwell v. Hill*, 76 Mo. App. 46; *Johnson v. St. Paul & W. C. Co.*, 131 Wis. 627.

⁸¹ *Bowe v. Bowe*, 5 Ohio C. C. (N.S.) 233.

⁸² *Goodhart v. Pennsylvania R. Co.*, 177 Pa. 1, 14, 55 Am. St. 705; *Jones v. George*, 227 Ill. 64; *Gibney v. St. Louis T. Co.*, 204 Mo. 704.

⁸³ *Spencer v. Johnson*, 176 Mich. 278 (under civil damage statute); *Wells v. Minneapolis B. & A. Ass'n*, 122 Minn. 327, 46 L.R.A.(N.S.) 606; *The Little Silver*, 189 Fed. 980; *Indianapolis & E. R. Co. v. Bennett*, 39 Ind. App. 141; *Seurlock v. Boone*, 142 Iowa 684; *Strand v. Grinnell A. G. Co.*, 136 Iowa 68; *Lewark v. Parkinson*, 73 Ark. 533, 20 Am. Neg. Rep. 81; *Kaiser v. St. Louis T. Co.*, 108 Mo. App. 708; *Houston, etc. R. Co. v. Gerald* (Tex. Civ. App.), 128 S. W. 166; *Dallas Con. E. St. R. Co. v. Ison*, 37 Tex.

Civ. App. 219, 17 Am. Neg. Rep. 268; *Crouse v. Chicago & N. R. Co.*, 102 Wis. 196; *Missouri, etc. R. Co. v. Holman*, 15 Tex. Civ. App. 16; *Varnham v. Council Bluffs*, 52 Iowa 698; *Brosnan v. Sweetser*, 127 Ind. 1. See § 1252.

The expenses of relatives who leave home for the purpose of attending an injured person may be recovered. *Dean v. Wabash R. Co.*, 229 Mo. 425.

There is no presumption that a son is not to pay for services rendered by a mother with whom he was not living. *Kimball v. Northern E. Co.*, 159 Cal. 225.

⁸⁴ *Brosnan v. Sweetser*, *supra*; *Ft. Worth, etc. City R. Co. v. Walker*, 48 Tex. Civ. App. 86; *Macdonald v. St. Louis T. Co.*, 108 Mo. App. 374.

⁸⁵ *Western U. Tel. Co. v. Morris*, 10 Kan. App. 61, 8 Am. Neg. Rep. 575; *Southern R. Co. v. Crowder*, 135 Ala. 417, 428; *Walker v. Philadelphia*, 195 Pa. 168, 78 Am. St. 801; *Hazard P. Co. v. Volger*, 7 C. C. A. 130, 58 Fed. 152; *Salida*

sional duties and the loss of time from preparation therefor are too remote.⁸⁶ It is said in a Missouri case that a husband could testify to the facts relating to his services in attending his wife and their value or the time lost,⁸⁷ but not as to the general trouble he was put to on account of her injuries.⁸⁸ In an action for a personal injury by a minor who has no father or guardian, he may recover as part of his damages bills for medical attendance during any illness resulting from such injury;⁸⁹ and so where the action is brought in behalf of the minor with the consent of the father, as where he causes it to be brought in his own name as guardian *ad litem* and includes the expense of medical attendance.⁹⁰ There cannot be a recovery for "board and keeping" in addition to compensation for loss of time unless the cost thereof was materially increased because of the injury.⁹¹ The expense of supporting a child born of a woman carnally assaulted may not be recovered by her father.⁹² If the injured person dies the medical expenses incurred by him cannot be recovered by his personal representative.⁹³ Under a statute authorizing a recovery for personal injury or damage to property caused by a defective highway there cannot be a recovery for the expense of medical attendance.⁹⁴ Attorney's fees are not an element of the recovery.⁹⁵

Under a statute giving to any person who takes charge of and provides for an intoxicated person a right of action against the

v. McKinna, 16 Colo. 523; Selleck v. Janesville, 104 Wis. 570, 579, 76 Am. St. 892, 47 L.R.A. 691; Keenan v. Metropolitan St. R. Co., 118 App. Div. (N. Y.) 56; Ceigler v. Hopper-M. Co., 90 App. Div. (N. Y.) 379; Barnes v. Keene, 132 N. Y. 13. *Contra*, The Little Silver, *supra*; Ft. Worth, etc. R. Co. v. Kennedy, 12 Tex. Civ. App. 654.

⁸⁶ Dallas Con. E. St. R. Co. v. Ison, 37 Tex. Civ. App. 219, 17 Am. Neg. Rep. 268.

⁸⁷ Abbitt v. St. Louis T. Co., 104 Mo. App. 534.

⁸⁸ Dallas v. Moore, 32 Tex. Civ. App. 230.

⁸⁹ Forbes v. Loftin, 50 Ala. 396; Ellyson v. International & G. N. R. Co., 33 Tex. Civ. App. 1.

⁹⁰ Daly v. Everett P. & P. Co., 31 Wash. 252; Donald v. Ballard, 34 Wash. 576.

⁹¹ Vedder v. Delaney, 122 Iowa 583.

⁹² Palmer v. Baum, 123 Ill. App. 584.

⁹³ Pulling v. Great Eastern R. Co., 9 Q. B. Div. 110.

⁹⁴ Nestor v. Fall River, 183 Mass. 265.

⁹⁵ San Antonio T. Co. v. Cassanova (Tex. Civ. App.), 154 S. W. 1190.

vendor of the liquor which caused the intoxication a reasonable compensation and an additional specified sum for every day such person shall be kept, the wife of such person, he having been injured, may recover for watching, nursing and caring for him while suffering from his injury; for injury to her health by such watching, and the medical treatment thereby made necessary: for assistance in giving the necessary care; the bill of a physician employed to attend the husband, and the wages of a man hired to do the work the husband would have done had he been well.⁹⁶ A wife who devotes additional time to the care and nursing of her husband and is obliged to do additional work to provide for herself and family is injured in her person, property and means of support, and may recover for such care and nursing. It is not ground for denying her the recovery of a bill for a physician's services that the husband had given his note therefor because if it is paid it will be paid out of the maker's wages and be a loss incident to the injury sustained.⁹⁷ The Nebraska statute providing for the recovery of all damages sustained by a wife and children on account of the liquor traffic does not give an action for the death of the husband, but for the loss of means of support caused by the death. The expense of medicine and medical attendance may be recovered, and if death is caused by the violation of the act, the funeral expenses, if the widow paid them from her own resources.⁹⁸ The father of an adult son, who is *sui juris*, without a home of his own, except at his father's, whom he paid for board, is not a person aggrieved by an injury to person or property so as to recover his expenditure of money or time on account of an injury sustained by the son while intoxicated by liquors unlawfully sold to him; neither could a recovery be based on the probable liability of the father for the support of the son under the poor laws.⁹⁹

§ 1251. But one action maintainable; prospective damages.

A personal injury from a single wrongful act or negligence

⁹⁶ Wightman v. Devere, 33 Wis. 570, 14 Am. Rep. 775.

⁹⁷ Thomas v. Dansby, 74 Mich. 398.

⁹⁸ Keeling v. Pommer, 83 Neb. 510.

⁹⁹ Veon v. Creaton, 138 Pa. 48, 9 L.R.A. 814.

is an entirety and affords ground for only one action.¹ In that action recovery may be had for all damages suffered up to the time of the trial,² and for all reasonably certain to be suffered in the future.³ Under this last head would of course be included present injuries that from their nature will continue for a more

¹ *Pla v. San Juan L. & T. Co.*, 3 Porto Rico Fed. 216.

² If evidence is received showing damages sustained down to the time of the trial it is not cause for a reversal that the allegation was limited to the time of bringing the action, no objection being made to the evidence. *Savannah, etc. R. Co. v. Grogan*, 117 Ga. 461.

³ *Chicago Union T. Co. v. Chugren*, 209 Ill. 429; *Wrisley v. Burke*, 203 Ill. 250; *Muncie P. Co. v. Hacker*, 37 Ind. App. 194 (use of "may" suffer, disapproved; but not fatal error, there being evidence from which it was reasonably certain suffering would result); *Williams v. Clark County*, 143 Iowa 328; *Elzig v. Bales*, 135 Iowa 208; *Huggard v. Glucose S. R. Co.*, 132 Iowa 724; *Evans v. Elwood*, 123 Iowa 92; *Louisville & N. R. Co. v. Simrall*, 127 Ky. 55; *Same v. Brown*, 127 Ky. 732, 13 L.R.A. (N.S.) 1135; *Pullen v. Boston E. R. Co.*, 208 Mass. 356; *Brininstool v. Michigan United R. Co.*, 157 Mich. 172, 21 Am. Neg. Rep. 446; *Olson v. Chicago, etc. R. Co.*, 94 Minn. 241; *Adler v. Desser (Misc.)*, 110 N. Y. Supp. 196; *Springer v. Schultz*, 205 Ill. 144 (though the declaration merely describes the injury generally without pointing out its seriousness or permanency); *Edward v. Illinois Cent. R. Co.*, 184 Ill. App. 107; *Lisenbury v. St. Louis & Springfield Ry. Co.*, 184 Ill. App. 395.

It is competent to prove by medical experts the probability that the

injury will permanently impair the health and physical or mental ability of the plaintiff. *Rossier v. Metropolitan St. R. Co.*, 125 Mo. App. 159; *Goldstein v. East Fallowfield*, 43 Pa. Super. Ct. 158; *Chesapeake & O. R. Co. v. Wiley*, 134 Ky. 461; *Meily v. St. Louis, etc. R. Co.*, 215 Mo. 567; *Pullman Co. v. Hoyle*, 52 Tex. Civ. App. 534; *Ferguson & Wheeler Land, Lumber & Handle Co. v. Good*, 112 Ark. 260 (effect of loss of one eye on the other); *Louisville, etc. R. Co. v. Falvey*, 104 Ind. 409, 422, citing *Tinney v. New Jersey S. Co.*, 12 Abb. Pr. (N.S.) 1; *Filer v. New York Cent. R. Co.*, 49 N. Y. 42, 5 Am. Neg. Cas. 147; *Wilt v. Vickers*, 8 Watts 227, 17 Am. Neg. Cas. 244; *Kent v. Lincoln*, 32 Vt. 591; *Montgomery v. Scott*, 34 Wis. 338; *Toledo, etc. R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Townsend v. Paoli*, 41 Kan. 591; *Sloan v. Edwards*, 61 Md. 89; *Lemoine v. Cook*, 36 Mo. App. 193; *Ganard v. Rochester, etc. R. Co.*, 50 Hun 22, 5 Am. Neg. Cas. 450; *White v. Milwaukee City R. Co.*, 61 Wis. 536; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 10 Am. Neg. Cas. 574; *Barr v. City of Kansas*, 121 Mo. 22; *Ayres v. Delaware, etc. R. Co.*, 158 N. Y. 254; *Nichols v. Brabazon*, 94 Wis. 549; *Denver, etc. R. Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738, 49 L.R.A. 77; *Beauerle v. Michigan Cent. R. Co.*, 152 Mich. 345; *Monize v. Begaso*, 190 Mass. 87; *Hallum v. Omro*, 122 Wis. 337; *Faber v. Reiss C. Co.*, 124 Wis. 554; *Cordiner v.*

or less definite period. Also, if flowing as a direct and necessary consequence from the present injury, there will in all probability

Los Angeles T. Co., 5 Cal. App. 400; Hutchinson L. & P. Co. v. Baker, 74 Kan. 120; Cumberland Tel. & T. Co. v. Overfield, 127 Ky. 548; Cotant v. Boone S. R. Co., 125 Iowa 46, 16 Am. Neg. Rep. 26, 69 L.R.A. 982, are to the same effect. But direct expert evidence is not essential. Missouri, etc. R. Co. v. Fowler, 61 Kan. 320, 7 Am. Neg. Cas. 243; Ayres v. Delaware, etc. R. Co., 158 N. Y. 254. Nor any expert evidence. Horowitz v. Hamburg-Am. P. Co., 18 N. Y. Misc. 24; Shaier v. Broadway I. Co., 22 App. Div. (N. Y.) 102.

It is competent to show the probable occurrence of future ill effects that may arise from an injury. St. Louis S. W. Ry. Co. of Texas v. Brown, — Tex. Civ. App. —, 163 S. W. 383.

The jury may pass upon the permanency of the injury solely on the testimony as to the plaintiff's condition and the nature of the injury, as in case of a miscarriage. West v. St. Louis S. R. Co., 187 Mo. 351.

Testimony that the injury might become permanent is objectionable. Carlile v. Bentley, 81 Neb. 715.

The opinions of experts are not incompetent because they use such words as "apt," "liable" or "likely," instead of "probable," in testifying as to the future effect of the injury. Moran v. Dake D. Co. (Misc.), 134 N. Y. Supp. 995.

The opinions and best judgments of experts are a basis on which the permanency of the injury may be submitted. South Covington & C. St. R. Co. v. Hardy, 152 Ky. 374, 44 L.R.A.(N.S.) 32.

In Wisconsin it is error to receive the evidence of a physician as to the necessity of medical attendance and

the services of nurses for the plaintiff in the future, and as to the extent to which such attendance would be required. Crouse v. Chicago & N. R. Co., 104 Wis. 473, two judges dissenting; Selleck v. Janesville, 104 Wis. 570, 76 Am. St. 892, 47 L.R.A. 691. *Contra*, Martin v. Southern Pac. Co., 130 Cal. 285. The California rule is to be preferred.

The plaintiff's physician may testify that a certain result was "likely" to follow the injury. Vohs v. Shorthill, 130 Iowa 538.

It is error to use the word "may" in connection with future pain, etc. Ford v. Des Moines, 106 Iowa 94; Pennsylvania Co. v. Files, 65 Ohio St. 403; Nixon v. Omaha, etc. St. R. Co., 79 Neb. 550; Henry v. Omaha P. Co., 81 Neb. 237; Olson v. Chicago, etc. R. Co., *supra*; Smith v. Chicago City R. Co., 169 Ill. App. 570; Escher v. Carroll County, 159 Iowa 627. *Contra*, Vansant v. Kowalewski, — Del. Super. Ct. —, 90 Atl. 421; McGowan v. Wilmington & P. Traction Co., — Del. Super. Ct. —, 92 Atl. 1015; Reynolds v. Clark, — Del. Super. Ct. —, 92 Atl. 873; Travers v. Hartman, — Del. Super. Ct. —, 92 Atl. 855; Brown v. Mayor & Council of Wilmington, 4 Boyce (Del.) 492.

Where the injury is indisputably permanent, such as the loss of legs, an instruction, permitting the jury "to allow for any pain and suffering that he may endure in the future," is not prejudicially erroneous if such objectionable phrase is limited by the clauses "as shown by the evidence in this case, if any, he will suffer in the future and for the depreciation, if any, in his earning capacity, all as established by

be future independent injuries, recovery therefor may also be had. The same is true of present injuries, for some reason non-

the evidence." *Woodworth v. Iowa Cent. Ry. Co.*, — Iowa —, 149 N. W. 522.

The use of the word "probably" in that connection was approved. The court said in the *Ford* case: While one court has disapproved of the use of the term "reasonable probability" in an instruction relating to future pain and suffering (*Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 46 Am. St. 849, 27 L.R.A. 365, and *Smith v. Milwaukee B.'s & T.'s Exch.*, 91 Wis. 360, 17 Am. Neg. Cas. 916, 51 Am. St. 912, 30 L.R.A. 504), yet this same court has also held that an instruction to the effect that plaintiff might recover for pain which she may have to endure in the future, but that, in order to assess damages for the future, the jury must be satisfied to a reasonable extent, from the evidence, that she will continue to suffer, was good. *Kriegel v. Aitken*, 94 Wis. 432, 59 Am. St. 900, 35 L.R.A. 249. Other courts have approved of the use of "likely" (*Illinois Cent. R. Co. v. Davidson*, 22 C. C. A. 306, 76 Fed. 517, 7 Am. Neg. Cas. 449; *Scott v. Montgomery*, 95 Pa. 444; *Holden v. Missouri R. Co.*, 108 Mo. App. 665; *Birmingham v. Gordon*, 167 Ala. 334); and others, "reasonably certain" (*Stafford v. Oskaloosa*, 64 Iowa 251; *Ross v. Kansas City*, 48 Mo. App. 440; *Sherwood v. Chicago & N. W. R. Co.*, 82 Mich. 374, and still others, "reasonably result" (*Chilton v. St. Joseph*, 143 Mo. 192, 3 Am. Neg. Rep. 693; *Pentoney v. St. Louis T. Co.*, 108 Mo. App. 681). Reasonable certainty that future pain and suffering or loss of capacity will follow is all that is required. When we say that it is

"likely" or "probable" that such results will follow, we mean the evidence preponderates that way, and there is that reasonable certainty which the law requires. In accord as to the use of "may." *Chicago Great Western R. Co. v. Bailey*, 9 Kan. App. 207; *Hardy v. Milwaukee St. R. Co.*, 89 Wis. 183, 7 Am. Neg. Cas. 283; *Raymond v. Keseberg*, 91 Wis. 191; *Sanders v. O'Callaghan*, 111 Iowa 574, 581; *Omaha, etc. R. Co. v. Brady*, 39 Neb. 27, 56, 12 Am. Neg. Cas. 238; *Hall v. Cedar Rapids, etc. R. Co.*, 115 Iowa 18; *Dean v. St. Louis T. Co.*, 121 Mo. App. 379, citing local cases.

Various cases in the Missouri courts of appeals have disapproved of the use of "may" in instructions; but, following *Reynolds v. St. Louis T. Co.*, 189 Mo. 408, 107 Am. St. 360, and other cases in the supreme court have modified their views accordingly. See *Robertson v. Hammond P. Co.*, 115 Mo. App. 520; *O'Keefe v. United R. Co.*, 124 Mo. App. 613.

It is error to submit the question of permanent damages on "the probability or improbability" of their being sustained (*McBride v. St. Paul City R. Co.*, 72 Minn. 291. See *Knudsen v. Muskegon*, 158 Mich. 185) or to use the words "reasonably probable" (*Matthews v. Lamberton*, 184 Mich. 493; *Kethledge v. City of Petoskey*, 179 Mich. 301) or the words "likely to endure." *Kucera v. Merrill L. Co.*, 91 Wis. 637, 17 Am. Neg. Cas. 918; *Collins v. Janesville*, 99 Wis. 464; *Osterhout v. Delaware, etc. R. Co.*, 138 App. Div. (N. Y.) 625; *Cherry v. St. Louis, etc. R. Co.*, 163 Mo. App. 53.

existent for a time, shown to be likely to recur at some future date. The essential thing is that a basis for the damages be shown

It is only required that it be shown that pain and suffering will likely or probably ensue. *Wallace v. Pennsylvania R. Co.*, 222 Pa. 556, 128 Am. St. 817; *Harris v. Brown's Bay L. Co.*, 57 Wash. 8; *Blakley v. Pittsburgh Ry. Co.*, 243 Pa. 250. Reasonable certainty is required. *Allen v. St. Louis & S. F. R. Co.*, 184 Mo. App. 492; *Ongaro v. Twohy*, 49 Wash. 93. A reasonable probability is sufficient. *Industrial L. Co. v. Bivens*, 47 Tex. Civ. App. 396; *Devoy v. St. Louis T. Co.*, 192 Mo. 197; *Cameron M. & E. Co. v. Anderson*, 34 Tex. Civ. App. 105. The difference between "probable" and "reasonably probable" is not significant. *Galveston, etc. R. Co. v. Paschall*, 41 Tex. Civ. App. 357. "Probable" is equivalent to "reasonably certain." *Gallamore v. Olympia*, 34 Wash. 379. The probable effects of an injury must be shown. *Norfolk R. & L. Co. v. Spratley*, 103 Va. 379, 19 Am. Neg. Rep. 514; *Lentz v. Dallas*, 96 Tex. 258. They must be shown with reasonable certainty. *Chicago, etc. R. Co. v. Lindeman*, 75 C. C. A. 18, 143 Fed. 946; *Same v. De Clow*, 61 C. C. A. 34, 124 Fed. 142; *Howard v. Beldenville L. Co.*, 129 Wis. 98; *St. Louis, etc. R. Co. v. Bird*, 106 Ark. 177; *Breen v. Iowa Cent. R. Co.*, 159 Iowa 537; *Chambers v. Chicago City R. Co.*, 175 Ill. App. 362; *Jungst v. Aurora, etc. R. Co.*, 177 id. 435; *Ovens v. Chicago City R. Co.*, 171 Ill. App. 647; *Marshall v. Wabash R. Co.*, 171 Mich. 180; *Brininstool v. Michigan United R. Co.*, 157 Mich. 172; *United R. & E. Co. v. Dean*, 117 Md. 686. The words "will reasonably suffer" may be used. *Igle v. People's Ry. Co.*, — Del. Super. Ct. —, 93 Atl. 666.

"Reasonably likely" may be used. *Taylor v. Metropolitan St. R. Co.*, 166 Mo. App. 131. A reasonable probability is not sufficient. *Chicago & M. E. R. Co. v. Ullrich*, 213 Ill. 170. Testimony as to what "might" happen is incompetent. *Briggs v. New York, etc. R. Co.*, 177 N. Y. 59, 15 Am. Neg. Rep. 396, 101 Am. St. 718. And so of "likely." *Chicago, etc. R. Co. v. Newsome*, 83 C. C. A. 422, 154 Fed. 665; *Daigneau v. Grand Trunk R. Co.*, 153 Fed. 593. "May suffer" is too broad. *Melone v. Sierra R. Co.*, 151 Cal. 113. And so of "liable to suffer." *Green v. Catawba P. Co.*, 75 S. C. 102. Testimony as to possibilities is inadmissible. *Galveston, etc. R. Co. v. Powers*, 101 Tex. 161. The use of "may" has been approved. *Missouri, etc. R. Co. v. Allen*, 53 Tex. Civ. App. 433. And so of "reasonably and probably result." *St. Louis S. R. Co. v. Hawkins*, 49 Tex. Civ. App. 545. Consequences merely prospective and speculative are not to be weighed. *Gleason v. Hudson Valley R. Co.*, 143 App. Div. (N. Y.) 884.

Reasonable certainty is required in California, the code providing for the recovery of damages certain to result in the future; but mental suffering can hardly be susceptible of direct evidence. *Ryan v. Oakland G. L. & H. Co.*, 21 Cal. App. 14.

The rule of reasonable certainty is not violated by a charge using the words "as in all probability he will suffer." *Smith v. Metropolitan St. R. Co.*, 169 Mo. App. 610; *Welborn v. Same*, 170 Mo. App. 351.

The pain and suffering which has been endured as a result of injuries and which shall continue to be en-

by a preponderance of evidence to be reasonably certain to be suffered, or at least that it is fair to believe they will be so suffered.⁴

dured is an element of damages. *St. Louis, I. M. & S. Ry. Co. v. McMichael*, 115 Ark. 101.

The necessity for and the effect of an operation upon the plaintiff may be shown. *Monaghan v. Northwestern F. Co.*, 140 Wis. 457.

Present pain and permanent injury are evidential of future pain. *Jordan v. Cedar Rapids, etc. R. Co.*, 124 Iowa 177.

A recovery for permanent injury will not be sustained if the plaintiff's counsel disclaims a demand therefor and thereby misleads the defendant. *Kircher v. Larchwood*, 120 Iowa 578.

A wife may recover for the damage she will suffer by reason of injury to her property and means of support by reason of the unlawful sales of liquor to her husband. *Spencer v. Johnson*, 176 Mich. 278.

⁴*Denbeigh v. Oregon-W. R. & N. Co.*, 23 Idaho 663; *Ruttledge v. Rowland*, 161 Ala. 114, citing the text; *Southern R. Co. v. Petway*, 7 Ga. App. 659; *MacGregor v. Rhode Island Co.*, 27 R. I. 85; *Swensen v. Bender*, 51 C. C. A. 627, 114 Fed. 1; *Denver, etc. R. Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738, 49 L.R.A. 77.

There is disagreement concerning the extent of the proof as to future pain and suffering. In some courts it must appear such consequences are reasonably certain to result, not that they may result or are merely probable or likely. *Chicago, etc. R. Co. v. Newsome*, 83 C. C. A. 422, 154 Fed. 665; *Chicago & N. W. R. Co. v. De Clow*, 61 C. C. A. 34, 124 Fed. 142; *Chicago, etc. R. Co. v. Lindeman*, 75 C. C. A. 18, 143 Fed. 946.

In opposition, it has been said that "certainty" is freedom from

doubt, and if a plaintiff is required to prove that future apprehended consequences are reasonably free from doubt, he has imposed upon him a burden far beyond the ordinary requirement of proof in a civil action and approximating closely to the proof beyond a reasonable doubt of the criminal action. When a plaintiff has by a fair preponderance of the evidence satisfied the jury that future pain and suffering in consequence of his injury is reasonable, likely, or probable, or to be expected, he should be compensated for these as well as for those which are certain to occur. *Johnson v. Connecticut Co.*, 85 Conn. 438; *Cross v. Syracuse*, 200 N. Y. 393, explains the holding in *Strohm v. New York, etc. R. Co.*, 96 N. Y. 304, as applying the reasonable certainty rule to a case in which it was sought to show that diseases might develop in the plaintiff which had not developed at the time of the trial.

The time between the injury and the trial has been regarded as a material factor in determining whether the injuries are permanent or not, the condition of the plaintiff at the latter time being taken into account. *Kanen v. Philadelphia & R. R. Co.*, 70 N. J. L. 619, 16 Am. Neg. Rep. 127.

"A jury may only assess damages for mental and physical pain, suffering and inconvenience suffered or to be suffered in the future from the evidence in the case on the question of damages, considered in connection with their general knowledge, observation, and experience in business affairs." It is not necessary, however, that any witness shall have expressed his opinion as to the

The notes to this section disclose that varying forms of expression are employed to designate the sufficiency of the evidence required to authorize a verdict for future suffering. The divergence of views is so great that it is of doubtful utility to undertake to formulate a rule on the subject, if, indeed, its nature is such as to allow of that being done. The weight of authority appears to favor such expressions as these: The evidence is sufficient if it shows that the anticipated consequence is reasonably probable to follow,⁵ or will naturally, reasonably and probably result,⁶ or there is a reasonable probability it will result,⁷ or it is reasonably certain to follow.⁸ Such prospective damages may include compensation for physical and mental pain, disability and expenses,⁹ including the expense necessary

amount of such damages. *Hatcher v. Quincy Horse Railway & Carrying Co.*, 181 Ill. App. 30.

⁵ *St. Louis, etc. R. Co. v. Taylor* (Tex. Civ. App.), 134 S. W. 819.

⁶ *Norfolk R. & L. Co. v. Spratley*, 103 Va. 379, 19 Am. Neg. Rep. 514.

⁷ *St. Louis, etc. R. Co. v. Jenkins* (Tex. Civ. App.), 137 S. W. 711 (writ of error denied by the supreme court); *Gulf, etc. R. Co. v. Harriett*, 80 Tex. 73.

⁸ *Amann v. Chicago Con T. Co.*, 243 Ill. 263; *Lauth v. Chicago Union T. Co.*, 244 Ill. 244.

⁹ *St. Louis, etc. R. Co. v. Bird*, 106 Ark. 177; *Price v. Northern Elec. R. Co.*, 168 Cal. 173; *Barnett v. Chicago City R. Co.*, 167 Ill. App. 87; *Clark L. Co. v. St. Coner*, 97 Ark. 358; *Scally v. Garratt*, 11 Cal. App. 138; *Southern C. O. v. Skipper*, 125 Ga. 368; *Southern R. Co. v. Wright*, 6 Ga. App. 172; *Sturm v. Consolidated C. Co.*, 248 Ill. 20; *Chicago & M. E. R. Co. v. Ullrich*, 213 Ill. 170; *Chicago City R. Co. v. Carroll*, 206 Ill. 318; *Sebastian v. Chicago C. B. Co.*, 144 Ill. App. 504; *Indianapolis St. R. Co. v. Ray*, 167 Ind. 236; *Latman v. Douglas*, 149

Iowa 699 (expense of proposed operation); *Huggard v. Glucose S. R. Co.*, 132 Iowa 724; *Buce v. Eldon*, 122 Iowa 92; *Arkansas City v. Payne*, 80 Kan. 353; *Howell v. Lansing City E. R. Co.*, 136 Mich. 432; *Frazier v. St. Louis S. & R. Co.*, 150 Mo. App. 419; *Parker v. St. Louis T. Co.*, 108 Mo. App. 465, 17 Am. Neg. Rep. 263; *Duffy v. Same*, 104 Mo. App. 235; *Maguire v. Same*, 103 Mo. App. 459; *Batten v. Same*, 102 Mo. App. 285; *Carlson v. City Sav. Bank*, 85 Neb. 659; *Rushing v. Seaboard A. L. R. Co.*, 149 N. C. 158; *Shoemaker v. Sonju*, 15 N. D. 518; *Choctaw, etc. R. Co. v. Burgess*, 21 Okla. 653; *Benson v. Altoona, E. R. Co.*, 228 Pa. 290; *Amos v. Delaware River F. Co.*, 228 Pa. 362; *Wallace v. Pennsylvania R. Co.*, 222 Pa. 556, 128 Am. St. 817; *St. Louis S. R. Co. v. Cleland*, 50 Tex. Civ. App. 499; *Northern Texas T. Co. v. Mullins*, 44 Tex. Civ. App. 566; *Norfolk R. & L. Co. v. Spratley*, 103 Va. 379, 19 Am. Neg. Rep. 514; *Webster v. Seattle, etc. R. Co.*, 42 Wash. 364; *Cole v. Same*, 42 Wash. 462 (probability of medical treatment); *Gallamore v. Olympia*, 34 Wash. 379;

to improve the appearance of an injured hand, though its use-

- Hallum v. Omro, 122 Wis. 337; Ryan v. Oakland G., L. & H. Co., 21 Cal. App. 14; Igle v. People's Ry. Co., — Del. Super. Ct. —, 93 Atl. 666; Sang v. City of St. Louis, 262 Mo. 454; Elkhart v. Ritter, 66 Ind. 136; Indianapolis v. Gaston, 58 id. 224; Drinkwater v. Dinsmore, 10 Hun 250; Tefft v. Wilcox, 6 Kan. 46; Howell v. Goodrich, 69 Ill. 556; Stewart v. Ripon, 38 Wis. 584; McLaughlin v. Corry, 77 Pa. 109, 18 Am. Rep. 432; Barbour County v. Horn, 48 Ala. 566; Goodno v. Oshkosh, 28 Wis. 309; Curtis v. Rochester, etc. R. Co., 18 N. Y. 542, 9 Am. Neg. Cas. 606; Ransom v. New York, etc. R. Co., 15 id. 415; Wiesenbergh v. Appleton, 26 Wis. 56; § 120; Barlow v. Lowder, 35 Ark. 492; Atlanta, etc. R. v. Johnson, 66 Ga. 259, 14 Am. Neg. Cas. 223; Chicago & E. R. Co. v. Holland, 122 Ill. 461; Macer v. Third Ave. R. Co., 47 N. Y. Super. Ct. 461, 5 Am. Neg. Cas. 731; Cleveland, etc. R. Co. v. Newell, 104 Ind. 264, 9 Am. Neg. Cas. 289, 54 Am. Rep. 312; Morgan v. Kendall, 124 Ind. 454, 9 L.R.A. 445; Kendall v. Albia, 73 Iowa 241; Wardle v. New Orleans, etc. R. Co., 35 La. Ann. 202, 3 Am. Neg. Cas. 522; Feeney v. Long Island R. Co., 116 N. Y. 375, 12 Am. Neg. Cas. 394, 5 L.R.A. 544; Staat v. Grand St. & N. R. Co., 36 Hun 268, 6 Am. Neg. Cas. 418; Wallace v. Western North Carolina R. Co., 104 N. C. 442; Scott v. Montgomery, 95 Pa. 444; Walker v. Erie R. Co., 63 Barb. 260; Indianapolis St. R. Co. v. Robinson, 157 Ind. 414; Hickey v. Welch, 91 Mo. App. 4; Westercamp v. Brooks, 115 Iowa 159; Snook v. Anaconda, 26 Mont. 128; Yerkes v. Northern Pac. R. Co., 112 Wis. 184; Wallace v. Wilmington & N. R. Co., 8 Houst. 529, 9 Am. Neg. Cas. 160; Ford v. Warner Co., 1 Marvel 88; Murphy v. Hughes, 1 Pennew. (Del.) 250; Sandwich v. Dolan, 141 Ill. 430; Bailey v. Centerville, 108 Iowa 20; Edgerton v. O'Neil, 4 Kan. App. 73, 11 Am. Neg. Cas. 571; Rosenkranz v. Lindell R. Co., 108 Mo. 9, 32 Am. St. 588; Gorham v. Kansas City & S. R. Co., 113 Mo. 408; Bigelow v. Metropolitan St. R. Co., 48 Mo. App. 367; Stuppy v. Hof, 82 id. 272; Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 352, 12 Am. Neg. Cas. 229; Omaha St. R. Co. v. Emminger, 57 Neb. 240; Ayres v. Delaware, etc. R. Co., 158 N. Y. 254; Kane v. New York, etc. R. Co., 132 N. Y. 160; Cicero & P. St. R. Co. v. Brown, 89 Ill. App. 318, aff'd 193 Ill. 274; McCracken v. Smathers, 122 N. C. 799; Smithson v. Southern Pac. Co., 37 Ore. 74; Baker v. Hagey, 177 Pa. 128, 55 Am. St. 712; Schenkel v. Pittsburg & B. T. Co., 194 Pa. 182; San Antonio, etc. R. Co. v. Weigers, 22 Tex. Civ. App. 344; Cameron v. Union Trunk Line, 10 Wash. 507; Nichols v. Brabazon, 94 Wis. 549; Kenyon v. Mondovi, 98 Wis. 50; Washington & G. R. Co. v. Harmon, 147 U. S. 571, 584, 37 L. ed. 284, 289, 7 Am. Neg. Cas. 359; Eddy v. Wallace, 1 C. C. A. 435, 49 Fed. 801, 7 Am. Neg. Cas. 462; Kansas City, etc. R. Co. v. Stoner, 1 C. C. A. 231, 49 Fed. 209; Denver v. Sherret, 31 C. C. A. 499, 88 Fed. 226; Denver, etc. R. Co. v. Roller, 41 C. C. A. 22, 100 Fed. 738, 49 L.R.A. 77; Washington & G. R. Co. v. Patterson, 9 App. Cas. (D. C.) 423; Fair v. London & N. W. R. Co., 21 L. T. (N.S.) 326; Chamier v. Hill, 15 South Aust. L. R. 84.

The same principle has been ap-

fulness may not be increased;¹⁰ and such as may result from the performance of a surgical operation if that may be resorted to in consequence of the injury and with a reasonable prob-

plied to actions under a civil damage statute. *Lucker v. Liske*, 111 Mich. 683.

Future suffering is an element of general damages, and recovery may be had for any pain which it is reasonably certain the plaintiff will endure after the trial, as well as any endured up to that time, as the result of his injuries, although future suffer more than he otherwise would *Louisville & N. R. Co. v. Stewart*, 163 Ky. 164.

In considering the permanency of an injury the jury may take into account the plaintiff's liability to suffer more than he otherwise would from such ailments as ordinarily afflict mankind. *Crank v. Forty-second St., etc. R. Co.*, 53 Hun 425.

In *Union Pac. R. Co. v. Jones*, 1 C. C. A. 282, 49 Fed. 343, it was held that where the injuries complained of were sustained six months previous to the trial and the plaintiff was then suffering from them, though the proof was that he would probably recover, compensation might be awarded for future suffering and disability which was reasonably certain to result, notwithstanding there was no evidence as to the length of time it would probably continue. The nature of the injury, its effect upon the plaintiff, and its continuance were proven and afforded the jury the basis upon which its conclusion should rest.

To entitle apprehended consequences to be considered they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible. *Suth. Dam. Vol. IV.—69.*

sible are not to be considered. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely so to develop. To entitle a plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. Per *Rapallo, J.*, in *Strohm v. New York, etc. R. Co.*, 96 N. Y. 305, citing *Curtis v. Rochester & S. R. Co.*, 18 id. 541; *Filer v. New York Cent. R. Co.*, 49 id. 45, 5 Am. Neg. Cas. 147; *Clark v. Brown*, 18 Wend. 229; *Lincoln v. Saratoga & S. R. Co.*, 23 id. 425, 435. See *Mosher v. Russell*, 44 Hun 12; *Johnson v. Manhattan R. Co.*, 52 id. 111, 9 Am. Neg. Cas. 105; *Gregory v. New York, etc. R. Co.*, 55 Hun 303; *Elsas v. Second Ave. R. Co.*, 56 Hun 161; *Crawford v. Delaware, etc. R. Co.*, 53 N. Y. Super. Ct. 255; *Abbot v. Tolliver*, 71 Wis. 64.

Where the injury is permanent and of such a nature as to show that medical aid will be required, it is not cause for refusing an allowance therefor that the extent of it is left uncertain. No one can say how long the plaintiff may live or what amount of aid he may require. The jurors are as capable of judging of those matters as any one else. *Sotebier v. St. Louis T. Co.*, 203 Mo. 702.

¹⁰ *Busch v. Robinson*, 46 Ore. 539, 18 Am. Neg. Rep. 614.

ability that the effects of the injury will be thereby relieved.¹¹ In an action by a husband for an injury to his wife the future loss of her aid, comfort and society is an element of damage.¹² If permanent disfigurement has followed the injury that is also to be regarded.¹³ The expenses incurred may be taken as a basis upon which to estimate those which will need to be incurred.¹⁴ For this reason it is important in cases of serious injury to determine the permanence of any disability or reduction of working capacity, or impairing effect upon health resulting therefrom.¹⁵ Besides giving compensation for future pain and the anticipated expense of treatment and nursing, it appearing that they are reasonably certain to occur, the pecuniary loss in respect of the diminution of ability to earn money is to be considered by the jury.¹⁶ The material inquiries on this subject will be, what is a pecuniary equivalent for this loss per year, and how long will it continue? The answer to them must be chiefly found in the nature of the injury, the age and general health of the injured party, and his antecedent earning capacity as indicated by his qualifications and the character of his business or calling.¹⁷ In respect to years to come the recovery will be like payment in advance, and the amount should be reduced to its present worth.¹⁸ In a Texas case the trial court

¹¹ *Beattie v. Detroit*, 137 Mich. 319.

The probability that another operation will be necessary may be shown. *Southwestern States P. C. Co. v. Young* (Tex. Civ. App.), 140 S. W. 378.

¹² *The Little Silver*, 189 Fed. 980; *Hewitt v. Pennsylvania R. Co.*, 228 Pa. 397; *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A.(N.S.) 545.

¹³ § 1241.

¹⁴ *Scurlock v. Boone*, 142 Iowa 684.

¹⁵ The injury may speak so plainly for itself as to make parol evidence unnecessary. *Kirkham v. Wheeler-O. Co.*, 39 Wash. 415, 18 Am. Neg. Rep. 661.

¹⁶ *Muskogee E. T. Co. v. Reed*, 35 Okla. 334; *Rhinesmith v. Erie R. Co.*, 76 N. J. L. 783; *San Antonio, etc. R. Co. v. Spencer*, 55 Tex. Civ. App. 456; *Cordner v. Hall*, 54 Conn. 117.

Double compensation is not authorized by a charge providing for a recovery "for any future impairment of health and mind" and for "impairment of capacity to earn a livelihood." *Central Texas & N. R. Co. v. Luther*, 32 Tex. Civ. App. 309.

¹⁷ *Applegate v. Quincy, etc. R. Co.*, 252 Mo. 173.

¹⁸ *St. Louis, I. M. & S. Ry. Co. v. McMichael*, 115 Ark. 101, citing the text (rule applied to dam-

instructed the jury on the estimate of damages for the difference between the ability of the party injured before the injury and his ability afterwards to earn wages to find no greater sum than, put at interest, would produce annually a sum equal to the difference between what the plaintiff could earn before and what he can now earn in consequence of the injury. On appeal this instruction was deemed objectionable. Bonner, J., said: "If compensation for lessened ability to labor be assumed as the true measure of damages, then it would seem that it should not be such sum as would bring an annual interest corresponding with the annual value of this lessened ability, leaving the principal sum still belonging to the estate of plaintiff after his death, although he had then become wholly incapacitated for labor; but would be an amount which would purchase an annuity equal to this interest during the probable life of the plaintiff, calculated upon a reliable basis of the average duration of human life."¹⁹ In ascertaining this period the jury may consider standard life and annuity tables; but these are not an absolute guide,²⁰ and

ages of every character); Breen v. Iowa Cent. R. Co., 159 Iowa 537; Atlantic C. L. R. Co., v. Whitney, 65 Fla. 72; Fry v. North Carolina R. Co., 159 N. C. 357; Wolf v. Schmidt & Sons B. Co., 236 Pa. 240; Fulsome v. Concord, 46 Vt. 135; The William Branfoot, 48 Fed. 914; Florida E. C. R. Co. v. Lassiter, 58 Fla. 234; Greenway v. Taylor County, 144 Iowa 332; Williams v. Clark County, 143 Iowa 328; Doherty v. Des Moines City R. Co., 137 Iowa 358; Clark v. Cedar Rapids, 129 Iowa 358; O'Brien v. White, 105 Me. 308; Pauza v. Lehigh Valley C. Co., 231 Pa. 577; Wilkinson v. North East Borough, 215 Pa. 486; Galveston, etc. R. Co. v. Paschall, 41 Tex. Civ. App. 357. See § 124.

¹⁹ Houston, etc. R. Co. v. Willie, 53 Tex. 318, 37 Am. Rep. 756, 17 Am. Neg. Cas. 565; McDonald v. Chicago, etc. R. Co., 26 Iowa 124;

Kinney v. Folkerts, 78 Mich. 687, 16 Am. Neg. Cas. 12; Gregory v. New York, etc. R. Co., 55 Hun 303, 9 Am. Neg. Cas. 585; Richmond v. Second Ave. R. Co., 76 Hun 233, 239, 6 Am. Neg. Cas. 580; McDade v. Hoskins, 18 Vict. L. R. 417; Ritchie v. Victorian Rys. Com'r, 25 id. 272. See Albert Miller & Co. v. Wilkins, 126 C. C. A. 404, 209 Fed. 582 (interest method improper).

The present value of prospective earnings cannot properly be arrived at by ascertaining the entire amount and deducting seven per cent. therefrom. Macon, etc. R. Co. v. Moore, 99 Ga. 229.

²⁰ City of Key West v. Baldwin, 69 Fla. 136; Baltimore & O. R. Co. v. Whitacre, 124 Md. 411; Broz v. Omaha Maternity & General Hospital Ass'n, 96 Neb. 648, L.R.A. 1915D 334; Jones v. Chicago Great Western R. Co., 97 Neb. 306; San Bois Coal Co. v. Resetz, 43 Okla.

are not essential where the ages of the parties are known to the jury and other facts upon which a conclusion may be rested.²¹ Such tables are admissible where the injury is permanent, though it causes but a partial disability to labor.²² On admitting the Carlisle tables the jury should be instructed that they are not entitled to serious weight unless the plaintiff has brought himself clearly within the class of selected lives tabulated. In Pennsylvania annuity tables are not admissible in actions to recover for personal injuries.²³ It has been ruled that, where the action is by a married woman for the recovery for pain she will probably endure, such tables are not admissible in evidence, though it is conceded they would be admissible if the action was to recover for the loss of services.²⁴ Such tables are not essential if the age of the plaintiff is shown.²⁵ A witness familiar with them may testify as to the plaintiff's expectancy of life.²⁶ The age attained by the last two deceased paternal ancestors of the plaintiff may be shown.²⁷ Direct evidence as to the probable duration of his life is not required; the nature of the injury,

384; *Oliver v. Pettaconsett Const. Co.*, 36 R. I. 477; *Gulf, C. & S. F. Ry. Co. v. Stewart*, — Tex. Civ. App. —, 164 S. W. 1059; *St. Louis, etc. R. Co. v. Taylor* (Tex. Civ. App.), 134 S. W. 819; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257; *Allen v. Ames College R. Co.*, 106 Iowa 602; *Stonne v. Hanford P. Co.*, 108 Iowa 137, 7 Am. Neg. Rep. 101; *Missouri, etc. R. Co. v. St. Clair*, 21 Tex. Civ. App. 345; *Waterman v. Chicago & A. R. Co.*, 82 Wis. 613; *Indianapolis v. Marold*, 25 Ind. App. 428, 437; *Crouse v. Chicago & N. R. Co.*, 102 Wis. 196, 207; *Galveston, etc. R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 48, 6 Am. Neg. Cas. 624. See § 455.

The opinions of experts, based on the tables and the longevity of the plaintiff's ancestors, are not competent to show an expectancy of life beyond that given in the tables

Hamilton v. Michigan Cent. R. Co., 135 Mich. 95.

²¹ *Spencer v. Johnson*, 176 Mich. 278.

²² *Missouri, K & T. Ry. Co. of Texas v. Graham*, — Tex. Civ. App. —, 168 S. W. 55; *Ranta v. Newport Min. Co.*, 180 Mich. 459; *Gulf, etc. R. Co. v. Mangham*, 95 Tex. 413, overruling *Texas Mexican R. Co. v. Douglass*, 69 Tex. 694. See *O'Dell v. James Stewart & Co.*, 96 Neb. 147.

²³ *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. 98.

²⁴ *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367.

²⁵ *Atlantic C. L. R. Co. v. Moore*, 8 Ga. App. 185; *Southern R. Co. v. Petway*, 7 Ga. App. 659; *Merchants' & M. T. Co. v. Corcoran*, 4 Ga. App. 654. See § 1265.

²⁶ *Southern Pac. Co. v. Cavin*, 75 C. C. A. 350, 144 Fed. 348.

²⁷ *Haynes v. Waterville & O. St.*

his age and appearance are facts on which the jury may act.²⁸ The expectancy must be fixed as of the time of the trial.²⁹ The evidence must afford data for the ascertainment of the loss which it is claimed will be sustained.³⁰

According to the better view the assessment of damages is not to be made on the theory that, but for the injury, the plaintiff might have engaged in a more lucrative employment than he was engaged in when injured.³¹ But there are authorities to the contrary. In a case in the court of queen's bench in which a verdict for 5,000*l.* was returned, in answering the contention that the plaintiff's incapacity to earn a future improved income could not be considered, Cockburn, C. J., said that it would be really monstrous that because a young man has only arrived at a certain position—though from past experience you can see with tolerable certainty that he will within a reasonable time greatly increase his income—you are to exclude this most important element from consideration. So far from thinking that it should be excluded, I think the very reverse should be the rule.³² The plaintiff may show his qualifications for a better position and that the defendant had promised it to him when a vacancy occurred, his injuries disabling him from filling it.³³ The prospect of promotion under civil service rules has been allowed to be proved though it was dependent upon passing the required examination.³⁴ On the other hand, awards for

R., 101 Me. 335, 20 Am. Neg. Rep. 544.

²⁸ *San Antonio, etc. R. Co. v. Kivlin*, 42 Tex. Civ. App. 633; *Galveston, etc. R. Co. v. Paschall*, 41 Tex. Civ. App. 357; *Amos v. Delaware River F. Co.*, 228 Pa. 362.

²⁹ *Howell v. Lansing City E. R. Co.*, 136 Mich. 432.

³⁰ *Birmingham Southern R. Co. v. Lintner*, 141 Ala. 420, 109 Am. St. 40.

³¹ *Mississippi Cent. R. Co. v. Hardy*, 88 Miss. 732; *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266; *Richmond v. Second Ave. R. Co.*, 76

Hun 233, 239; *Reese v. Hershey*, 163 Pa. 253, 43 Am. St. 795, 17 Am. Neg. Cas. 245.

³² *Fair v. London & N. W. R. Co.*, 21 L. T. Rep. (N.S.) 326; *Chaminer v. Hill*, 15 South Aust. L. R. 84; *Missouri, etc. R. Co. v. St. Clair*, 21 Tex. Civ. App. 345; *Missouri, etc. R. Co. v. Lasater*, 53 Tex. Civ. App. 51 (brakeman allowed to show earnings of conductor). See *Grand Trunk Western R. Co. v. Lindsay*, 201 Fed. 836.

³³ *Clark L. Co. v. St. Coner*, 97 Ark. 358.

³⁴ § 1248.

the loss of future income should be made with regard to the contingencies of life, including disabling accidents.³⁵

In case the plaintiff dies from a cause other than the injuries sued for and the action is revived in the name of his personal representative, the allowance of damages should not extend beyond his death.³⁶

In Illinois an objection was made to a recovery because of future incapacity on the ground that the evidence did not show the earning ability of the plaintiff. The proposition was answered thus: It was manifest that it would have been incompetent to have proved what he had made in business prior to his injuries, since that was the result of circumstances that might never be repeated. He had no employment at fixed wages for the future, and he is not shown to have possessed peculiar skill or knowledge, having a definite pecuniary value, which was destroyed or affected by his injuries. What he or any other business man, however competent and skilled, might make in the future in any line of trade is too much a matter of speculation and contingency to be susceptible of direct evidence. It follows, therefore, that appellee gave all the evidence of the damages he has sustained on account of his permanent disability and consequent future inability to labor or transact business of which that question is susceptible. The inquiry, then, must be, whether, under such circumstances, a person is entitled to recover any damages because of inability to labor or transact business in the future, resulting from his injuries. We think, very clearly, that he is entitled to recover—that it can upon no principle make any difference whether a person is, at the time he is injured, engaged in a business paying a definite amount, or is then not engaged in business, but is by the act of injury prevented from engaging in business in the future in which he might reasonably expect, but not be entirely certain, that he would have success.³⁷ The

³⁵ *Johnston v. Great Western R. Co.* (1904), 2 K. B. 250. See § 1248.

³⁶ *Atchison, etc. R. Co v. Chance*, 57 Kan. 40.

³⁷ *Fisher v. Jansen*, 128 Ill. 549. Compare *Britton v. Street R. Co.*, 90 Mich. 159, 4 Am. Neg. Cas. 123. See *Propson v. Leatham*, 80 Wis. 608, 17 Am. Neg. Cas. 915.

condition of the plaintiff at the time of the trial is a material fact in determining the probable length of his life, and the loss he may sustain because of the injury.³⁸ A recovery for the impairment of earning power includes the diminution of power to pursue the course of life the injured person would otherwise have done; hence to make both elements of the recovery would be doubling the damages.³⁹ Though the absence of proof of what the plaintiff received in his previous employment may prevent a recovery for the impairment of his ability to pursue it,⁴⁰ if the nature of his injury prevents him from engaging therein and greatly lessens his capacity to perform any kind of labor, the jury may assess his damages without evidence of his present earning capacity from their common knowledge, experience and sense of justice.⁴¹ Where a claim is made because of time lost and also for permanent injury and impairment of earning power, the allowance for the latter should begin where that for lost time ends.⁴² A minor, suing by his next friend, may recover for loss of earning capacity after his arrival at age of maturity where the injuries are permanent in character.⁴³ The amount which may be recovered by an infant who has never earned anything and who does not possess the capacity to labor, for the loss of his earnings after he shall have attained his majority must, in the absence of direct evidence, be left to the judgment, common experience and enlightened conscience of the jurors under the facts;⁴⁴ subject to the power of the court to set aside the verdict if it was given under the influence of passion or prejudice.⁴⁵ The earnings of an unemancipated

³⁸ *Scott v. Chicago, R. I. & P. R. Co.*, 160 Iowa 306; *Howell v. Lansing City E. R. Co.*, 136 Mich. 437.

³⁹ *Louisville & N. R. Co. v. Moore*, 150 Ky. 692.

⁴⁰ *Dallas Con. E. St. R. Co. v. Motwiller*, 51 Tex. Civ. App. 432.

⁴¹ *Id.*; *St. Louis S. R. Co. v. Garber*, 51 Tex. Civ. App. 70; *Taxarkana, etc. R. Co. v. Toliver*, 37 Tex. Civ. App. 437.

⁴² *Blue Grass T. Co. v. Ingles*, 140 Ky. 488.

⁴³ *Fedorawicz v. Citizens' Electric Illuminating Co.*, 246 Pa. 141.

⁴⁴ *Rosenkranz v. Lindell R. Co.*, 108 Mo. 9, 32 Am. St. 588; *Baker v. Irish*, 172 Pa. 528, 533; *Netherland Am. S. N. Co. v. Hollander*, 8 C. C. A. 169, 59 Fed. 417; *Wise v. St. Louis T. Co.*, 198 Mo. 546; *Moore v. Wabash R. Co.*, 157 Mo. App. 53.

⁴⁵ *St. Louis, etc. R. Co. v. Waren*, 65 Ark. 619, 627.

minor prior to his injury may be shown as a basis for awarding compensation for permanent impairment of his capacity after his majority.⁴⁶ His possession of an estate or the necessity he may or may not be under to depend upon his own efforts after attaining majority do not effect the right to recover or the amount he is entitled to.⁴⁷ Where jurisdiction is taken of an action for personal injuries sustained in another country the fact that the law thereof provides for the recovery of subsequent damages when injuries shall accrue, will not prevent the recovery of all the damages sustained in one suit; that provision relates to the remedy only and is inoperative outside of the jurisdiction which enacted it.⁴⁸

§ 1252. Husband's, wife's or parent's action; intoxicating liquors; civil damage acts. The action in such cases is generally for the pecuniary loss. A husband is entitled to the services⁴⁹ and society of his wife on his own account and for the benefit of their children, and is bound to take care of and provide for her in sickness as well as in health.⁵⁰ Therefore any

⁴⁶ *Andrews v. Chicago, etc. R. Co.*, 129 Iowa 162, 19 Am. Neg. Rep. 225.

⁴⁷ *Moore v. Wabash R. Co.*, *supra*.

⁴⁸ *Evey v. Mexican Cent. R. Co.*, 26 C. C. A. 407, 81 Fed. 294, 38 L.R.A. 387.

⁴⁹ Services implies whatever of aid, assistance, comfort and society the wife would be expected to render to, or bestow upon, her husband under the circumstances and in the condition in which they may be placed. That services in the ordinary sense were not rendered at all would be immaterial and irrelevant, except as the fact might, under some circumstances, tend to show a want of conjugal regard and affection and thereby mitigate the damages. *Cooley on Torts*, 226; *Kelley v. Mayberry*, 154 Pa. 440, 447; *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 4 Am. Neg. Cas. 180, 42 Am. St. 738, 26 L.R.A. 46.

The inability of the husband to support his wife in a particular condition does not defeat his right to recover for the loss of her services though they were not living together, their separation not being the result of domestic troubles, nor an abandonment. *Bowdle v. Detroit St. R. Co.*, 103 Mich. 272, 282, 50 Am. St. 366.

It is said that the value of a wife's services is to be shown, not by what they were worth to the husband, but by their value generally. *Keller v. Gilman*, 93 Wis. 9, 12. But this has been modified and the general rule approved. *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. 892, 47 L.R.A. 691.

⁵⁰ *Grant v. Green*, 41 Iowa 88; *The Little Silver*, 189 Fed. 980; *Indianapolis, etc. R. Co. v. Reeder*, 42 Ind. App. 520.

The allowance for the loss of companionship must be limited to

wrongful injury to her, by which he is deprived of her services or society; is a legal injury to him although the circumstances which gave rise to the right of action arose out of a contract between the wife and a third party,⁵¹ and this injury is enhanced if he has been obliged to incur expenses for her cure.⁵² The

such future time as the jury believe would mark the limit of the loss. *Foley v. Philadelphia R. T. Co.*, 240 Pa. 169.

⁵¹ *Blair v. Chicago & A. R. Co.*, 89 Mo. 334; *McKinney v. Western S. Co.*, 4 Iowa 420; *Cregin v. Brooklyn C. R. Co.*, 75 N. Y. 192, 31 Am. Rep. 459; *Indianapolis T. & T. Co. v. Menze*, 173 Ind. 31, 89 N. E. 370; *Lyons v. New York City R. Co.*, 49 N. Y. Misc. 517; *May v. Western U. Tel. Co.*, 157 N. C. 416, 37 L.R.A.(N.S.) 912; *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A.(N.S.) 545; *Zolawenski v. Aberdeen*, 72 Wash. 95.

⁵² *Nashville, etc. R. Co. v. Hubble*, 139 Ga. 300 (ruled under a statute of Alabama); *Indianapolis & M. R. T. Co. v. Reeder*, 51 Ind. App. 533; *The Little Silver*, 189 Fed. 980; *Chicago & M. E. R. Co. v. Krempel*, 116 Ill. App. 253; *Driscoll v. Gaffey*, 207 Mass. 102; *Womach v. St. Joseph*, 201 Mo. 467, 10 L.R.A.(N.S.) 140; *Kirkpatrick v. Metropolitan St. R. Co.*, 129 Mo. App. 524; *McMeekin v. Pittsburg R. Co.*, 229 Pa. 572; *Gulf, etc. R. Co. v. Farmer*, 102 Tex. 235; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557, 2 Am. Neg. Cas. 266; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Kavanaugh v. Janesville*, 24 Wis. 618; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Barnes v. Hurd*, 11 Mass. 59; *McKinney v. Western S. Co.*, 4 Iowa 420; *Rogers v. Smith*, 17 Ind. 323; *Mowry v. Cheney*, 43 Iowa 609; *Mewhirter v. Hatten*, 42 Iowa

288, 20 Am. Rep. 618; *Tuttle v. C., R. I. & P. R. Co.*, 42 Iowa 518; *Smith v. St. Joseph*, 55 Mo. 456, 17 Am. Rep. 660; *Berger v. Jacobs*, 21 Mich. 215; *Matteson v. New York Cent. R. Co.*, 35 N. Y. 487, 9 Am. Neg. Cas. 618, 91 Am. Dec. 67; *Eden v. Lexington, etc. R. Co.*, 14 B. Mon. 204; *Philippi v. Wolff*, 14 Abb. Pr. (N.S.) 196; *Stone v. Evans*, 32 Minn. 243; *Nier v. Missouri Pac. R. Co.*, 12 Mo. App. 35; *Martin v. Southern Pac. Co.*, 130 Cal. 285; *Denver Con. T. Co. v. Riley*, 14 Colo. App. 132; *Southern Kansas R. Co. v. Pavey*, 57 Kan. 521, 530; *Henry v. Klopfer*, 147 Pa. 178; *Washington & G. R. Co. v. Hickey*, 12 App. Cas. (D. C.) 269.

Such injuries, resulting from a defect in a highway, do not give the husband a right of action under a statute providing therefor in case of an injury to his "person or property." *Lounsbury v. Bridgeport*, 66 Conn. 360.

Prospective damages for loss of the wife's services are recoverable. *Hodsoll v. Stallebrass*, 11 Ad. & E. 301; *Fox v. Saint John*, 23 New Bruns. 244; § 1251.

The husband may testify as to the reasonable and ordinary value of his wife's services to him, and such estimate should not be reduced because servants could be employed for a lesser sum. *Schwancfeldt v. Metropolitan St. R. Co.*, 187 Mo. App. 588.

The additional expense caused a husband for the nursing, care and treatment of his wife may be re-

expense of taking a wife away from home for treatment may be recovered if better results were probable because of doing so and this was done under medical advice.⁵³ He has also been held entitled to recover the sum paid by him for necessary labor and services substituted for the ordinary service of the wife, and for his own services in attending upon her.⁵⁴ The recovery under the latter head cannot exceed the value of the services of a competent nurse; the loss to the husband is not to be regarded.⁵⁵

The married women's enabling statutes have not released them from their common-law and scriptural obligation and duty to be helpmeets to their husbands, and have not affected the latter's right to recover for the loss of their services and comfort.⁵⁶ Where such statutes are in force the husband's right to the services of the wife is limited to those which reasonably

covered though it resulted from the defendant's breach of contract with him and she subsequently died. *Sherlag v. Kelley*, 200 Mass. 232, 19 L.R.A.(N.S.) 633, 128 Am. St. 414.

⁵³ *Alabama City, etc. R. Co. v. Appleton*, 171 Ala. 324.

⁵⁴ *Hertzberg v. Pittsburgh Taxicab Co.*, 243 Pa. 540; *Kirkpatrick v. R. Co.*, *supra*; *Indianapolis & M. T. Co. v. Reeder*, 42 Ind. App. 520; *Smith v. St. Joseph*, *supra*; *Blair v. Chicago & A. R. Co.*, 89 Mo. 334; *Lindsey v. Danville*, 46 Vt. 144; *Martin v. Southern Pacific Co.*, *supra*; *Union Pac. R. Co. v. Jones*, 21 Colo. 340; *Riley v. Lidtke*, 49 Neb. 139; *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. 892, 47 L.R.A. 691. See § 1250.

The reasonable cost of hiring a person to do the work done by the wife prior to her injury may be shown. *Birmingham R., L. & P. Co. v. Humphries*, 172 Ala. 495. Unless it was done without charge.

New York T. Co. v. Garside, 85 C. C. A. 285, 157 Fed. 521.

⁵⁵ *Howells v. North American T. & T. Co.*, 24 Wash. 689; *Barnes v. Keene*, 132 N. Y. 13. See § 1250.

The husband may recover, besides the value of his own services in nursing his wife, for any gratuitous services in caring for her if it was rendered for him; but not for such service rendered to her. *Indianapolis & M. R. T. Co. v. Reeder*, 42 Ind. App. 520.

The right to recover for loss of wages, earnings, or profits seems to be favored if the proof is sufficient. *Esque v. United R. Co.*, 174 Mo. App. 317.

⁵⁶ *Birmingham S. R. Co. v. Lintner*, 141 Ala. 420, 109 Am. St. 40; *Norfolk R. & L. Co. v. Williar*, 104 Va. 679; *Mewhirter v. Hatten*, 42 Iowa 288, 20 Am. Rep. 618; *Omaha, etc. R. Co. v. Chollette*, 41 Neb. 578, 592, 4 Am. Neg. Cas. 885; *Richmond R. & E. Co. v. Bowles*, 92 Va. 738; *Booth v. Manchester St. R.*, 73 N. H. 529.

devolve upon her by reason of the marriage relation.⁵⁷ The fact that prior to the injury the wife had applied her earnings, realized for services to others than the members of the family, to its support, does not give the husband a right to recover for the loss of such earnings.⁵⁸ It is within the discretion of the jury to allow interest on the money actually paid by the husband for medical attendance, medicine and nursing for his wife.⁵⁹ So far as he suffers loss in being deprived of his wife's services and being put to expense by her illness the loss is pecuniary; but he is also entitled to her society. The wrong may entitle him to substantial compensation though the parties are in such circumstances that she is not accustomed or desired to do physical labor;⁶⁰ or the husband may not have realized anything from

⁵⁷ Omaha, etc. R. Co. v. Chollette, *supra*.

The unremunerated labor of the wife as a clerk in her husband's store may not be recovered for. Kirkpatrick v. R. Co., 129 Mo. App. 524.

In Nelson v. Metropolitan St. R. Co., 113 Mo. App. 659, a married woman who earned money as a boarding-house keeper was held entitled thereto, regardless of the disposition made of it; hence the husband's recovery was limited to the loss of the value of her services in performing work for the family. Local cases are cited in the opinion. See Brooks v. Schwerin, 54 N. Y. 343.

⁵⁸ Riley v. Lidtke, 49 Neb. 139.

⁵⁹ Washington & G. R. Co. v. Hickey, 12 App. Cas. (D. C.) 269.

⁶⁰ Birmingham R., L. & P. Co. v. Girod, 164 Ala. 10, 137 Am. St. 17; Indianapolis & M. T. Co. v. Reeder, 42 Ind. App. 520, citing the text; Hewitt v. Pennsylvania R. Co., 228 Pa. 397; Blair v. Chicago & A. R. Co., 89 Mo. 334; Indianapolis St. R. Co. v. Robinson, 157 Ind. 414; Ainley v. Manhattan R. Co., 47 Hun

206, 9 Am. Neg. Cas. 599; Denver Con. T. Co. v. Riley, 14 Colo. App. 132; Metropolitan St. R. Co. v. Johnson, 91 Ga. 466; Allen v. Manhattan R. Co., 60 N. Y. Super. Ct. 230; Kelley v. Mayberry, 154 Pa. 440; Platz v. McKean, 178 Pa. 601, 1 Am. Neg. Rep. 170; Gainesville, etc. R. Co. v. Lacy, 86 Tex. 244, 248, quoting the text; Selleck v. Janesville, 104 Wis. 570, 76 Am. St. 892, 47 L.R.A. 691, citing the text. See first note to this section.

Loss of *consortium* is not an element of damages. Bolger v. Boston E. R. Co., 205 Mass. 420.

In Furnish v. Missouri Pac. R. Co., 102 Mo. 669, 22 Am. St. 800, 9 Am. Neg. Cas. 515, it is held that the husband is entitled to his wife's society as she was before she was injured. By "society" is meant such capacities for usefulness, aid and comfort as a wife as she possessed when injured. The nature of the damage resulting from the loss of a wife's society does not admit of direct proof of value: the assessment is committed to the discretion of a jury. Where the husband expended \$800 in the care and

her services before she was injured.⁶¹ The law does not compute the husband's recovery on a commercial basis, but gives him

treatment of his wholly disabled wife, a verdict for \$5,000 was sustained, there being no demand for compensation because of loss of services. Gainesville, etc. R. Co. v. Lacy, 86 Tex. 244, is to the same effect.

In an action by a husband for the loss of the society, companionship and services of his wife due to the negligence of a physician in performing an operation there need be no direct or express evidence of the value of the wife's services either by the day, week, month, or any other period of time, and consequently evidence that the wife was disabled and that another woman was employed as a housekeeper is sufficient. Reeves v. Lutz, 179 Mo. App. 61, citing the text.

But it has been held that the loss of a wife's society, companionship and solace are too sentimental and intangible for the law to measure. Hawkins v. Front St. C. R. Co., 3 Wash. 592, 595, 28 Am. St. 72, 16 L.R.A. 808.

⁶¹ Georgia R. & B. Co. v. Tice, 124 Ga. 459, citing the text.

A witness qualified by observation and experience may testify to the value of the services of a wife to her husband. Croft v. Chicago, etc. R. Co., 134 Iowa 411.

In addition to such services as may be performed by servants, those rendered by a wife include her society and counsel, her superintendence and care over the household, her nurture, guidance and training of the children; hence, evidence of her attainments, temperament, character and the interest manifested by her in the care of

the home and general welfare of the members of the family is admissible. Indianapolis & M. R. T. Co. v. Reeder, *supra*.

"There need be no direct or express evidence of the value of the wife's services, either by the day, week, month, or any other period of time, or of any aggregate sum." Metropolitan St. R. Co. v. Johnson; Indianapolis St. R. Co. v. Robinson, *supra*.

While the value of the aid, comfort and society of a wife cannot be proved in terms of dollars and cents, they have a pecuniary value to the husband, and for their loss he is not to be denied a remedy because of the fact that he cannot show the extent of their pecuniary value. He may place before the jury the ages of his wife and himself, their conditions for the enjoyment of life before and after the wrong done her. With these facts before them, the jury are to determine, in the light of their common experience, what is just and equitable in the premises, and the right of the husband is not affected by the previous recovery by the wife for the pain and suffering she has undergone. Per Woodward, J., in Zingrebe v. Union R. Co., 56 App. Div. (N. Y.) 555. In this case the husband was aged forty-seven, the wife forty-eight. She was so injured that there was no probability of her contributing anything of importance to his aid, comfort or society. A verdict for \$7,250 was sustained. In Cannon v. Brooklyn City R. Co., 14 N. Y. Misc. 400, a verdict in favor of the husband for \$10,000 was sustained by the city court of Brooklyn.

such compensation as, in the judgment of the jury, is a money equivalent for the loss of such services, assistance, companionship and society as he has been deprived of by the injury.⁶² There are certain facts which may be shown to aid the jury in arriving at the extent of the husband's loss, such as the extent and duration of the injuries done the wife, including her condition at the time of the trial.⁶³ In some states if the wife is voluntarily rendering service for her husband by carrying on his business he can recover for the loss of her services therein if the facts are properly alleged.⁶⁴ The future earnings of the wife in an independent business would belong to her, and do not affect the recovery by the husband.⁶⁵ He may not recover for her pain and suffering; she must sue with her husband for such elements of the injury.⁶⁶ In such action there may be a

⁶² *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A.(N.S.) 545; *Hutcheis v. Cedar Rapids, etc. R. Co.*, 128 Iowa 279; *Reagan v. Harlan*, 24 Pa. Super. Ct. 27; *Platz v. McKean*, 178 Pa. 601, 1 Am. Neg. Rep. 170; *Ft. Worth, etc. St. R. Co. v. Hawes*, 48 Tex. Civ. App. 487.

⁶³ *Birmingham Southern R. Co. v. Lintner*, 141 Ala. 420, 109 Am. St. 40.

For the purpose of showing that the plaintiff was strong and healthy before the injury and capable of taking care of her family, it may be shown of whom the family consisted. *Latimer v. Metropolitan St. R. Co.*, 126 Mo. App. 70.

⁶⁴ *Georgia R. & B. Co. v. Tice*, *supra*, quoting the text; *Indianapolis T. & T. Co. v. Menze*, 173 Ind. 31; *Standen v. Pennsylvania R. Co.*, 214 Pa. 189, 110 Am. St. 540; *Citizens' St. R. Co. v. Twiname*, 121 Ind. 375, 7 L.R.A. 352. See *Holcomb v. Harris*, 166 N. Y. 257; *Omaha, etc. R. Co. v. Chollette*, *Kirkpatrick v. St. R. Co.*, *supra*; *Blaehinska v. Howard Mission, etc.*, 56 Hun 322.

⁶⁵ *Hutcheis v. R. Co.*, *supra*.

⁶⁶ *Chicago & M. E. R. Co. v. Krempel*, 116 Ill. App. 253; *Indianapolis T. & T. Co. v. Menze*, 173 Ind. 31; *Hyatt v. Adams*, 16 Mich. 180; *Michigan Cent. R. Co. v. Coleman*, 28 id. 440, 4 Am. Neg. Cas. 1; *Brooks v. Schwerin*, 54 N. Y. 343, 12 Am. Neg. Cas. 400; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 5 Am. Neg. Cas. 151, 10 Am. Rep. 327; *Hunter v. Ogden*, 31 Up. Can. Q. B. 132; *Reeder v. Purdy*, 41 Ill. 279; *Union Pac. R. Co. v. Jones*, 21 Colo. 340.

In *Minick v. Troy*, 19 Hun 253, it was held that in an action by a married woman she might recover for such loss of service as she sustained herself and towards herself. On this point Boeckes, J., said: "Here, in effect, the jury were instructed that they should not allow such consequential damages as might result to the plaintiff's husband from her inability to labor. In this case, unlike *Brooks v. Schwerin*, 54 N. Y. 343, the plaintiff was engaged in no separate business or employment; still there remained to

recovery for such pain and suffering as it is reasonably certain will be endured in the future.⁶⁷ The husband cannot recover for his own mental distress on account of his wife's suffering,⁶⁸ nor for speculative losses, as by being deprived of prospective

her many duties, privileges and services, *personal to herself*, which were proper subjects for the consideration of the jury, in connection with the suffering endured, in determining the damages to be awarded to her." It has been said that there is great good sense in this view. *Johnson v. Baltimore & P. R. Co.*, 6 Mack. 232. See §§ 1243, 1249.

In *Chicago & M. E. R. Co. v. Krempel*, 103 Ill. App. 1, it is held proper for the jury to consider what the effect of the injuries sustained by a married woman might be in respect to ability to perform ordinary labor. "The loss of her ability to so work is a personal injury to herself which may affect her in many ways peculiar to herself. We cannot assume that if not injured she might not hereafter find it necessary, for support of herself or other reasons, to perform work other than ordinary household work."

By the effect of statutes married women have in some states the right to sue alone for the damages for personal injury, so far as they are themselves affected. *Chicago, etc. R. Co. v. Dunn*, 52 Ill. 260, 4 Am. Rep. 606; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Hennies v. Vogel*, 66 Ill. 401; *Pancoast v. Bumell*, 32 Iowa 394; *Musselman v. Gallagher*, id. 383. See *Gibson v. Gibson*, 43 Wis. 23, 29, 28 Am. Rep. 527.

The damages recoverable for her injuries, in a joint action, belong to

the husband when recovered and he may release them. *Southworth v. Packard*, 7 Mass. 95; *Ballard v. Russell*, 33 Me. 196, 54 Am. Dec. 620; *Shaddock v. Clifton*, 22 Wis. 114.

Under statutes providing in effect that any person receiving any bodily injury through any defect in or want of repair of a highway may have a right of action against the town, a husband has not been permitted to maintain a separate action for any consequences of an injury to his wife. The action is given only to the party injured, and husband and wife must join to recover for injuries to her. *Harwood v. Lowell*, 4 Cush. 310; *Starbird v. Frankfort*, 35 Me. 89.

In *Sanford v. Augusta*, 32 Me. 536, it was held that, in order to give the statute the beneficial effect for which it was designed, the jury might allow, in such joint action, compensation for loss of time from the injury to the wife and the reasonable expenses incurred to obtain a cure.

⁶⁷ *Gilson v. Cadillac*, 134 Mich. 189; *Louth v. Thompson*, 1 Pennw. (Del.) 149, § 1251; *Johnson v. Baltimore & P. R. Co.*, 6 Mack. 232.

⁶⁸ *Hyatt v. Adams*, 16 Mich. 180; *Filebrown v. Hoar*, 124 Mass. 580; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 8 Am. Neg. Cas. 638; *Texas & P. R. Co. v. Woods*, 15 Tex. Civ. App. 612; *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A. (N.S.) 545.

offspring.⁶⁹ His action will not abate by her death,⁷⁰ and is not affected by the recovery of judgment by her for her own injuries.⁷¹ The elements of damage which form the basis of recovery in a suit by the husband alone are not to be considered when he joins with his wife for an injury to her.⁷² It is held, however, in states in which the right to sue for a tort is property and where all property acquired by either spouse, otherwise than by gift, bequest, devise or descent, is common or community property, that the chose in action arising from an injury to the wife is suable by the husband when he is vested with the right of disposing of the community personalty. In such a case the wife is a proper but not a necessary party;⁷³ it is otherwise in Texas.⁷⁴ In these states all the damages naturally flowing from the wrong done the wife are recoverable.⁷⁵ The husband's right to recover to the extent of the injury done is not affected by the probable duration of his life,⁷⁶ nor is it to be diminished by the necessary cost of her maintenance.⁷⁷ In Pennsylvania it is required by statute that the rights of both husband and wife shall be adjusted in a joint action brought by them, and that a separate verdict and judgment shall be rendered if both recover.

⁶⁹ *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 42 Am. St. 738, 26 L.R.A. 46, 5 Am. Neg. Cas. 364.

⁷⁰ *Hyatt v. Adams*, *supra*; *Eden v. Lexington, etc. R. Co.*, 14 B. Mon. 204; *Green v. Hudson River R. Co.*, 28 Barb. 9; *Nixon v. Ludlam*, 50 Ill. App. 273. See *Long v. Morrison*, 14 Ind. 509.

⁷¹ *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. 892, 47 L.R.A. 570; *Zingrebe v. Union R. Co.*, 56 App. Div. (N. Y.) 555; *Indianapolis T. & T. Co. v. Menze*, 173 Ind. 31; *Indianapolis & M. T. Co. v. Reeder*, 42 Ind. App. 520, citing the text.

⁷² *Ohio & M. R. Co. v. Co-by*, 107 Ind. 32; *Louth v. Thompson*, *supra*.

⁷³ *Paine v. San Bernardino Valley T. Co.*, 143 Cal. 654; *Hawkins v. Front St. C. R. Co.*, 3 Wash. 592, 10 Am. Neg. Cas. 397, 28 Am. St.

72, 16 L.R.A. 808; *McFadden v. Santa Anna, etc. R. Co.*, 87 Cal. 464, 11 L.R.A. 252.

⁷⁴ *San Antonio, etc. R. Co. v. Belt*, 24 Tex. Civ. App. 281; *Texas & P. R. Co. v. Humble*, 38 C. C. A. 502, 97 Fed. 837. See *Ezell v. Dudson*, 60 Tex. 331.

⁷⁵ *Hawkins v. R. Co.*, *supra*; *Galveston, etc. R. Co. v. Baumgarten*, 31 Tex. Civ. App. 253; *Martin v. Southern Pac. Co.*, 130 Cal. 285; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634; *Campbell v. Harris*, 4 Tex. Civ. App. 636, 10 Am. Neg. Cas. 312; *International, etc. R. Co. v. Anthony*, 24 Tex. Civ. App. 9.

⁷⁶ *International, etc. R. Co. v. Anthony*, *supra*.

⁷⁷ *San Antonio, etc. R. Co. v. Belt*, *supra*.

A mistake in awarding the damages due to the wrong party is not ground of complaint by the defendant.⁷⁸ The money loss of the husband because of the deprivation of the services of his wife measures his recovery; so far as that loss may be sustained after the trial the present value of the sum awarded fixes it.⁷⁹ It has been said that the limitation as to damages in actions to recover for death, while not controlling in an action by a husband to recover for an injury to his wife, is to be considered in passing on the question of the excessiveness of a verdict.⁸⁰ This proposition may be questioned. If sound in the instance suggested, it ought to have some weight where the injured person dies from his injuries and the action therefor is prosecuted by his administrator. It seems that the Minnesota court was right in denying that it had any effect in the latter case.⁸¹ The laws of the state in which a married woman was injured and in which she brings an action control the right to recover and the extent of the recovery, regardless of where she is domiciled.⁸² A personal injury which disqualifies a married woman from carrying on the business in which she is engaged vests in her the right to recover damages sustained in respect to her separate business.⁸³ A deserted wife may maintain an action in her own name to recover for the loss of capacity to acquire property.⁸⁴ The jury may determine the value of the services of a wife on their own knowledge and the evidence of the extent to which she discharged them before the injury as compared with the disability imposed upon her thereby.⁸⁵ The recovery of full compensation by the husband in his own action for injuries negligently inflicted upon him precludes the wife from recovering for the loss of *consortium*.⁸⁶ Under civil damage statutes

⁷⁸ *Helsel v. Traction Co.*, 14 Pa. Super. Ct. 420.

⁷⁹ *Samarra v. Allegheny Valley St. R. Co.*, 238 Pa. 469.

⁸⁰ *Indianapolis T. & T. Co. v. Menze*, 173 Ind. 31.

⁸¹ *Clay v. Chicago, etc. R. Co.*, 104 Minn. 1.

⁸² *Texas & P. R. Co. v. Humble*, 38 C. C. A. 502, 97 Fed. 837.

⁸³ *Healey v. Ballentine*, 66 N. J. L. 339, 10 Am. Neg. Rep. 155; *Gilson v. Cadillac*, 134 Mich. 189.

⁸⁴ *Schmelzer v. Chester T. Co.*, 218 Pa. 29.

⁸⁵ *Posener v. Long* (Tex. Civ. App.), 156 S. W. 591.

⁸⁶ *Feneff v. New York Cent. etc. R. Co.*, 203 Mass. 278, 24 L.R.A. (N.S.) 1024, 133 Am. St. 291.

her recovery must not exceed what she has lost by the acts of the defendant.⁸⁷ In ascertaining her loss the damages will be computed by the value of the necessities and comforts the husband would have supplied but for the acts of the defendant, regard being had to their station and situation in life.⁸⁸ She may, however, show that he was prevented from procuring or holding a permanent position.⁸⁹ Loss of support by a wife does not include luxuries or the gross earnings of her husband; it is measurable by such necessities and comforts as are suitable to her station.⁹⁰ "Means of support" relates to whatever the husband might have earned or made by his labor and attention to business, and contributed to the support of his family.⁹¹ In estimating the extent of the loss of support the difference in the wages of the husband prior to and after his disability will be taken into account, as will the expenditure of time and money by the wife to effect his cure.⁹² A wife provided for as well after the husband's debauch as before cannot recover the money spent on the debauch on the theory that if she survived him her share of the estate would have been increased to that extent.⁹³ In Michigan the wife may recover from the person who sold her husband the liquor or any part thereof the money or property received from him therefor.⁹⁴ Under a statute imposing liability for all damages resulting from the unlawful sale of liquors there may be a recovery by the personal representative of a decedent of the money expended by him for liquors so sold.⁹⁵ The seller of liquors to a husband whose sole means for the support of his family consists of his labor and who in consequence of such sale neglects his business and does not support them as he would have done if sober, is liable for the loss of

⁸⁷ *Mathre v. Devendorf*, 130 Iowa 107.

⁸⁸ *McNetton v. Herb*, 158 Mich. 525.

⁸⁹ *Mathre v. Story City D. Co.*, 130 Iowa 111.

⁹⁰ *McNetton v. Herb*, 158 Mich. 525.

⁹¹ *Wrightman v. Devere*, 33 Wis. 570; *Schneider v. Hosier*, 21 Ohio St. 98.

⁹² *Thomas v. Dansby*, 74 Mich. 398. See as to expenditures, § 1250.

⁹³ *Manzer v. Phillips*, 139 Mich. 61.

⁹⁴ *Rouse v. Melsheimer*, 82 Mich. 172. But compare *McNetton v. Herb*, 158 Mich. 525.

⁹⁵ *Kilburn v. Coe*, 48 How. Pr. 144.

their support.⁹⁶ It is immaterial to a wife's recovery of damages caused by her husband's thriftless and dissipated career how long the unlawful sales of liquor to him were continued.⁹⁷ Her right to recover for the loss of support for herself and her children is not affected because she was endeavoring to obtain a divorce and did not purpose to resume marital relations with her husband.⁹⁸

The liability of the sureties upon the bond of a liquor dealer is not confined to the damages resulting directly from his acts, but for all damages to which they contribute. "And where, during the existence of a license based upon such bond, the principal sells intoxicating liquors to one who is disqualified to earn a support for his family, by reason of his intoxication, the liability of the surety attaches and continues throughout the period of such disqualification, whether the same terminates during the license year or continues for a longer time."⁹⁹ The recovery may be, according to the facts, for the total or partial loss of the means of support. This rule does not limit a plaintiff to such damages as may compensate for the loss of time by the intoxicated person while intoxicated, but covers such loss as is the direct result of the intoxication.¹ The sources from which a wife derived support during the time her husband was incapacitated by intoxication may be shown.² It may not be shown that the plaintiff had children.³ The occupation and business of the plaintiff's husband and the manner in which he supported her in another place may be shown; but not the wife's standing in society; the last bears upon mental suffering which is not an element of damages under some statutes.⁴ The age, condition in life, habits of industry and sobriety of the plaintiff's husband and his ability to support her before the sales complained of and

⁹⁶ *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

⁹⁷ *Wardell v. McConnell*, 23 Neb. 152; *Stalnka v. Kreitle*, 66 Neb. 829; *Jessen v. Wilhite*, 74 Neb. 608.

⁹⁸ *Jessen v. Wilhite*, *supra*.

⁹⁹ *Wardell v. McConnell*, 23 Neb. 152; *Selders v. Brothers*, 88 Neb. 61, citing intermediate local cases.

¹ *Warriek v. Rounds*, 17 Neb. 411; *Selders v. Brothers*, 88 Neb. 61.

² *Fox v. Wunderlich*, 64 Iowa 187; *Mayers v. Smith*, 121 Ill. 442; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

³ *Manzer v. Phillips*, 139 Mich. 61.

⁴ *Jackson v. Noble*, 54 Iowa 641. See § 1213.

thereafter are matter for consideration.⁵ The liability of the defendant is not mitigated, because the plaintiff had sued other parties for the illegal sales of liquors to her husband and had settled such suits unless the sales made by them were made during the same time as those in question.⁶ No reason is perceived why the inability or disinclination of the plaintiff's husband to work or give attention to business may not be shown to affect the recovery, she being dependent upon his exertions for the means of support.⁷

The parent's action for injury to his child is one for loss of services during minority and expenses of the illness and care,⁸ including his own time spent in taking care of the

⁵ *Dunlavey v. Watson*, 38 Iowa 398; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625; *Acken v. Tinglehoff*, 83 Neb. 296; *Selders v. Brothers*, 88 Neb. 61.

⁶ *Jackson v. Noble*, 54 Iowa 641.

⁷ See *Wightman v. Devere*, 33 Wis. 570.

⁸ *San Antonio T. Co. v. Emerson* (Tex. Civ. App.), 152 S. W. 468; *Travers v. Hartman*, — Del. Super. Ct. —, 92 Atl. 855; *Birmingham R., L. & P. Co. v. Baker*, 161 Ala. 135, 135 Am. St. 118; *Reaves v. Anniston K. Mills*, 154 Ala. 565; *Sloss-S. S. & I. Co. v. Vinzant*, 153 Ala. 212; *Brinkman v. St. Landry C. O. Co.*, 118 La. 835; *Keating v. Boston El. R. Co.*, 209 Mass. 278; *Galligan v. Woonsocket St. R. Co.*, 27 R. I. 363; *Pacific Exp. Co. v. Watson*, 57 Tex. Civ. App. 111; *Young v. Gravenhurst*, 24 Ont. L. R. 467; *Banks v. Shedden F. Co.*, 11 id. 483 (the rule rests on the statutory duty of the parent to maintain and the wrongful increase of the burden of that duty by the defendant); *Dennis v. Clark*, 2 Cush. 347, 48 Am. Dec. 671; *Durden v. Barnett*, 7 Ala. 169; *Cartanos v. Ritter*, 3 Duer 370; *Whitney v. Hitchcock*, 4 Denio 461; *Hall v.*

Hollander, 7 Dowl. & R. 133; *Ma-gee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341; *Karr v. Parks*, 44 Cal. 46, 1 Am. Neg. Cas. 5; *Durkee v. Central Pac. R. Co.*, 56 Cal. 388, 38 Am. Rep. 59; *Frick v. St. Louis, etc. R. Co.*, 75 Mo. 542; *Evansich v. Railway Co.*, 57 Tex. 123; *County Com'rs v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Barnes v. Keene*, 132 N. Y. 13, quoting the text; *Seltzer v. Saxton*, 71 Ill. App. 229; *Buck v. People's St. R. etc. Co.*, 46 Mo. App. 555, 568, 4 Am. Neg. Cas. 396; *Woeckner v. Erie Electric M. Co.*, 182 Pa. 182, 3 Am. Neg. Rep. 601; *McGarr v. National & P. W. Mills*, 24 R. I. 447, 60 L.R.A. 122.

The loss of the services of a minor son whose earnings contributed to the support of his family is a damage within the meaning of a statute giving a right of action on a liquor dealer's bond to any person injured or damaged in his person, property or means of support, although such earnings were not necessary to keep the family from becoming dependent. *Reath v. State*, 16 Ind. App. 146.

The amount of future expenses must be shown by some degree of

child,⁹ and also that of his daughter and wife,¹⁰ and the increased cost of its care and nurture on account of the injury.¹¹ The ordinary expense of maintaining an injured child does not enter into the question of damages.¹² In Pennsylvania the increased inconvenience and trouble caused other members of the family by the injury are not ground for recovery. "The duties performed by them in the care of the injured child cost the plaintiff nothing and caused him no pecuniary loss, and they cannot be made a ground of recovery by him."¹³ The better view seems to be that such services were rendered by the plaintiff in the discharge of his duty to lessen the damages, and that they were, in point of law, rendered to the defendant and for his benefit. The right of a parent to recover for the loss of his son's services during minority is not affected by the fact that the latter has recovered therefor in an action brought by himself.¹⁴

proof. *Ott v. Philadelphia*, 235 Pa. 534.

A deserted or widowed mother may maintain an action. *O'Brien v. Philadelphia*, 215 Pa. 407; *Crowley v. Pennsylvania R. Co.*, 231 Pa. 286.

⁹ *San Antonio T. Co. v. Emerson* (Tex. Civ. App.), 152 S. W. 468; *Birmingham R., L. & P. Co. v. Chastain*, 158 Ala. 421; *Barnes v. Keene*, 132 N. Y. 13, see § 1250; *Missouri, etc. R. Co. v. Horton*, 28 Okla. 815; *Young v. Gravenhurst*, 22 Ont. L. R. 291; *Woodward I. Co. v. Curl*, 153 Ala. 205; *County Com'rs v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Connell v. Putnam*, 58 N. H. 534.

An instruction that if the father had lost contract wages while caring for his injured child they might be recovered, but speculative and uncertain earnings could not, was held to be as liberal to the plaintiff as the law allows. *Bridger v. Asheville & S. R. Co.*, 27 S. C. 456, 13 Am. St. 653.

It is error to allow a parent to testify that he lost lucrative employment in order to nurse his child. *Barnes v. Keene*, *supra*. See § 1250.

Evidence as to what a parent could have earned at his trade is not proper proof of the value of his services for nursing his injured child. *Gulf, T. & W. Ry. Co. v. Dickey*, — Tex. Civ. App. —, 171 S. W. 1097.

¹⁰ *Baxter v. St. Louis T. Co.*, 103 Mo. App. 597, 15 Am. Neg. Rep. 632; *Gorman v. New York, etc. R. Co.*, 128 App. Div. (N. Y.) 414, citing the text; *Schmitz v. St. Louis, etc. R. Co.*, 46 Mo. App. 380; *Blackwell v. Hill*, 76 id. 46, 54.

¹¹ *Lang v. New York, etc. R. Co.*, 51 Hun 603.

¹² *Sloss-S. S. & I. Co. v. Vinzant*, 153 Ala. 212.

¹³ *Woceckner v. Erie Electric M. Co.*, 182 Pa. 182. See § 1250, 3 Am. Neg. Rep. 601.

¹⁴ *Texas & P. R. Co. v. Morin*, 56 Tex. 133; *Forsyth v. Central Mfg. Co.*, 103 Tenn. 497, citing the text.

In considering the earning capacity of a child regard may be paid to any employment for which he was fitted,¹⁵ and to the fact that the value of his services will increase with age and experience; but in the absence of evidence showing that he was fitted for a particular calling it may not be assumed that he would have engaged therein.¹⁶ The profits a parent might have realized from the labor of a minor son as an employee are not to be regarded if like profits could have been made from the labor of another.¹⁷ In estimating the value of the services of a newsboy the evidence as to income received should be restricted to the compensation from sources other than tips.¹⁸ Where a child is only partially disabled the recovery for loss of services during minority should be based upon the depreciated value of the services during such period.¹⁹ The parent of an emancipated child may not recover for the loss of his services,²⁰ and so of a parent who requested that he be employed in the work in which he was engaged when injured.²¹ If a female becomes of age for some purposes at an earlier date than for general purposes the recovery for loss of services may be co-extensive with the age at which her majority is attained for the latter.²² It has been held that a deduction must be made from the probable gross earnings equal to the expense of maintenance of the minor.²³ This proposition has been departed from for the very good reason that a parent is bound to support his minor child regardless of his earnings. The latter case was one in which there was loss of a regular salary, and it was held that the wages which would have been received were not

¹⁵ *Pecos, etc. R. Co. v. Blasen-game*, 42 Tex. Civ. App. 66.

¹⁶ *Missouri, etc. R. Co. v. Horton*, 28 Okla. 815; *Birmingham R., L. & P. Co. v. Chastain*, 158 Ala. 421.

Evidence that the plaintiff intended his son should follow his occupation and what he would be likely to earn in it is too speculative. *Brown v. St. Louis & S. R. Co.*, 127 Mo. App. 499.

¹⁷ *Moers v. Michigan United R. Co.*, 158 Mich. 659.

¹⁸ *Torgeson v. Hanford*, 79 Wash. 56.

¹⁹ *Indianapolis Traction & Terminal Co. v. Croly*, 55 Ind. App. 543.

²⁰ *Ingram v. Southern R. Co.*, 152 N. C. 762.

²¹ *Rowland v. Little*, 140 Ky. 309.

²² *Hussey v. Ryan*, 64 Md. 426, 54 Am. Rep. 722.

²³ *Matthews v. Missouri Pac. R. Co.*, 26 Mo. App. 75, 87; *Peters v. Bessemer, etc. R. Co.*, 225 Pa. 307.

to be diminished because of the expense of support.²⁴ If a statute makes the father of adult children liable for medical care for them if they are too poor to pay therefor he may recover the money reasonably paid for such care and the expenses connected therewith.²⁵ Injury to the clothing of a minor may be recovered for.²⁶

The recovery must be substantially governed by what the proof shows the loss to be.²⁷ Where the evidence showed that a boy aged five years would have been worth \$100 per year to his father from the time he became ten or eleven years of age a verdict for \$4,500 was set aside.²⁸ But this strictness is not always observed.²⁹ A reasonable rule is that the damages for loss of services rest in the sound discretion of the jury if the case is such that direct proof thereof cannot be made.³⁰ Where the injury was to a bright boy of fourteen years, who was going

²⁴ *Mauerman v. St. Louis, etc. R. Co.*, 41 Mo. App. 348; *Texas & P. R. Co. v. Morin*, 66 Tex. 133; *Birkel v. Chandler*, 26 Wash. 241, '12 Am. Neg. Rep. 487; *Schmitz v. St. Louis, etc. R. Co.*, 46 Mo. App. 381; *Flaherty v. Butte E. R. Co.*, 42 Mont. 89; *Missouri, etc. R. Co. v. Horton*, 28 Okla. 815.

²⁵ *Union Pac. R. Co. v. Jones*, 21 Colo. 340, 347.

²⁶ *Shoemaker v. Jackson*, 128 Iowa 488, 1 L.R.A.(N.S.) 137.

²⁷ *Texas & P. R. Co. v. Morin*, *Schmitz v. St. Louis, etc. R. Co.*, *supra*; *Goodrich v. Burlington, etc. R. Co.*, 97 Iowa 521, 11 Am. Neg. Cas. 538.

In *Reese v. Hershey*, 163 Pa. 253, 17 Am. Neg. Cas. 245, 43 Am. St. 795, the plaintiff's son was earning two dollars and a half a week when injured. Without any proof that he was likely to earn more the court suggested that he might do so by way of promotion. Held, error. See § 1251.

²⁸ *Hurt v. St. Louis, etc. R. Co.*, 94 Mo. 255, 4 Am. St. 374, 4 Am.

Neg. Cas. 584; *Matthews v. Missouri Pac. R. Co.*, 26 Mo. App. 75.

²⁹ *Dollard v. Roberts*, 130 N. Y. 269, 14 L.R.A. 238; *Buck v. People's St. R. etc. Co.*, 46 Mo. App. 555, 568; *Birmingham R., L. & P. Co. v. Chastain*, 158 Ala. 421.

³⁰ *Flaherty v. Butte E. R. Co.*, 42 Mont. 89; *Blackwell v. Memphis St. R. Co.*, 124 Tenn. 516; *Gulf, etc. R. Co. v. Brown*, 33 Tex. Civ. App. 269; *Vanderveer v. Moran*, 79 Neb. 431; *Seltzer v. Saxton*, 71 Ill. App. 229; *Blackwell v. Hill*, 76 Mo. App. 46, 55.

In *Baltimore, etc. R. Co. v. Keek*, 89 Ill. App. 72, a verdict was set aside because it awarded excessive damages.

Proof of the age of an infant, that he lived at home, and the extent of his injuries is sufficient to call into requisition the sound sense and experience of the jury to fix the amount of damages. *Drogmund v. Metropolitan St. R. Co.*, 122 Mo. App. 154; *Brunke v. Missouri & K. Tel. Co.*, 112 Mo. App. 623.

to school at the time it occurred and was learning easily and well, and who, as a result of the wrong done him, became stupid and nervous, and sometimes delirious, requiring careful nursing and medical attendance, with a prospect of continued epilepsy and ultimate premature death, a verdict for \$5,000 was sustained. The expenses incurred up to the time of the trial aggregated \$500 or \$600.³¹ In England the weight of authority is to the effect that in an action by a parent for injuries to a minor child under his care the *gravamen* is the loss of service, as incidental to which he may recover the expense of nursing and healing the child; though if the child be of such tender years as to be incapable of rendering any service whatever there can be no recovery even for the expenses.³² But in this country a more liberal rule has been adopted; and the best considered cases hold that inasmuch as it is a duty enjoined by the law of the land, as well as by the laws of nature, upon the parent to care for and heal his injured minor child, he who wilfully or negligently occasioned the injury should be held responsible for the expenses incurred without reference to the capacity of the child to render service to the parent.³³ The latter may recover for an injury to his child if that results in loss by being put to damage and expense in the care and cure of the child, though there was no loss of the child's services, and notwithstanding it dies; but the recovery must be limited to the damages sustained before death.³⁴ The parent's right of action for an injury to his minor child is not affected because, at the time of the injury, he was serving a term in the chain gang for the

³¹ *Strohm v. New York, etc. R. Co.*, 32 Hun 20.

³² *Grinnell v. Wells*, 7 Man. & G. 1041; Add. on Torts, 902.

On this principle the mother of a minor cannot recover for her services in attending him and for moneys expended in medical attendance, nursing and supplies, she not being in the legal relationship of master to him or under liability for his support. *Wilson v. Boulter*, 26 Ont. App. 184, 194.

³³ *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95; *Dennis v. Clark*, 2 Cush. 347, 48 Am. Dec. 671; *Sykes v. Lawler*, 49 Cal. 237, 238; *Netherland-Am. Steam N. Co. v. Hollander*, 8 C. C. A. 169, 59 Fed. 417; *Clark v. Bayer*, 32 Ohio St. 300, 30 Am. Rep. 593; *Durden v. Barnett*, 7 Ala. 169; *Werbolovsky v. New York & B. D. Exp. Co.*, 63 N. Y. Misc. 329.

³⁴ *Trow v. Thomas*, 70 Vt. 580.

violation of law, such term expiring before he attained his majority.³⁵ The recovery must be limited to such expenses as have been actually incurred, or which are immediately necessary to be incurred.³⁶ There can be no recovery for medical services or hospital expenses in the absence of evidence showing their reasonable value.³⁷ The recovery of the expense incurred by a father in going to the place where his son was, has been denied,³⁸ a ruling which seems to ignore the natural instincts of the father, and if applied generally to be inconsistent with the duty to make reasonable exertion to mitigate the injury done and to recover the resulting expense. Wounded feelings of the parent cannot be considered,³⁹ nor the loss of the society of a young child,⁴⁰ nor can exemplary damages be recovered.⁴¹ The parent's action is thus restricted on the ground that a child has a right of action for his personal loss, including such as may be undergone after his majority has been reached.⁴² For the

³⁵ *Amos v. Atlanta R. Co.*, 104 Ga. 809.

³⁶ *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95; *Karr v. Parks*, *infra*.

³⁷ *Torgeson v. Hanford*, 79 Wash. 56.

³⁸ *Woodward I. Co. v. Curl*, 153 Ala. 205.

³⁹ *Clinton v. Laning*, 61 Mich. 355; *Birmingham R., L. & P. Co. v. Baker*, 161 Ala. 135, 135 Am. St. 118; *Bube v. Birmingham R., L. & P. Co.*, 140 Ala. 276, 103 Am. St. 33; *Brinkman v. St. Landry C. O. Co.*, 118 La. 835; *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633; *Pennsylvania R. Co. v. Kelly*, 31 Pa. 372, 12 Am. Neg. Cas. 534; *County Com'rs v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Baltimore, etc. R. Co. v. Keck*, 89 Ill. App. 72, 78. But see *Trimble v. Spiller*, 7 T. B. Mon. 394, 18 Am. Dec. 189, and *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341.

⁴⁰ *Werbolovsky v. New York & B. D. Exp. Co.*, *supra*.

⁴¹ *Baltimore, etc. R. Co. v. Keck*; *Bube v. Birmingham Co.*, *supra*; *Reaves v. Anniston K. Mills*, 154 Ala. 565.

In *Whitney v. Hitchcock*, 4 Denio 461, it was held in trespass for assault and battery upon the child or servant of the plaintiff that the damage was the actual loss which the plaintiff had sustained; that exemplary damages could not be given, though the assault was of an indecent character, and under circumstances of great aggravation.

⁴² *Delaware, etc. R. Co. v. Devore*, 52 C. C. A. 77, 15 Am. Neg. Rep. 701, 114 Fed. 155; *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. 320; *Linthicum v. Truitt*, 2 Boyce (Del.) 338; *Newbury v. Getchell*, 100 Iowa 441, 62 Am. St. 583; *Cincinnati, etc. R. Co. v. Troxell*, 143 Ky. 765; *Ceigler v. Hopper-M. Co.*, 90 App. Div. (N. Y.) 379; *Whitney v. Hitchcock*, *supra*. The case of *Karr v. Parks*, 44 Cal. 46, is thus stated in the opinion: "It appears from the evidence that the

abduction of a minor child the parent may recover for reasonable expenses incurred in its pursuit, though no evidence be given that the act was malicious.⁴³ If the injuries cause instantaneous death the father cannot recover for loss of services,⁴⁴ and if they do not produce that immediate result his recovery therefor cannot extend beyond the child's life.⁴⁵ There is not a recovery of double damages because the minor recovers for his decreased earning capacity after he shall attain his majority and the father for the loss of the pecuniary aid he might reasonably expect to receive from his son thereafter, such loss being alleged.⁴⁶ In Louisiana a parent may recover for the

daughter of plaintiff, between ten and eleven years of age, was attacked and gored by the defendant's cow. A wound was inflicted upon her face which destroyed the sight of the right eye and lachrymal duct, and tore the lower lid from its attachment at the inner corner of the eye. She was immediately placed in the care of a surgeon, under whose treatment the wound healed; but there remained an eversion of the lower eyelid, which was an unseemly disfigurement of the face. The larger portion of the expense for which the plaintiff sought to recover was incurred in the endeavor to remove this disfigurement. For this purpose the child was taken to San Francisco and two surgical operations were performed — the first being an entire failure, and the other partially successful. The amount of the verdict found by the jury renders it certain that the expenses attending these operations entered largely into their estimate of damages. * * * There was evidence tending to show that the restoration of the eyelid to its normal condition would add to the child's comfort by affording protection to the eye. But the discomfort was the unavoidable result of the

injury received, for which the child could recover compensation in her own suit, as she could for the immediate pain and suffering caused by the wound. There would be practically no limit to the liability of the defendant if the father could pursue at pleasure a series of expensive surgical operations for the purpose of removing every trace of the injury and charge the defendant with the entire cost."

Some cases in line with those cited indicate the view that evidence of damage which may be sustained after an injured minor arrives at his majority is too speculative. See *Brown v. St. Louis & S. R. Co.*, 127 Mo. App. 499. See *Western & A. R. Co. v. Young*, *supra*, as to the basis upon which the jury may arrive at a conclusion.

⁴³ *Rice v. Nickerson*, 9 Allen 478, 85 Am. Dec. 777; *Howell v. Howell*, 162 N. C. 283, 45 L.R.A. (N.S.) 867; *Brown v. Crockett*, 8 La. Ann. 30.

⁴⁴ *Ohnmacht v. Mount Morris E. L. Co.*, 66 App. Div. (N. Y.) 482.

⁴⁵ *Davis v. St. Louis, etc. R. Co.*, 53 Ark. 117, 7 L.R.A. 285, 13 Am. Neg. Cas. 229, 230.

⁴⁶ *Gulf, etc. R. Co. v. Hall*, 34 Tex. Civ. App. 535.

pain, suffering and disfigurement of a deceased child who died from other causes than the injury, as well as for the pecuniary loss resulting from the disability up to the time of death.⁴⁷ Injury to the property of a parent accrues when an adult son who has no estate is rendered helpless by the illegal sale of liquors to him if the father is bound to provide for him. In so far as he does so provide though without direction of the authorities, he may recover to the extent that expenditures might have been compelled—the amount necessary for the humane and comfortable support of a needy person, and no more. Attorney's fees were not recoverable.⁴⁸ Future loss of earnings during the minority of a child must be specially claimed.⁴⁹

§ 1253. **Exemplary damages.** Where the action is brought by one who suffered the injury in his own person (but not otherwise as is shown in the preceding section) exemplary damages may be allowed, where the doctrine of such damages prevails if the wrong was done with malice or with reckless indifference to consequences.⁵⁰ There is much conflict of decision as to

⁴⁷ *Payne v. Georgetown L. Co.*, 117 La. 983.

⁴⁸ *Clinton v. Laning*, 61 Mich. 355.

⁴⁹ *Collins v. Godwin*, 65 Fla. 283.

⁵⁰ *Vansant v. Kowalewski*, — Del. Super. Ct. —, 90 Atl. 421; *Turk v. Norfolk & W. Ry. Co.*, — W. Va. —, L.R.A.1915E 145, 84 S. E. 569; *Louisville & N. R. Co. v. Williams*, 183 Ala. 138; *Sheffield Co. v. Harris*, 183 Ala. 357; *Avondale Mills v. Bryant*, 10 Ala. App. 507 (from an employer for assault and battery by employee); *Pine Bluff & A. R. Ry. Co. v. Washington*, — Ark. —, 172 S. W. 872 (although the defendant is a corporation); *Pacelli v. People's Ry. Co.*, — Del. Super. Ct. —, 93 Atl. 560; *Woody v. Louisville R. Co.*, 153 Ky. 14; *Rogers v. Foote*, 109 Me. 564; *Ellis v. Wahl*, 180 Mo. App. 507; *Booker v. Trainer*, 172 Mo. App. 376; *Dodd v. Spartanburg R., G. & E. Co.*, 95 S. C. 9; *Wilhelm v. Park-*

ersburg, M. & I. R. Co., 74 W. Va. 678 (in the discretion of the jury); *Williams v. Campbell*, 22 Wyo. 1; *Pratt v. Davis*, 118 Ill. App. 161 (unauthorized surgical operation); *Bennett v. Charleston Union S. Co.*, 90 S. C. 308; *Harrison v. Ely*, 120 Ill. 73; *Alabama, etc. R. Co. v. Frazier*, 93 Ala. 45, 8 Am. Neg. Cas. 17; *Badostain v. Grazide*, 115 Cal. 425; *Kirton v. North Chicago St. R. Co.*, 91 Ill. App. 554; *Webb v. Rothschild*, 49 La. Ann. 244; *Thillman v. Neal*, 88 Md. 525; *Crosby v. Humphreys*, 59 Minn. 92; *Canfield v. Chicago, etc. R. Co.*, 59 Mo. App. 354; *Sloan v. Speaker*, 63 id. 321; *Pierce v. Carpenter*, 65 id. 191; *Lyddon v. Dose*, 81 id. 64; *White v. Barnes*, 112 N. C. 323; *Hendricks v. Fowler*, 16 Ohio C. C. 597; *Sargent v. Carnes*, 84 Tex. 156; *Nichols v. Brabazon*, 94 Wis. 549; *Lamb v. Stone*, 95 Wis. 254; *Rauma v. Lamont*, 82 Minn.

the allowance of such damages, and the reader is referred to the chapter on that subject.⁵¹ In actions for assault and battery, where the latter is proved and there is no justification or palliation, the plaintiff has a right to a fair compensation for the injury actually sustained, and this compensation, as we have seen, should include remuneration for bodily and mental pain, loss of time from any disability and the expenses of cure. The mental pain which will be considered for compensation is not only that which results from the corporal hurt, but also the insulting or humiliating incidents of the wrong as perpetrated.⁵² The jury should be instructed to consider the entire transaction.⁵³ The circumstances which would induce the allowance of punitive damages in one jurisdiction will elsewhere be generally considered as aggravations to enhance damages for compensation.⁵⁴ Where there are such aggravations it is generally held admissible to show the wealth and social position of the parties to affect damages therefor.⁵⁵ Any facts may be proven to enhance damages which tend to show actual malice. The plaintiff may show previous threats, and for this purpose it is

477; *Germolus v. Sausser*, 83 Minn. 141; *Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 512, 11 Am. Neg. Cas. 9; *Louisville & N. R. Co. v. Long*, 94 Ky. 410, 11 Am. Neg. Cas. 579; *Haulish v. Boller*, 72 App. Div. (N. Y.) 559.

⁵¹ Ch. 9.

⁵² *Shields v. Rowland*, 151 Ky. 136; *Coal Belt E. R. Co. v. Young*; 126 Ill. App. 651; *Root v. Sturdivant*, 70 Iowa 55; *Remmler v. Shenuit*, 15 Mo. App. 192; *Tatnall v. Courtney*, 6 Houst. 434; *Sampson v. Henry*, 11 Pick. 379; *Thillman v. Neal*, 88 Md. 525.

In *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143, a verdict for \$1,200 was sustained for spitting in a woman's face in a public place in the presence of a large number of persons.

⁵³ *Frost v. Pinkerton*, 61 App Div. (N. Y.) 566.

⁵⁴ See *Ford v. Cheever*, 105 Mich. 679, as to the recovery by a wife of exemplary damages or damages in the nature thereof under the civil damage act.

⁵⁵ *Schmitt v. Kurrus*, 234 Ill. 578; *Sampson v. Henry*, 11 Pick. 379; *Webb v. Gilman*, 80 Me. 177; *Sloan v. Edwards*, 61 Md. 89; *Beck v. Dowell*, 40 Mo. App. 71, 111 Mo. 506, 33 Am. St. 547 (pecuniary condition of the plaintiff); *Goldsmith v. Joy*, 61 Vt. 488, 15 Am. St. 923, 4 L.R.A. 500; *Draper v. Baker*, *supra*; *Brown v. Evans*, 17 Fed. 912; *Dailey v. Houston*, 58 Mo. 361; *Rowe v. Moses*, 9 Rich. 423; *Pullman P. C. Co. v. Lawrence*, 74 Miss. 782, 2 Am. Neg. Rep. 586; *Hendricks v. Fowler*, 16 Ohio C. C. 597. See *McKenzie v. Allen*, 3 Strobb. 546; *Reeder v. Purdy*, 41 Ill. 279; *Tatnall v. Courtney*, 6 Houst. 434; § 404.

immaterial whether he knew of them before the assault or not.⁵⁶ Evidence of threats and abusive language uttered in reference to the plaintiff fourteen hours after the assault was committed is admissible to show express malice.⁵⁷ In Ohio provocation may mitigate punitive damages; but is not cause for awarding them.⁵⁸ In some states such damages may be mitigated in an action for trespass *vi et armis* by proof of the payment of a fine imposed in a criminal prosecution for the act which is the basis of the civil proceeding; but a conviction does not bar the right to recover such damages.⁵⁹ The general rule is that such a payment does not affect the amount which may be awarded as exemplary damages.⁶⁰ It is within the discretion of the jury to include, as part of the damages, a reasonable attorney fee in favor of the plaintiff, but evidence as to the amount thereof is not admissible.⁶¹ A parent may recover punitive damages for the injury to his affections and in the interference with his domestic life by the abduction or concealment of a minor child.⁶² Under a statute dispensing with scienter and making the owner of a dog liable to a person injured by it to the full amount of the injury done there can be no recovery for exemplary damages in the absence of wilfulness, recklessness or wantonness upon the part of the owner.⁶³

In the general discussion of the subject of exemplary damages there are noticed some of the cases brought under civil damage acts, the language of which may determine whether such damages may be recovered. In Indiana it is not competent for the legislature to authorize their imposition in cases

⁵⁶ Bartram v. Stone, 31 Conn. 159; Treat v. Barber, 7 Conn. 279.

⁵⁷ Spear v. Sweeney, 88 Wis. 545.

⁵⁸ Menninger v. Taylor, 30 Ohio C. C. 717.

⁵⁹ Flanagan v. Womack, 54 Tex. 45; § 402; Rhodes v. Rodgers, 151 Pa. 634; Jackson v. Wells, 13 Tex. Civ. App. 275; Wirsing v. Smith, 222 Pa. 8.

⁶⁰ Hoadley v. Watson, 45 Vt. 289, 12 Am. Rep. 197; Cook v. Ellis, 6 Hill 466, 41 Am. Dec. 757; Read v.

Kelly, 4 Bibb 400; Wheatley v. Thorn, 23 Miss. 62; Phillips v. Kelly, 29 Ala. 628; Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582; McWilliams v. Bragg, 3 Wis. 424; § 402; Roach v. Caldbeck, 64 Vt. 593.

⁶¹ Hudson v. Voigt, 15 Ohio C. C. 391.

⁶² Howell v. Howell, 162 N. C. 283, 45 L.R.A.(N.S.) 867.

⁶³ Kleybolte v. Buffon, 89 Ohio St. 61.

which are offenses against the penal statutes.⁶⁴ Under the Illinois act of 1872 the general rule that actual damages must be found as a predicate for those of a punitive nature prevailed unless the defendant sold the liquor after he was notified not to sell to the person in question.⁶⁵ A dram shop keeper who had notified his employees not to sell to a person within the statute was not subject to exemplary damages for the employee's wilful disobedience of the order.⁶⁶ In Iowa in the absence of damages to the means of support of a wife, exemplary damages may not be awarded because of her mental suffering based on her husband's threatening language and vulgar conduct.⁶⁷ A wife does not suffer injury to her person, property or means of support, in the absence of injury to her person or property, or her husband's property if his means are adequate for her support and that of the family.⁶⁸ Under the statute such damages are not dependent upon the malice, wantonness or recklessness of the vendor of liquors where injury to the wife of the consumer results and such injury is within the statute wilfully violated.⁶⁹ Wantonness may be predicated upon the sale of liquor to a person known to be intoxicated; the vendor need not have known that such person was married or anticipated the injury caused by his sale of liquor to him.⁷⁰ The dealer's knowledge that an habitual drunkard to whom he made sales has a wife is cause for imposing exemplary damages though she had not forbidden the making of sales to her husband.⁷¹ In Kansas exemplary damages are allowed only where the defendant has been willful, wanton, reckless, malicious, oppressive or otherwise deserves condemnation beyond the actual damages. He brings himself within the scope of these conditions by selling liquors to a person addicted to intoxication after notice from his wife not to do so, though such notice was

⁶⁴ *Koerner v. Oberly*, 56 Ind. 284.

⁶⁸ *Confrey v. Stark*, 73 Ill. 187.

⁶⁵ *McEvoy v. Humphrey*, 77 Ill. 388.

⁶⁹ *Fox v. Wunderlich*, 64 Iowa 187.

⁶⁶ *Brantigam v. While*, 73 Ill. 561.

⁷⁰ *Manzer v. Phillips*, 139 Mich. 61.

⁶⁷ *Calloway v. Laydon*, 47 Iowa 456.

⁷¹ *Johnson v. Schultz*, 74 Mich. 75.

not given recently.⁷² Exemplary damages in a suit brought by the wife are not to be enhanced by evidence of the number of her children these having a right of action in their own names.⁷³ In New York the unlawful sale of liquor does not, it seems, render the parties liable under the statute for compensatory damages to persons injured thereby liable also at the suit of each of these for punitive damages for the same act, but if such liability exists the defendant might show how much had been awarded against him in prior actions growing out of the same transaction.⁷⁴

§ 1254. **Pecuniary and other circumstances of the parties.** The general rule is that compensatory damages are not affected by the financial circumstances of either party to the action or the number or ages of the plaintiff's dependents,⁷⁵ or the

⁷² *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625; *Rouse v. Melsheimer*, 82 Mich. 172; *Larzelere v. Kirchgessner*, 73 Mich. 276; (it is immaterial that the request was made before the defendant was licensed).

⁷³ *Thomas v. Dansby*, 74 Mich. 398.

⁷⁴ *Secor v. Taylor*, 41 Hun 123.

⁷⁵ *Long v. Seigel*, 177 Ala. 338; *Story v. Green*, 164 Cal. 768; *Andonique v. Carmen*, 162 Ky. 154; *Johnson v. Schultz*, 74 Mich. 75; *Larzelere v. Kirchgessner*, 73 Mich. 276 (the two cases last cited were ruled under civil damage statutes); *Rauhala v. Maki*, 172 Mich. 112; *Texas Co. v. Strange* (Tex. Civ. App.), 154 S. W. 327; *Bakka v. Kemmerer C. Co.*, 43 Utah 345; *Riverside & Dan River C. M. Co. v. Carter*, 113 Va. 346; *Eoff v. Spokane*, etc. R. Co., 70 Wash. 270; disapproving *Starek v. Washington U. C. Co.*, 61 Wash. 213, and holding that evidence, incidentally given, of the number of the plaintiff's children is not fatal error; *Kelly v. Southern Wisconsin R. Co.*, 152

Wis. 328; *Lacorazza v. Cantalupo*, 127 C. C. A. 459, 210 Fed. 875 (possession of wife and seven children no bearing upon earning power); *Chicago, etc. R. Co. v. Batsel*, 100 Ark. 526; *St. Louis, etc. R. Co. v. Adams*, 74 Ark. 326, 109 Am. St. 85; *Rio Grande S. R. Co. v. Campbell*, 44 Colo. 1; *Savannah E. Co. v. Badenhop*, 6 Ga. App. 371; *Frick v. Aurora*, etc. R. Co., 154 Ill. App. 277; *Illinois Cent. R. Co. v. Rothschild*, 134 id. 504; *Jones v. George*, 227 Ill. 64 (domestic relations); *Chicago, etc. R. Co. v. Steckman*, 125 Ill. App. 299 (not fatal); *Vandalia C. Co. v. Yemm*, 175 Ind. 524; *Monongahela River Con. C. & C. Co. v. Hardsaw*, 169 Ind. 147; *Atchison, etc. R. Co. v. Ringle*, 71 Kan. 839; *Cleveland, etc. T. Co. v. Ward*, 27 Ohio C. C. 761; *Montross v. Alexander*, 152 Mich. 513; *Manzer v. Phillips*, 139 Mich. 61; *Bahr v. Northern Pac. R. Co.*, 101 Minn. 314; *Torreyson v. United R. Co.*, 144 Mo. App. 626; *Skiles v. St. Louis, etc. R. Co.*, 130 Mo. App. 162; *Carlile v. Bentley*, 81 Neb. 715; *Simpson v. Foundation Co.*,

public position of the defendant at the time an assault was com-

201 N. Y. 479, 2 N. C. C. A. 183 (unless the fact that the plaintiff has a wife is shown in connection with the loss of sexual power); *Madigan v. Schaghtioke*, 143 App. Div. (N. Y.) 887, citing the text; *Purcell v. Duncan*, 107 App. Div. (N. Y.) 501; *Warner v. De Armond*, 49 Ore. 199; *Maynard v. Oregon R. Co.*, 46 Ore. 15, 68 L.R.A. 477; *Ft. Worth I. Works v. Stokes*, 33 Tex. Civ. App. 218; *Dallas v. Moore*, 32 Tex. Civ. App. 230; *Union Pac. R. Co. v. McMican*, 194 Fed. 393; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593; *Sesler v. Rolfe C. & C. Co.*, 51 W. Va. 318, 12 Am. Neg. Rep. 571; *La Salle v. Thorndike*, 7 Ill. App. 282; *Pittsburg, etc. R. Co. v. Powers*, 74 Ill. 341; *Moody v. Osgood*, 50 Barb. 628, 60 id. 644, 12 Am. Neg. Cas. 399; *Georgia R. & B. Co. v. Benton*, 117 Ga. 785; *Kansas City, etc. R. Co. v. Eagan*, 64 Kan. 421, 11 Am. Neg. Rep. 418; *Shea v. Potrere, etc. R. Co.*, 44 Cal. 415, 11 Am. Neg. Cas. 224; *Kansas, etc. R. Co. v. Painter*, 9 Kan. 621; *McKenzie v. Allen*, 3 Strobb. 546; *Joliet v. Conway*, 119 Ill. 489; *Stephens v. Hannibal, etc. R. Co.*, 96 Mo. 207, 16 Am. Neg. Cas. 504; *Louisville & N. R. Co. v. Gower*, 85 Tenn. 465, 17 Am. Neg. Cas. 438; *Rooney v. Milwaukee C. Co.*, 65 Wis. 397; *Vosburg v. Putney*, 78 Wis. 84; *Overhold v. Vieths*, 93 Mo. 422, 3 Am. St. 557; *Southern R. Co. v. McLellan*, 80 Miss. 700, 12 Am. Neg. Rep. 258; *Coffin v. Spencer*, 2 Hawaii 23; *Louisville & N. R. Co. v. Collinsworth*, 45 Fla. 403; *City of Dallas v. Moore*, 32 Tex. Civ. App. 230; *Louisville & N. R. Co. v. Hall*, 115 Ky. 567; *Junction City v. Blades*, 1 Kan. App. 85; *Par-*

sons v. Lindsay, 26 Kan. 426; *Roach v. Caldbeck*, 64 Vt. 593; *Baltimore & O. R. Co. v. Camp*, 26 C. C. A. 626, 81 Fed. 807; *Louisville & N. R. Co. v. Binion*, 107 Ala. 645, 13 Am. Neg. Cas. 68; *Galion v. Lauer*, 55 Ohio St. 392; *Missouri, etc. R. Co. v. Hannig*, 91 Tex. 347; *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 505, 17 Am. Neg. Cas. 603; *Crouse v. Chicago & N. R. Co.*, 102 Wis. 196; *Schwanzer v. Brooklyn Heights R. Co.*, 18 App. Div. (N. Y.) 205; *Standard O. Co. v. Tierney*, 96 Ky. 89. Compare *Hardin v. Moline*, 179 Ill. App. 101.

The rule applies to actions for loss of support under civil damage statutes. *Rodgers v. Bailey*, 68 W. Va. 186.

Evidence that the plaintiff has a family or other persons dependent upon him is inadmissible for the purpose of enhancing the damages. *Longmore v. Puget Sound Traction, Light & Power Co.*, 78 Wash. 468.

In *Devir v. Curley*, 3 New South Wales L. R. 322 (1882), it was held that the plaintiff might show that his family were dependent upon him for support. The chief justice said: It is a gratification to any one to be able to maintain his family and a cause of anxiety not to be able to do so. Though this gratification is not one which can be measured in money, it is one of which the plaintiff has been deprived. His anxiety of mind may have been greatly increased by the consciousness that he is now unable to maintain his family, and this anxiety may, I think, be taken into account in estimating the damages to which he is entitled. If there is no authority in favor of this view, it is high time that a precedent

mitted.⁷⁶ There are some exceptions. Thus, in Iowa it is held that a person who is permanently disabled may show that his only means of support were his earnings;⁷⁷ and in Louisiana and Maryland that the pecuniary circumstances of the plaintiff and the extent and dependent condition of his family may be considered by the jury in arriving at his damages.⁷⁸ In Missouri in an action by a married woman who is not living with her husband and who supports herself by her own labor it is proper for the jury to consider her age and condition.⁷⁹ In the same state it has been held that where the injuries to a widow are permanent, the jury, in estimating damages for the diminution in ability to earn a livelihood or to attend to ordinary daily tasks, should also consider her station in life.⁸⁰ In South Carolina the plaintiff in an action to recover for a personal injury may testify as to the number of his children and their ages for the purpose of showing that the injury deprives him of the capacity to meet his obligation to provide for them.⁸¹ It has been decided in North Carolina in an action by a child for personal injury that it was competent to show the plaintiff had no property and no source of income, such proof being made in connection with proof of wages current in the locality, though the child was but three years old when injured.⁸² The general rule prevails in an action to recover for the loss of the services of a minor child,⁸³ except that inquiry has been per-

should be made. In doing so we are not running counter to any rule of law. The other judges agreed.

In *National B. Co. v. Nolan*, 70 C. C. A. 436, 138 Fed. 6, the court said respecting testimony that the plaintiff was dependent upon herself for support: Whether she was rich or poor, with or without an adequate income outside of her manual labor, in no manner affected her right to recover compensatory damages. Any other rule would create a sliding scale for measuring compensation.

⁷⁶ *Hare v. Marsh*, 61 Wis. 435, 50 Am. Rep. 141.

⁷⁷ See § 1248.

⁷⁸ *Wirsing v. Smith*, 222 Pa. 8; *Bailey v. Louisiana & N. R. Co.*, 129 La. 1029; *Sloan v. Edwards*, 61 Md. 89; *Gaither v. Blowers*, 11 id. 536.

⁷⁹ *Brake v. Kansas City*, 100 Mo. App. 611.

⁸⁰ *McKenzie v. United Rys. Co. of St. Louis*, 183 Mo. App. 312.

⁸¹ *Youghblood v. South Carolina & G. R. Co.*, 60 S. C. 9.

⁸² *Jeffries v. Seaboard A. L. R. Co.*, 129 N. C. 236.

⁸³ *Sanitary C. Co. v. McKinney*, 52 Ind. App. 379; *Gulf, etc. R. Co. v. Johnson*, 99 Tex. 337; *Price v. Wright*, 35 New Bruns. 26; *Hold-*

mitted concerning the financial condition of the child in order that the jury may determine the loss likely to be entailed upon the parent; but the source of the child's estate is immaterial.⁸⁴ The plaintiff cannot prove the value of his time to his family;⁸⁵ nor, it has been ruled, show his business qualifications prior to his injury except as they may be inferred from the state of his health.⁸⁶ In actions in which insult and mortification bear a large proportion to the injury inflicted the jury may in Missouri, Mississippi and Illinois consider the financial circumstances of both parties.⁸⁷ The court say in the Illinois case: "It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessities of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured."⁸⁸ This doctrine has no application in an action against a city to recover for the consequence of its negligence.⁸⁹ It is not relevant to show that the defendant is protected by insurance.⁹⁰ A wife who sues under a civil damage statute may

ridge v. Mendenhall, 108 Wis. 1, 9 Am. Neg. Rep. 27.

⁸⁴ Reeves v. Anniston K. Mills, 166 Ala. 645; Bube v. Birmingham R., L. & P. Co., 140 Ala. 276, 103 Am. St. 33.

⁸⁵ Austin v. Ritz, 72 Tex. 391.

⁸⁶ Illinois Cent. R. Co. v. Rothschild, 134 Ill. App. 504.

⁸⁷ Eltringham v. Earhart, 67 Miss. 488, 19 Am. St. 319; McNamara v. King, 7 Ill. 432; Beck v. Dowell, 111 Mo. 506, 511, 33 Am. St. 547; Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88; Dailey v. Houston, 58 Mo. 361; Smith v. Butler, 48 Mo. App. 663 (plaintiff's condition). Compare Berryman v. Suth. Dam. Vol. IV.—71.

Cox, 73 id. 61. See Hendricks v. Fowler, 16 Ohio C. C. 597.

⁸⁸ See Mullin v. Spangenberg, 112 Ill. 140, 145, where it is said: Evidence of this character, even when offered by the plaintiff for the purpose of enhancing the damages, is held inadmissible by many courts and text writers of high standing, but, nevertheless, we have recognized the contrary rule, and have no disposition to depart from it; but under the present state of the authorities we are not inclined to extend the rule.

⁸⁹ Jackson v. Pool, 91 Tenn. 448.

⁹⁰ Lytton v. Marion Mfg. Co., 157 N. C. 331; Featherstone v. Lowell C. Mills, 159 N. C. 429.

show the financial condition of her husband as bearing upon her means of support,⁹¹ and that necessities were obtained through charity or from the public, and the suffering resulting to her and her family through the husband's drunkenness.⁹² It seems that the purchasing power of money may be regarded in considering whether the verdict allowed excessive damages;⁹³ but it is not cause for increasing the damages that the defendant is able to pay its creditors but a few cents on the dollar.⁹⁴

§ 1255. **Evidence in mitigation.** In actions for assault and battery matters of provocation cannot be admitted in mitigation unless they happen at the time of the assault or immediately preceding it, so as to form part of the transaction.⁹⁵ The provocation, to entitle it to be proved for that purpose, must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it.⁹⁶ The defendants may show that the plaintiff immediately before charged him with a crime,⁹⁷ and no inquiry can be permitted concerning the truth or falsity of the charge.⁹⁸ If the parties fight voluntarily that fact may be shown in reduction of punitive, but not to affect compensatory, damages.⁹⁹ On this question the courts which

⁹¹ *Manzer v. Phillips*, 139 Mich. 61.

⁹² *Acken v. Tinglehoff*, 83 Neb. 296; *Eastwood v. Klamm*, 83 Neb. 546.

⁹³ *Cross v. Lee L. Co.*, 130 La. 66, 4 N. C. C. A. 327.

⁹⁴ *Rogers v. Allen L. Co.*, 129 La. 900, 39 L.R.A.(N.S.) 202.

⁹⁵ *Willis v. Forrest*, 2 Duer 310; *Corning v. Corning*, 6 N. Y. 97; *Chambers v. Porter*, 5 Cold. 273; *Avery v. Ray*, 1 Mass. 12; *Tatnall v. Courtney*, 6 Houst. 434; *City E. R. Co. v. Shropshire*, 101 Ga. 33, 38, 3 Am. Neg. Rep. 369; *Hanson v. Urbana & C. E. St. R. Co.*, 75 Ill. App. 474; *Munday v. Landry*, 51 La. Ann. 303; *Haman v. Omaha H. R. Co.*, 35 Neb. 74, 8 Am. Neg. Cas. 498. See § 151.

⁹⁶ *Davis v. Collins*, 69 S. C. 460, citing the text; *Heiser v. Loomis*, 47 Mich. 16; *Genung v. Baldwin*, 75 App. Div. (N. Y.) 195; *Gronan v. Kukukuck*, 59 Iowa 18; *Lee v. Woolsey*, 19 Johns. 319, 10 Am. Dec. 230; *Chandler v. Newton*, 13 Ky. L. Rep. 927; *Shapiro v. Michelson*, 19 Tex. Civ. App. 615 (in mitigation of exemplary damages); *Carson v. Singleton*, 23 Ky. L. Rep. 1626. See § 151.

⁹⁷ *Bartram v. Stone*, *infra*; *Bauman v. Bean*, 57 Mich. 1.

⁹⁸ *Bartram v. Stone*, 31 Conn. 159; *Grace v. Dempsey*, 75 Wis. 313, applying the rule to an action for false imprisonment. See *Bull v. Gould*, 34 Ind. 552; *Marker v. Miller*, 9 Md. 338.

⁹⁹ *Grotton v. Glidden*, 84 Me. 589,

permit recovery of exemplary damages are not in harmony. Some of them permit proof of oral provocation to mitigate compensatory damages;¹ others hold that it can affect only punitive damages.² It has been suggested that an intimation in the Pennsylvania case cited, to the effect that the doctrine of punitive damages should be mutual, that it should apply to the conduct of the plaintiff as well as that of the defendant, seems to embody the correct principle. "Through punitive damages the community punishes the defendant by making him pay more than is necessary to compensate the plaintiff; through mitigation of damages it punishes the plaintiff by giving him less than will compensate him for the loss which he has suffered."³ The difficulty with this view, aside from the ultra refinement it involves, is that the plaintiff is punished without cause—he may not have violated the law. The New Jersey court has said: A provocation that will not justify an assault should not excuse making compensation for the injury inflicted. It is enough that

30 Am. St. 513; *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230; *Logan v. Austin*, 1 Stew. 426; *Bell v. Hansley*, 3 Jones 131; *Commonwealth v. Colberg*, 119 Mass. 350; *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538.

¹*Sumner v. Kinney* (Tex. Civ. App.), 136 S. W. 1192; *McCormick v. Schtrenck* (Tex. Civ. App.), 130 S. W. 720; *Genung v. Baldwin*, 77 App. Div. (N. Y.) 584, following *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *Palmer v. Winston-S. R. & E. Co.*, 131 N. C. 250; *Daniel v. Giles*, 108 Tenn. 242; *Robison v. Ruper*, 23 Pa. 523; *Frazer v. Berkeley*, 7 C. & P. 789; *Perkins v. Vaughan*, 5 Scott N. R. 881; *Linford v. Lake*, 3 H. & N. 275; *Cushman v. Ryan*, 1 Story 100; *Avery v. Ray*, 1 Mass. 12; *Lee v. Woolsey*, 19 Johns. 241; *Maynard v. Berkeley*, 7 Wend. 560, 22 Am. Dec. 595; *Corcoran v. Harran*, 55 Wis. 120; *Mowry v. Smith*, 9 Allen

67; *Tyson v. Booth*, 100 Mass. 258; *Bonino v. Caledonio*, 144 id. 299; *Burke v. Melvin*, 45 Conn. 243; *Thrall v. Knapp*, 17 Iowa 468; *Crosby v. Humphreys*, 59 Minn. 92; *Hayes v. Sease*, 51 S. C. 534. See § 151; *Lewis v. Fountain*, 168 N. C. 277.

²*Shields v. Rowland*, 151 Ky. 136; *Barrette v. Carr*, 75 Vt. 425; *Osler v. Walton*, 67 N. J. L. 63; *Scott v. Fleming*, 16 Ill. App. 539; *Armstrong v. Rhoads*, 4 Pennw. (Del.) 151; *Goldsmith v. Joy*, 61 Vt. 488, 15 Am. St. 923, 4 L.R.A. 500; *Donnelly v. Harris*, 41 Ill. 126; *Gizler v. Witzel*, 82 id. 322; *Johnson v. McKee*, 27 Mich. 471; *Prentiss v. Shaw*, 56 Me. 712; *Jacobs v. Hoover*, 9 Minn. 204; *Cushman v. Waddell*, Baldwin 57; *McBride v. McLaughlin*, 5 Watts 375; *Tatnall v. Courtney*, 6 Houst. 434; *Yeager v. Berry*, 82 Mo. App. 534.

³16 Harv. L. Rev. 591.

it may save or reduce a penalty *quasi-criminal*, which is the foundation of punitive damages.⁴ Another objection is that to allow abusive language used by the plaintiff to mitigate actual damages would be virtually allowing it as a defense.⁵ In Nebraska exemplary damages are not recoverable; neither are the pecuniary damages actually sustained to be mitigated by proof of provocation.⁶ A defendant who has used excessive force in his defense may prove in mitigation that the plaintiff first assaulted him.⁷ One called upon by a parent to aid in capturing a fleeing minor child may show in mitigation that he pursued and captured the plaintiff at the parent's request. This has a tendency to explain the defendant's conduct, and to mitigate any wrongful act done by him after capturing the boy.⁸

The bad character of the plaintiff cannot be proved in mitigation unless it in some way contributed to the provocation⁹ or is in issue upon the question of damages.¹⁰ Where a female plaintiff in an action for assault and battery made proof in aggravation of damages that the defendant took indecent liberties with her person and attempted to have sexual intercourse

⁴ *Osler v. Walton, supra.*

⁵ *Scott v. Fleming*, 16 Ill. App. 539. See *Jones v. Byrum*, 189 Ala. 677, where it was held that abusive or offensive language of the plaintiff at or about the time of an assault was not a defense but mitigated the fault of the defendant and that some damages, although only nominal, should be allowed.

⁶ *Mangold v. Oft*, 63 Neb. 397.

⁷ *Chicago & A. R. Co. v. Randolph*, 65 Ill. App. 208, 8 Am. Neg. Cas. 195.

⁸ *Vanmeter v. True*, 16 Ky. J. Rep. 320.

⁹ *McCormick v. Schtrenck* (Tex. Civ. App.), 130 S. W. 720; *McKenzie v. Allen*, 3 Strobb. 546.

It has been held that the defendant in an action for an assault and battery cannot show that the plaintiff was a fighting, high-tempered,

quarrelsome man, who had previously assaulted him. *Galbraith v. Fleming*, 60 Mich. 403. But see third paragraph of next note.

Where the plaintiff in an action for assault and battery claims punitive damages or damages for his injured feelings the plaintiff's conduct and any aggravation by him may be shown to mitigate the damages. *Newton v. Hawks*, 113 Me. 44.

Any benefit resulting to the plaintiff from a battery, as the loss of his teeth, cannot mitigate the defendant's liability. *Hitchler v. Voelker*, 8 Mo. App. 492.

¹⁰ *Ford v. Jones*, 62 Barb. 484; *Verry v. Watkins*, 7 C. & P. 308; *Indianapolis, etc. R. Co. v. Bush*, 101 Ind. 582; *Johnson v. Wells, etc. Co.*, 6 Nev. 224, 3 Am. Rep. 245. *Contra, Abbot v. Tolliver*, 71 Wis. 64. See § 94.

with her, her character for chastity was in issue on the question of damages and it was competent to disparage it by proving specific acts of lewdness and immorality.¹¹

The injured party cannot recover damages which result from his own acts or want of care. He is required to observe proper precautions against increasing the injury, and to reasonably exert himself to obtain a cure.¹² Such part of the damages he

The defendant's character is not in issue in an action to recover for an assault and battery. *Brown v. Evans*, 17 Fed. 912. Even to the extent of his being a peaceable and orderly citizen. *Elliott v. Russell*, 92 Ind. 526.

Proof that the plaintiff was of a quarrelsome disposition and had an ungovernable temper must be made by evidence of his general reputation, and not by opinions based on observation of witnesses. *Golder v. Lund*, 50 Neb. 867.

¹¹ *Ford v. Jones*, 62 Barb. 484. See *Parker v. Coture*, 63 Vt. 155, 25 Am. St. 750, and the cases cited in *Ford v. Jones*.

¹² *Ft. Worth, etc. R. Co. v. McCrummen* (Tex. Civ. App.), 133 S. W. 899; *Missouri, etc. R. Co. v. Aycock* (Tex. Civ. App.), 135 S. W. 198; *Smith v. Hewitt-L. L. Co.*, 55 Wash. 357; *Leitzell v. Delaware, etc. R. Co.*, 232 Pa. 475, 48 L.R.A. (N.S.) 114; *Moore v. Kalamazoo*, 109 Mich. 176; *Toledo El. St. R. Co. v. Tucker*, 13 Ohio C. C. 411, 416; *Mattis v. Philadelphia T. Co.*, 6 Pa. Dist. 94; *Vallo v. United States Exp. Co.*, 147 Pa. 404, 30 Am. St. 741, 14 L.R.A. 743; *Kehoe v. Allentown, etc. T. Co.*, 187 Pa. 474; *Texas & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690; § 90.

The fact that a married woman became pregnant some weeks after being injured, no caution having been given by her physician respect-

ing the matter, does not as matter of law justify a reduction of the damages, although the results of the injury may thereby have been prolonged or her recovery retarded. *Salladay v. Dodgeville*, 85 Wis. 318, 20 L.R.A. 541.

"A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction; but if it be painful, injurious and unskillful, he is not bound to peril his health and perhaps his life by submission to it. It follows that before the surgeon can shift the responsibility from himself to the patient on the ground that the latter did not submit to the course recommended it must be shown that the prescriptions were proper and adapted to the end in view." *McCandless v. McWha*, 22 Pa. 261, quoted with approval in *Du Bois v. Decker*, *infra*.

The plaintiff may show why medical aid was not obtained for him. *Muller v. Hale*, 138 Cal. 163.

It cannot be held as matter of law that a person who has sustained an injury like that for which he had previously undergone a successful operation, which was alleged not to have cured the infirmity, may be cured by undergoing another operation. *Guild v. Portland R., L. & P. Co.*, 64 Ore. 570.

sustains as the defendant can show has resulted from the plaintiff's fault will be deducted from his recovery.¹³ The plaintiff's condition of health prior to the injury may be shown,¹⁴ but the fact that another person with better health and in better physical condition would not have been injured, or only slightly injured is not ground for ordering a *remittitur*,¹⁵ nor is it a defense.¹⁶ Where tuberculosis of the leg develops from an injury thereto, the fact that the plaintiff is predisposed to tuberculosis or that his physical condition is such as to yield more readily to tubercular germs, and his injuries are greater than is usual or to be expected from such cause is not avail-

¹³ *United R. & E. Co. v. Dean*, 117 Md. 686; *Ward v. Ely-W. D. G. Bldg. Co.*, 248 Mo. 348, 45 L.R.A. (N.S.) 550; *Du Bois v. Decker*, 130 N. Y. 325, 14 L.R.A. 429, 27 Am. St. 529; *McCracken v. Smathers*, 122 N. C. 799; *Freeman v. Wilson* (Tex. Civ. App.), 149 S. W. 413; *Ralph v. Gies-G. G. Co.*, 164 Mich. 44; *Tiggerman v. Butte*, 44 Mont. 138; *Laut v. White Feather Main Reefs*, 7 West Aust. L. R. 203 (expense of operation made necessary by refusal to submit to operation previously); *Chicago, etc. R. Co. v. Heil*, 83 C. C. A. 400, 154 Fed. 626; §§ 155, 156; *Baldwin v. Lincoln County*, 29 Wash. 509, 1 Am. Neg. Cas. 93; *Geiselman v. Scott*, 25 Ohio St. 86; *Nashville, etc. R. Co. v. Smith*, 6 Heisk. 174; *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705; *Gilman v. Holey*, 7 Ill. App. 349; *Moss v. Pardridge*, 9 id. 490; *Louisville, etc. R. Co. v. Falvey*, 104 Ind. 409, 425; *Goshen v. England*, 119 Ind. 368, 5 L.R.A. 253; *Crete v. Childs*, 11 Neb. 252; *Texas & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690; *Texas & P. R. Co. v. White*, 42 O. C. A. 86, 62 L.R.A. 90, 101 Fed. 928; *Illinois S. Co. v. Szutenbach*, 64 Ill. App. 642; *Bailey v. Centerville*, 108 Iowa 20. See *La Salle*

v. Thorndike, 7 Ill. App. 282; *Föels v. Tonawanda*, 59 Hun 567.

If an operation, not ordinarily dangerous, is recommended by competent physicians the injured party must submit to it; if unable to meet the expense resort must be had, it seems, to charitable institutions. *Donovan v. New Orleans R. & L. Co.*, 132 La. 239.

In so far as a wife's injuries are aggravated by neglect the husband may not recover for the consequences thereof to him. *Gulf, etc. R. Co. v. Bagby* (Tex. Civ. App.), 127 S. W. 254.

¹⁴ *Sherman v. Indianapolis T. Co.*, 48 Ind. App. 623.

¹⁵ *Patterson v. Springfield Traction Co.*, 178 Mo. App. 250.

¹⁶ A carrier which negligently injures a passenger is liable for the ill effects which naturally and necessarily follow the injuries, and it is no defense that the injuries may have been aggravated and rendered more difficult to cure by reason of plaintiff's previous condition of health, or that by reason of latent ailments he was more seriously injured than an ordinary robust person would have been or that he would not have been injured or that his injuries would not have been so

able as a defense or in mitigation of damages.¹⁷ The effect of a surgical operation on the injured member and that its performance had been tendered the plaintiff without charge may be shown.¹⁸ Independently of any duty of the injured person to submit to a surgical operation, the feasibility of a slight one calculated to obviate pain and improve conditions may be shown as bearing on the nature and extent of the injury and its probable consequences. The cost of the operation is not the measure of recovery for the pain and suffering caused by the injury.¹⁹ An injured person who has been properly treated is not required to have his limb broken again in order to reduce its stiffness.²⁰

The burden of proving an aggravation of the injury and the extent of it is upon the defendant.²¹ One who seasonably employs a physician believed to be competent and exercises reasonable care in selecting him is not to be deprived of compensation because the best means were not used to restore him to health.²² An injured person who has submitted to an unsuc-

great if he had been in good health. *Gillogly v. Dunham*, 187 Mo. App. 551.

¹⁷ *Thomas v. St. Louis, I. M. & S. R. Co.*, 187 Mo. App. 420.

¹⁸ *Allen v. Bear Creek C. Co.*, 43 Mont. 269.

¹⁹ *White v. Chicago & N. R. Co.*, 145 Iowa 408.

²⁰ *Snyder I., L. & P. Co. v. Bowron* (Tex. Civ. App.), 156 S. W. 550.

²¹ *Wissler v. Atlantic*, 123 Iowa 11, citing the text; *Viou v. Brooks-S. L. Co.*, 99 Minn. 97; *El Paso E. R. Co. v. Shaklee* (Tex. Civ. App.), 138 S. W. 188; *Goshen v. England*, 119 Ind. 368, 5 L.R.A. 253.

²² *Reed v. Detroit*, 108 Mich. 224; *Collins v. Council Bluffs*, 32 Iowa 324, 7 Am. Rep. 200; *Rice v. Des Moines*, 40 Iowa 644; *Stover v. Bluehill*, 51 Me. 441; *Selleek v. Janesville*, 100 Wis. 157, 4 Am. Neg. Rep. 352, 41 L.R.A. 563, 104 Wis.

570, 579, 76 Am. St. 892, 47 L.R.A. 691; *Loeser v. Humphrey*, 41 Ohio St. 378, 12 Am. Neg. Cas. 487, 52 Am. St. 86; *Louisville, etc. R. Co. v. Falvey*, 104 Ind. 411, 424; *Pullman P. C. v. Bluhm*, 109 Ill. 20, 14 Am. Neg. Cas. 392; *Tuttle v. Farmington*, 58 N. H. 13; *Boynton v. Somersworth*, id. 321; *Lyons v. Erie R. Co.*, 57 N. Y. 489, 9 Am. Neg. Cas. 618; *Bardwell v. Jamaica*, 15 Vt. 438; *Ross v. City of Stamford*, 88 Conn. 260; *Doran v. Waterloo, C. F. & N. R. Co.*, — Iowa —, 147 N. W. 1100; *Variety Mfg. Co. v. Landaker*, 227 Ill. 22; *Hooper v. Bacon*, 101 Me. 533. *Contra*, *Wade v. Mt. Vernon*, 123 App. Div. (N. Y.) 796. See § 155.

A person who settles with his physician for his malpractice cannot recover for any aggravation of his injuries attributable thereto. *Viou v. Brooks-S. L. Co.*, 99 Minn. 97.

cessful operation to cure or relieve his injury is not bound to submit to another if it is likely to be serious and is attended with some risk of failure.²³ It is otherwise if an operation has not been performed if that proposed is such as a reasonable man would submit to.²⁴ The refusal to follow the treatment prescribed by a physician may not be fatal to a recovery if there was reasonable ground for believing that fatal results might follow it.²⁵ The failure to employ a physician instead of relying on home remedies is not a mitigating fact if the plaintiff acted in good faith, though an ordinarily prudent person might have called a professional man.²⁶ Expert evidence that the ordinary man dreads an operation and that the beneficial results of a particular operation were questionable is admissible to rebut a claim of negligence in failing to have an operation performed.²⁷ Where it is claimed that the plaintiff aggravated the injury by engaging in heavy work, he may properly testify that he worked because he had to in order to make a living.²⁸

In an action by a mother under a civil damage statute to recover damages caused by the sale of intoxicants to her minor son it may be shown that she had been in the habit of furnishing him liquor until he became intoxicated thereby. "The injury which the plaintiff sustained consisted mainly of the shame and mortification and mental anguish induced by discovery of the fact of her son's use of intoxicating liquor, and of his intoxication resulting from its use. It needs no argument to demonstrate that a mother who had herself been in the habit of furnishing intoxicating liquors to her minor son would not be affected by the discovery of such a wrong on the part of the defendant as is here counted on to any such degree as one who was not so lost to the sense of parental responsibility."²⁹

²³ *Martin v. Pittsburgh R. Co.*, 238 Pa. 528, 48 L.R.A. (N.S.) 115.

²⁴ *Leitzell v. Delaware, etc. R. Co.*, 232 Pa. 81.

²⁵ *Lobbau v. Wabash R. Co.*, 159 Mo. App. 464.

²⁶ *Toledo v. Radbone*, 3 Ohio C. (N.S.) 382, affirmed by the supreme court.

²⁷ *St. Louis S. W. Ry. Co. of Texas v. Brown*, — Tex. Civ. App. —, 163 S. W. 383.

²⁸ *St. Louis S. W. Ry. Co. of Texas v. Brown*, — Tex. Civ. App. —, 163 S. W. 383.

²⁹ *Cramer v. Danielson*, 99 Mich. 531.

A wife's treatment of her husband or her conduct toward the property of the person who unlawfully sold him liquors is not material to her recovery because not connected with the subject of the action.³⁰ If the previous habits or condition of the plaintiff had been such as to lessen the probability of a complete recovery from the effects of the injury, or to prolong or aggravate the suffering caused by it the fact cannot be shown in mitigation of damages.³¹ But it has been held that evidence as to the intoxication of the plaintiff at the time of the injury is competent as part of the *res gesta*,³² and of his intoxication on other occasions as bearing upon the question of his capacity to earn money, but for no other purpose.³³ In an action by a wife on the bond of a liquor dealer to recover for the loss of means of support resulting from the sale of liquor to her husband the fact that he drank to excess prior to the time the sales in question were made may be proved.³⁴ The rule which prevails in common-law actions for injuries to the person, that the possession of capital or property by the person injured has no bearing upon the scope of his recovery, does not apply in an action under such a statute; hence it is competent, as bearing upon the extent of the injury, to the means of support of the plaintiff to show that she had re-married or that shortly after the death of her first husband she had become possessed of property adequate for her support.³⁵ Where the action under a civil damage act is by a child of the intoxicated person it may be shown that the mother of the plaintiff had received a sum of money since the death of her husband; but not that it was recovered from the defendant because of his death.³⁶ The fact that the plaintiff was committing a technical trespass on the lands of a third party

³⁰ Gough v. State, 32 Ind. App. 22.

³¹ Littlehale v. Dix, 11 Cush. 364; Sullivan v. Marin, 175 Mass. 422, 7 Am. Neg. Rep. 261; St. Louis S. R. Co. v. Smith, 102 Ark. 562; Same v. Lewis, 91 Ark. 343.

³² Williams v. Edmunds, 75 Mich. 92, 16 Am. Neg. Cas. 83.

³³ Kingston v. Ft. Wayne, etc. R.

Co., 112 Mich. 40, 45, 40 L.R.A. 131; Herriek v. Wixom, 121 Mich. 384, 390, 6 Am. Neg. Rep. 576; Union Pac. R. Co. v. Reese, 5 O. C. A. 510, 56 Fed. 288.

³⁴ Uldrich v. Gilmore, 35 Neb. 288.

³⁵ Sharpley v. Brown, 43 Hun 374; Stevens v. Cheney, 36 id. 1.

³⁶ Secor v. Taylor, 41 Hun 123.

does not mitigate the liability of an officer for an assault and battery in making an arrest.³⁷ The age, capacity and intelligence of an injured child are to be regarded in determining whether he exercised ordinary care in seeking restoration to health; he is not to be charged with the negligence of his parents in this regard.³⁸

The right to recover damages for an intentional and unlawful assault and battery is not affected because the plaintiff took no care to avoid an invasion of his rights.³⁹ The damages for abducting a female child and causing her to be debauched may be mitigated by proof of the child's dissolute character and that of her family.⁴⁰ In actions to obtain damages for maiming, disfigurement or impairment of working capacity, if the injured person was employed in doing labor, or was able to fill an accustomed position, or any other to which he must resort as a consequence of the injury, everything which illustrates the effect thereof to lessen or enhance its prejudicial consequences is admissible.⁴¹ The injured person is not bound to work in order to mitigate the liability of the wrong-doer, though his ability to do so may be shown.⁴² It is presumed *prima facie*, that a person engaged in a different service from that he was in when injured is receiving the full value of his labor.⁴³ The jury may consider without speculative evidence what occupation may prove congenial to the plaintiff if his condition improves, the inability to follow his own occupation being apparent.⁴⁴ Where death has followed the injury the present worth of the intestate's earnings during his probable lifetime are not to be lessened by his living expenses.⁴⁵

The recovery for pain and suffering is materially affected by

³⁷ *Lamb v. Stone*, 95 Wis. 254.

³⁸ *Clark v. Chicago*, 174 Ill. 145.

³⁹ *Steinmetz v. Kelly*, 72 Ind. 442,

³⁷ *Am. Rep.* 170; *Whitehead v. Mathaway*, 85 Ind. 85.

⁴⁰ *Dobson v. Cothran*, 34 S. C. 518.

⁴¹ *Wallingford v. Kaiser*, 191 N. Y. 392, 123 *Am. St.* 600, 15 *L.R.A.* (N.S.) 1126; *The Orislamme*, 3 *Sawyer* 397; *Louisville & N. R. Co.*

v. Carothers, 23 *Ky. L. Rep.* 1673; *Carlton v. St. Louis & S. R. Co.*, 128 *Mo. App.* 451.

⁴² *Missouri, etc. R. Co. v. Flood* (Tex. Civ. App.), 70 *S. W.* 331.

⁴³ *Roth v. Buettell*, 142 *Iowa* 212.

⁴⁴ *O'Conner v. Chicago, etc. R. Co.*, 144 *Iowa* 289; *Greenway v. Taylor County*, 144 *Iowa* 332.

⁴⁵ *Davis v. Michigan Cent. R. Co.*, 147 *Mich.* 479.

the death of the injured person pending the action.⁴⁶ A corporation does not lessen its liability for an assault made by one of its servants because the latter had been fined therefor.⁴⁷ It is otherwise in some states where the defendant has been punished by a fine.⁴⁸ The fact that a person seriously and permanently hurt possesses mental qualifications and acquirements which enable him, temporarily at least, to earn more money than he previously received as wages, is not cause for reducing the amount recovered by him.⁴⁹ The fact that a person who has been injured in two accidents has recovered against the person liable for the first, compensation for the damage sustained by the second does not mitigate the liability of the party responsible for the latter. This rule prevails though the plaintiff committed perjury in the action.⁵⁰ It is immaterial to the liability of the defendant that the plaintiff has received sick benefits or insurance,⁵¹ or that the latter is being supported at the expense of the public,⁵² or that the wages of the plaintiff were paid by his employer while he was disabled.⁵³ Where the pleadings raise the issue of lost time by an injured servant the master may show that he paid him his wages for all or a portion of the time.⁵⁴ The assignment of part of the sum to be recovered to attorneys does not lessen the liability of the wrong-doer to the administrator of the person injured who prosecutes the action after the latter's death.⁵⁵

§ 1256. Province of the jury concerning damages, and instructions thereto. There being no legal measure of damages

⁴⁶ *Waggoner v. Sneed* (Tex. Civ. App.), 138 S. W. 219.

⁴⁷ *Hanson v. Urbana & C. E. St. R. Co.*, 75 Ill. App. 474.

⁴⁸ *Armstrong v. Rhoades*, 4 Pennew. (Del.) 151. See § 402.

⁴⁹ *Chicago City R. Co. v. Taylor*, 68 Ill. App. 613, *aff'd* 170 Ill. 49.

⁵⁰ *Post v. Hartford St. R. Co.*, 72 Conn. 362.

⁵¹ *Baltimore City P. R. Co. v. Baer*, 90 Md. 97; *Simpson v. Foundation Co.*, 201 N. Y. 479, 2

N. C. C. A. 183; *Missouri, etc. R. Co. v. Flood*, 35 Tex. Civ. App. 197, 17 Am. Neg. Rep. 673; *Dempsey v. Baltimore & O. R. Co.*, 219 Fed. 619. See § 158.

⁵² *Toledo v. Fuller*, 7 Ohio C. C. (N.S.) 598.

⁵³ *St. Louis, etc. R. Co. v. Clifford* (Tex. Civ. App.), 148 S. W. 1163; § 158; *Pittsburgh, C., C. & St. L. R. Co. v. Bir*, 56 Ind. App. 598.

⁵⁴ *Bell-K. C. Co. v. Gregory*, 152 Ky. 415.

⁵⁵ *Waggoner v. Sneed*, *supra*.

for pain and suffering, disfigurement, outraged feelings and invasion of the right of personal security, the amount which a jury may award as compensation for these elements of damage is peculiarly within their discretion.⁵⁶ The tendency in recent years has been for juries to award and courts to sustain increasingly larger sums as compensation for personal injuries. "This is attributable, no doubt, to the greatly decreased purchasing power of a dollar, as exemplified in the rise of the price of nearly all commodities, and the enormous increase in the cost of living; and, in some measure, perhaps, to a higher regard for human life and the value of physical efficiency."⁵⁷ The fact that there has been a tendency to increased liberality in the award of damages for serious personal injuries has been noticed by the courts, as has the fact that the latter show an increased hesitation to interfere therewith if the amounts are not clearly arbitrary and in unquestioned disproportion to the injury.⁵⁸ The jury should exercise a calm and dispassionate judgment in view of all the facts established by the evidence,⁵⁹ under the instructions of the court, supplemented by their knowledge, observation and experience in the affairs of life,⁶⁰ as applicable to the facts and circumstances proven.⁶¹ The

⁵⁶ *Hull v. Douglass*, 79 Conn. 266; *Knight v. Continental Auto. Mfg. Co.*, 82 Conn. 291; *Atoka C. & M. Co. v. Miller*, 7 Ind. T. 104; *Aldrich v. Palmer*, 24 Cal. 513; *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591; §§ 459, 460, 942.

⁵⁷ *Louisville & N. R. Co. v. Williams*, 183 Ala. 138.

In *Ilays v. United Rys. Co. of St. Louis*, 183 Mo. App. 608, the court took into consideration the fact that the purchasing power of the dollar at the time of the rendition of the decision in an earlier case was about double that at the time of the trial of the instant case.

⁵⁸ *Long v. Ottumwa R. & L. Co.*, 162 Iowa 11.

⁵⁹ *Parricomo v. Greco*, 115 La. 558.

The jury must be governed by the

evidence. *St. Louis, etc. R. Co. v. Dallas*, 93 Ark. 209.

⁶⁰ *Birmingham R., L. & P. Co. v. Humphries*, 171 Ala. 291; *Southern R. Co. v. Davis*, 132 Ga. 812; *Springfield Con. R. Co. v. Hoefner*, 175 Ill. 634; *North Chicago St. R. Co. v. Fitzgibbons*, 180 Ill. 466; *Baltimore, etc. R. Co. v. Keck*, 84 Ill. App. 159, 169.

⁶¹ *Sheffield Co. v. Harris*, 183 Ala. 357; *Southern Bell Tel. & T. Co. v. Shamos*, 12 Ga. App. 463; *Smith v. Chicago City R. Co.*, 165 Ill. App. 190; *Nilson v. Kalispell*, 47 Mont. 416; *Muskogee El. T. Co. v. Mueller*, 39 Okla. 63; *North Chicago St. R. Co. v. Fitzgibbons*, 79 Ill. App. 632, 637; *Jaegar v. Metcalf*, 11 Ariz. 283; *Zibbell v. Southern Pac. Co.*, 160 Cal. 237; *Scally v. Garratt*, 11

parties are entitled to the judgment of the jury, and it is not within the province of the court to decide on the amount of damages.⁶² Though two previous verdicts rendered upon the

Cal. App. 138; *Atlantic & B. R. Co. v. Johnson*, 125 Ga. 483; *Same v. Douglas*, 119 Ga. 658; *Maloney v. Winston*, 18 Idaho 740, 47 L.R.A. (N.S.) 634; *Richardson v. Nelson*, 221 Ill. 254, 20 Am. Neg. Rep. 297; *Indiana U. T. Co. v. Schwinge*, 46 Ind. App. 525; *Vohs v. Shorthill*, 130 Iowa 538; *Yazoo, etc. R. Co. v. Wallace*, 91 Miss. 492; *Saller v. Friedman S. Co.*, 130 Mo. App. 712; *Flinn v. Frederickson*, 89 Neb. 563; *Ohmstead v. Red Cloud*, 86 Neb. 528; *Union Pac. R. Co. v. Connolly*, 77 Neb. 254; *Powell v. Nevada, etc. R. Co.*, 28 Nev. 40, 17 Am. Neg. Rep. 628; *Stanton v. Parkersburg*, 66 W. Va. 393 (it seems). Compare *Helland v. Bridenstine*, 55 Wash. 470.

Direct evidence of mental suffering is not necessary where the injury is serious and its effect permanent. *St. Louis S. R. Co. v. Cleland*, 50 Tex. Civ. App. 499. But it is error to instruct the jury that evidence will not modify verdicts when pain and suffering and deformity are elements of damage. "Damages for pain and suffering incident to an injury can only be awarded upon sufficient proof," by which the jury must be guided. *Wallace v. Pennsylvania Co.*, 219 Pa. 327.

In the absence of evidence as to the earning capacity of a minor the award for permanent injury must be in accordance with the consciences of the jurors as enlightened by the facts and circumstances in evidence. *Atlanta, etc. R. Co. v. Gardner*, 122 Ga. 82.

⁶² *Dow v. Oroville*, 22 Cal. App. 215; *Walters v. Chicago, etc. R. Co.*,

47 Mont. 501; *Muskogee E. T. Co. v. Reed*, 35 Okla. 334; *Continental O. & C. Co. v. Gilliam* (Tex. Civ. App.), 151 S. W. 890; *Southwestern Tel. & T. Co. v. Shirley* (Tex. Civ. App.), 155 S. W. 663; *Birmingham R., L. & P. Co. v. Rutledge*, 142 Ala. 195; *Shaw v. Southern Pac. R. Co.*, 157 Cal. 240; *Kinic v. San Jose-L. G. I. R. Co.*, 156 Cal. 273; *James v. Oakland T. Co.*, 10 Cal. App. 785; *Hersperger v. Pacific L. Co.*, 4 Cal. App. 460; *Colorado Springs, etc. R. Co. v. Petit*, 37 Colo. 326, 20 Am. Neg. Rep. 496; *Denver Con. E. Co. v. Lawrence*, 31 Colo. 301; *Merchants' & M's T. Co. v. Corcoran*, 4 Ga. App. 654; *Maw v. Coast L. Co.*, 19 Idaho 396; *Van Vrankin v. Kansas City E. R. Co.*, 84 Kan. 287; *Lannon v. Chicago*, 159 Ill. App. 595; *Cleveland, etc. R. Co. v. Lynn*, 177 Ind. 311; *Beardmore v. Barton*, 108 Minn. 28; *Lindsay v. Kansas City*, 195 Mo. 166; *Waechter v. St. Louis, etc. R. Co.*, 113 Mo. App. 270; *Burch v. Southern Pac. Co.*, 32 Nev. 75; *McGahie v. Sprout*, 111 App. Div. (N. Y.) 445; *Jones v. New York Cent., etc. R. Co.*, 99 App. Div. (N. Y.) 1; *Lake Shore, etc. R. Co. v. Burtscher*, 8 Ohio C. C. (N.S.) 137; *St. Louis, etc. R. Co. v. Richards*, 23 Okla. 256, 23 L.R.A. (N.S.) 1032; *Freeman v. Cleary* (Tex. Civ. App.), 136 S. W. 521; *Lemoine v. Sullivan* (Tex. Civ. App.), 134 S. W. 946; *Galveston, etc. R. Co. v. Greb* (Tex. Civ. App.), 132 S. W. 489; *Texas & G. R. Co. v. Hall*, 58 Tex. Civ. App. 598; *San Antonio, etc. R. Co. v. Spencer*, 55 Tex. Civ. App. 456; *Southern R. Co. v. Smith*, 107 Va. 553; *Norfolk R.*

same evidence have been set aside because excessive, the court cannot interpose to prevent a repetition of a finding of the same or a larger amount of damages.⁶³ The right to a verdict, in the absence of a legal measure of damages, is not at all dependent upon offering affirmative evidence of the damages suffered in dollars and cents.⁶⁴ Generally courts will not set aside verdicts on the ground that the damages are excessive or inadequate unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.⁶⁵ This doctrine has special force if the case calls

& L. Co. v. Spratley, 103 Va. 379, 19 Am. Neg. Rep. 514; Dukette v. Northwestern W. Co., 61 Wash. 95; Normile v. Wheeling T. Co., 57 W. Va. 132, 68 L.R.A. 901; Ludvigson v. Superior S. Co., 147 Wis. 34; Southern Indiana G. Co. v. Tyner, 49 Ind. App. 475; Ward v. Blackwood, 48 Ark. 396; Georgia Pac. R. Co. v. Freeman, 83 Ga. 583, 14 Am. Neg. Cas. 220; Kelsey v. Hay, 84 Ind. 189; Pittsburgh, etc. R. Co. v. Sponier, 85 id. 165; Redfield v. Redfield, 75 Iowa 435; Chicago & A. R. Co. v. Fisher, 38 Ill. App. 33, 9 Am. Neg. Cas. 248; Kimball v. Bath, 38 Me. 219, 61 Am. Dec. 243; McKinley v. Chicago, etc. R. Co., 44 Iowa 322, 8 Am. Neg. Cas. 253; Butler v. Bangor, 67 Me. 385; Jacobs v. Bangor, 16 id. 187, 33 Am. Dec. 652; Shurtle v. Minneapolis, 17 Minn. 308; Wightman v. Providence, 1 Cliff. 530; Chicago v. Smith, 48 Ill. 107; Gale v. New York, etc. R. Co., 13 Hun 1, 12 Am. Neg. Cas. 365; Weisenberg v. Appleton, 26 Wis. 56; § 459; Richmond & D. R. Co. v. Allison, 89 Ga. 567, 11 L.R.A. 43; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 217. See Lane v. Holman, 145 Mass. 221.

⁶³ Illinois Cent. R. Co. v. Minor, 69 Miss. 710, 720, 16 L.R.A. 627.

⁶⁴ Bell v. Gulf & C. R. Co., 76

Miss. 71; Tarr v. Oregon S. L. R. Co., 14 Idaho 192, 125 Am. St. 151; Pratt v. Davis, 224 Ill. 300, 7 L.R.A. (N.S.) 609; Hobbs v. Marion, 123 Iowa 726; Jones v. Peterson, 44 Ore. 161; Broadway C. M. Co. v. Robinson, 150 Ky. 707; Johnson v. Grondin, 170 Mich. 447 (mental suffering under civil damage act); Rauhala v. Maki, 172 Mich. 112. See § 1252 and note.

Specific proof of pain and suffering need not be made. They are well shown by the nature, character and extent of the injuries sustained. Burley v. Meneffee, 129 Mo. App. 518.

⁶⁵ Liles v. Montgomery T. Co., 7 Ala. App. 537; Scragg v. Sallee, 24 Cal. App. 133; Southern Bell Tel. & T. Co. v. Davis, 12 Ga. App. 28; Crooks v. Tazewell Coal Co., 263 Ill. 343; Shaw v. Chicago, etc. R. Co., 173 Ill. App. 107; Harcourt v. Redmon, 149 Ky. 612; Hamilton v. Pacific Drug Co., 78 Wash. 689; Williams v. Spokane, 73 Wash. 237; Marks v. Mason Co., 73 Wash. 437; Kusmir v. Pressed Steel C. Co., 201 Fed. 146; Carberry v. Acme T. Co., 203 id. 780; Montgomery T. Co. v. Knabe, 158 Ala. 458; Colorado Springs E. Co. v. Soper, 38 Colo. 126; Southern R. Co. v. Brock, 132 Ga. 858; Central R. Co. v. Mote,

for the allowance of punitive, as well as compensatory, damages.⁶⁶ One or other of the grounds of objection to the verdict must be suggested to the reviewing court "at the first blush,"⁶⁷

131 Ga. 166; Seaboard A. L. R. v. Miller, 5 Ga. App. 402; Pittsburgh, etc. R. Co. v. Lighthouse, 168 Ind. 438; Michigan City v. Phillips, 163 Ind. 449; Rice v. Council Bluffs, 124 Iowa 639; Louisville & N. R. Co. v. Reaume, 128 Ky. 90; Kroe-ger v. Passmore, 36 Mont. 504, 14 L.R.A.(N.S.) 988; Olson v. Nebraska Tel. Co., 87 Neb. 593; Citizens' R. Co. v. Griffin, 49 Tex. Civ. App. 569; Central R. Co. v. White, 175 Ala. 60, citing the text. Cases cited in first note to this section; Woodward v. Consolidated T. Co., 17 Pa. Super. Ct. 576; Coleman v. Southwick, 9 Johns. 45, 6 Am. Dec. 253; Stephens v. Hudson Valley K. Co., 48 N. Y. St. Rep. 814; Hallack v. Johnson, 12 Colo. 244; Chicago, etc. R. Co. v. Barrett, 16 Ill. App. 17, 8 Am. Neg. Cas. 195; East St. Louis & C. R. Co. v. Frazier, 26 Ill. App. 437; Weleh v. McAllister, 15 Mo. App. 492; Honeycutt v. St. Louis, etc. R. Co., 40 id. 374; Bitner v. Utah Cent. R. Co., 4 Utah 502, 12 Am. Neg. Cas. 626; Corcoran v. Harran, 55 Wis. 120; Smalley v. Appleton, 75 Wis. 18; McLean v. Lewiston, 8 Idaho 472; Collin v. Varila, 8 Tex. Civ. App. 417, 420, quoting the text; Morgan v. Southern Pac. Co., 95 Cal. 501, 2 Am. Neg. Cas. 196, 17 L.R.A. 71; Lee v. Same, 101 Cal. 118, 13 Am. Neg. Cas. 334; Clare v. Sacramento E. P. & L. Co., 122 Cal. 504, 5 Am. Neg. Rep. 115; Roche v. Redington, 125 Cal. 174; East Tennessee, etc. R. Co. v. King, 88 Ga. 443; Illinois Cent. R. Co. v. Cheek, 152 Ind. 663, 678; Frankfort v. Coleman, 19 Ind. App. 368, 375; Lauter v. Duckworth, 19 Ind. App. 535, 543; Mt.

Vernon v. Hoehn, 22 Ind. App. 282, 287; Indianapolis v. Marold, 25 Ind. App. 428; Donnelly v. Booth, 90 Me. 110, 2 Am. Neg. Rep. 791; St. Joseph, etc. R. Co. v. Hedge, 44 Neb. 448, 461, 9 Am. Neg. Cas. 550; Finletter v. Philadelphia T. Co., 19 Phila. 413; Galveston, etc. R. Co. v. Hynes, 21 Tex. Civ. App. 34, 6 Am. Neg. Rep. 208; Richmond R. & E. Co. v. Garthright, 92 Va. 627, 635, 32 L.R.A. 220; Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 136, 53 Am. St. 839; Norfolk v. Johnakin, 94 Va. 285; Smith v. Pittsburgh & W. R. Co., 90 Fed. 783; Lambkin v. Southeastern R. Co., 5 App. Cas. 352, reversing the judgment of the queen's bench division which awarded a new trial on the ground of the excessiveness of the damages. See White v. Chicago, M. & P. S. R. Co., 49 Mont. 419.

The fact that the jury awarded \$3,000 more than the plaintiff's counsel suggested in his closing argument is not conclusive as to the existence of passion or prejudice. Oglesby v. Missouri Pac. R. Co., 150 Mo. 137, 162.

⁶⁶ Louisville & N. R. Co. v. Williams, 183 Ala. 138; Bogue v. Gunderson, 30 S. D. 1; Hickey v. Booth, 29 R. I. 466, 132 Am. St. 832; Stevens v. Friedman, 58 W. Va. 78; Newport News & M. V. R. Co. v. Dentzel's Adm'r, 12 Ky. L. Rep. 626.

⁶⁷ Howland v. Oakland Con. St. R. Co., 110 Cal. 513; Freeman v. Grashel (Tex. Civ. App.), 145 S. W. 695; City of Indianapolis v. Stokes, 182 Ind. 31; Interstate C. Co. v. Addington, 149 Ky. 120. See Fitch v. Huff, 134 C. C. A. 31, 218 Fed. 17.

and with such force as to make the court morally certain of its existence.⁶⁸ But a verdict which awards an excessive or inadequate sum is subject to the control of the court; and where some of the elements of damage which might have been considered by the jury have been ignored and the verdict is for a less amount than the plaintiff is clearly entitled to, it will be set aside although there has been no misdirection by the court or misconduct or miscalculation on the part of the jury.⁶⁹ The same reluctance is manifested against setting a verdict aside because of the inadequacy of the amount awarded as exists where the objection is that the award is excessive.⁷⁰ It will be assumed that the jury found every fact to mitigate or reduce the damages which the evidence warranted.⁷¹

There is no absolute rule to determine whether a verdict awards an excessive amount or not. It has been held that if the sum allowed is much above or greatly below the average that it is fair to infer, unless the case presents extraordinary features, that partiality, prejudice, or some other improper motive has led the jury astray.⁷² And if there have been two or more

"A verdict should not be set aside simply because it is excessive in the mind of the court, but only when the excess is shocking to a sound judgment and a sense of fairness to the defendant. Where there is any margin for a reasonable difference in the matter the view of the court should yield to the verdict of the jury rather than the contrary." *Lake Shore, etc. R. Co. v. Schultz*, 19 Ohio C. C. 39; *Massillon I. & S. Co. v. Wiegand*, 15 Ohio C. C. (N.S.) 417.

⁶⁸ *Galveston, etc. R. Co. v. Hansen*, 58 Tex. Civ. App. 584.

⁶⁹ *Anglim v. Columbus*, 128 Ga. 469; *Aboltin v. Hency*, 62 Wash. 65; *Phillips v. Southwestern R. Co.*, 4 Q. B. Div. 406, s. c. *sub nom. Phillips v. London, etc. R. Co.*, 5 id. 78; *Moseley v. Jamison*, 68 Miss. 336; *Smith v. Dittman*, 16 Daly 427; *Hanson v. Urbana*

& C. E. St. R. Co., 75 Ill. App. 474.

Substantial, and not merely nominal damages, should be awarded for an unprovoked and unjustified assault. *Cochran v. Mitchem*, 143 Ga. 35.

⁷⁰ *Schmidt v. Kentucky River Mills*, 142 Ky. 80; *McGowan v. Interstate Con. St. R. Co.*, 20 R. I. 264, 3 Am. Neg. Rep. 737; *Archibald v. Pruden*, 7 Vict. L. R. (law) 422.

The Louisiana Supreme Court will increase the award if it deems it inadequate. *Englert v. New Orleans R. & L. Co.*, 128 La. 473.

⁷¹ *McDermott v. Chicago & N. R. Co.*, 85 Wis. 102, 7 Am. Neg. Cas. 268; *Robinson v. Waupaca*, 77 Wis. 544.

⁷² *Rueping v. Chicago, etc. R. Co.*, 116 Wis. 625; *Jennings v. Van Schaick*, 13 Daly 7; *Lockwood v. Twenty-third St. R. Co.*, 15 id. 374,

trials of an action and the evidence has not been materially different as to the extent of the plaintiff's injuries a large discrepancy between the final and the previous awards will authorize the reversal of a judgment for an amount greatly in excess of that first awarded,⁷³ if the evidence was substantially the same on each trial.⁷⁴ If two or more verdicts have been returned in the same action for the same sum the last one will not be disturbed.⁷⁵ It is a common thing for the reviewing courts to endeavor to arrive at the sum which is a fair average of compensation in similar cases by resorting to common knowl-

5 Am. Neg. Cas. 755; *Atchison*, etc. R. Co. v. *Rowe*, 56 Kan. 411, 15 Am. Neg. Cas. 133; *Central R. Co. v. White*, 175 Ala. 60, quoting the text; *Denver*, etc. R. Co. v. *Scott*, 34 Colo. 99, 18 Am. Neg. Rep. 345; *Maloney v. Winston*, 18 Idaho 740; *Indianapolis T. & T. Co. v. Menze*, 173 Ind. 31; *Reems v. New Orleans G. N. R. Co.*, 126 La. 511; *Texas*, etc. R. Co. v. *Conway*, 44 Tex. Civ. App. 68. See *Zibbell v. Southern Pac. Co.*, 160 Cal. 237.

⁷³ *Langbein v. Swift*, 121 Fed. 416; *Smith v. Day*, 136 Fed. 964; *Tunnel M. & L. Co. v. Cooper*, 50 Colo. 390, 39 L.R.A.(N.S.) 1064; *Baker v. Madison*, 62 Wis. 137, *Richmond & D. R. Co. v. Allison*, 89 Ga. 567, 58 Am. St. 319; *Chatsworth v. Rowe*, 66 Ill. App. 55. See *McLimans v. Lancaster*, 63 Wis. 596.

In *Louisville W. Co. v. Upton*, 18 Ky. L. Rep. 326, the first verdict, for \$10,000, was set aside because excessive. A second verdict for \$6,750 was set aside for the same reason. The third verdict was for \$3,000, and was sustained on a cross-appeal by the plaintiff from the judgment, the court refusing to interfere with the setting aside of the second verdict.

Suth. Dam. Vol. IV.—72.

In *Wynkoop v. Ludlow V. Mfg. Co.*, 153 App. Div. (N. Y.) 507, four verdicts were returned—two for \$2,000, one for \$1,000, and one for \$6,000; the last was reduced to \$3,000.

A verdict for \$2,500, following one for \$1,000, was not clearly the product of passion or prejudice. *Lehnick v. Metropolitan St. R. Co.*, 141 Mo. App. 158.

⁷⁴ *Bridge v. Oshkosh*, 71 Wis. 363; *Harold v. New York*, etc. R. Co., 13 Daly 378.

In *Marshall C. Co. v. Eckman*, 153 Ky. 704, there was a discrepancy of more than \$4,000 in favor of the defendant in the second as compared with the first verdict, the evidence being practically the same. The action of the trial court in setting aside the first verdict was approved.

⁷⁵ *McDonald v. Postal Tel. Co.*, 22 R. I. 131; *Matthews v. Spokane*, 50 Wash. 107; *Haywood v. Dering C. Co.*, 161 Ill. App. 544; *Mills v. Larrance*, 120 Ill. App. 83; *Eoff v. Spokane*, etc. R. Co., 70 Wash. 270. But compare *Cincinnati T. Co. v. George*, 13 Ohio C. C. (N.S.) 209; *Partello v. Missouri Pac. R. Co.*, 240 Mo. 122; *Graham v. Consolidated T. Co.*, 62 N. J. L. 90.

edge, common experience and general observation.⁷⁶ It is not proper, however, to charge that decisions of the supreme court touching particular sums awarded by other juries as damages should be considered by the jury.⁷⁷

Elsewhere in this chapter are notes giving the amounts which have been awarded in various cases in which the principal elements of damage have been pain and suffering,⁷⁸ or loss of capacity to pursue business.⁷⁹ In notes hereto appended is given the result of the action of the courts in a considerable number of cases in which exceptions have been urged to judgments on the ground that the awards were excessive. The effort has been to include a variety of cases from a large number of courts, rather than to make the note represent even a large portion of the whole number of recent cases; it has also been the aim to indicate the controlling facts which govern the measurement of damages, such as the age of the plaintiff, his employment, the nature of his injury and the compensation he was earning when injured. This last fact is not always deducible from the reported cases except as it is to be inferred from his occupation. First are collected cases in which the injuries sustained were or appeared to be permanent in their nature. In this group are included loss, or loss of the use, of one leg,⁸⁰

⁷⁶ *Central R. Co. v. White*, 175 Ala. 60.

⁷⁷ *East Tennessee, etc. R. Co. v. King*, 88 Ga. 443, 8 Am. Neg. Cas. 119; *Ft. Worth, etc. R. Co. v. Limberg* (Tex. Civ. App.), 152 S. W. 1180.

⁷⁸ See § 1242.

⁷⁹ See § 1246.

⁸⁰ A verdict for \$25,000 in favor of a laborer, earning \$1.50 per day, and aged 20 years, was reduced to \$10,000. *Independent C. O. Co. v. Beacham*, 31 Okla. 384.

A verdict for \$15,000 in favor of a switchman of 30 years for the loss of a foot, which caused a decrease of earning power from \$1,000 to \$60 a year, was sustained. *Free-*

man v. Gerretts (Tex. Civ. App.), 153 S. W. 1163.

For the loss of a leg midway between the foot and the knee a girl of six years retained a verdict for \$10,000. *Ft. Worth, etc. R. Co. v. Winger* (Tex. Civ. App.), 151 S. W. 586.

A man aged 28 years employed as an assistant car-repairer retained a verdict for \$10,000 for an injury to a leg which caused him great suffering for 11 months and kept him in bed much of that time, and required the constant attendance of a physician, the probability being that the leg would have to be amputated. *Chicago, etc. R. Co. v. Smith*, 107 Ark. 512.

either wholly or in part, as well as any deformity of the pelvic bones resulting from the unusual posture of the body because of

A verdict for \$10,000 in favor of a man of 38 years for the loss of a leg below the knee followed by several amputations, was reduced to \$8,000; the plaintiff was a stationary engineer, earning from \$80 to \$90 a month. *Wheeler v. Sioux Paving B. Co.*, 162 Iowa 414.

A verdict for \$4,000 for an injury to the leg and knee of a child five years old was held not excessive, it appearing that the injury was permanent, that the injured leg was smaller and shorter than the other, that the circulation and nerve supply were permanently exhausted, and that as a result there will be a deformity of the pelvic bones. *Casper v. Geck*, 185 Ill. App. 155.

A boy of seven years retained a verdict for \$7,100 for the loss of a foot, except the back of the heel, three operations having been resorted to in the hope of saving more of the foot. *South Covington & C St. R. Co. v. Burns*, 150 Ky. 348.

A boy of 13 years retained a verdict for \$8,000 for the practical loss of a leg. *Betts Co. v. Hancock*, 139 Ga. 198.

In consequence of a permanent injury to his knee a traveling salesman aged 31 years was confined to a hospital a week, unable to work for seven weeks, and was under medical treatment ten months; pain was occasionally suffered thereafter; there was no loss of earning power. A verdict for \$5,250 was affirmed. *St. Louis S. R. Co. v. Leflar*, 104 Ark. 528.

A verdict for \$15,000 in favor of a man of 47 years, earning \$60 a month, for the loss of the left leg below the knee was sustained. *Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428.

A boy of eight years retained a verdict for \$8,000 for the loss of a foot. A previous award of \$10,548 was excessive. *Cunningham v. Illinois Cent. R. Co.*, 179 Ill. App. 505.

An award of \$10,000 for the loss of a leg by a man of 53 years, earning from \$25 to \$40 a month was reduced to \$7,500. *Applegate v. Quincy, etc. R. Co.*, 252 Mo. 173.

A verdict for \$15,000 in favor of young, unmarried woman for the loss of a leg below the knee was reduced to \$10,000. *Farrar v. Metropolitan St. R. Co.*, 249 Mo. 210.

Where the damages for loss of time and expenses were \$750 a verdict for \$4,158 for a broken leg near the hip which caused a shortening of it of more than an inch and a wasting of the muscles and deformity of the bone was sustained in favor of a man of 50 years, who resumed his employment at the wages previously paid. *Peaslee v. Railway T. Co.*, 120 Minn. 347.

A previously healthy woman, aged 35, retained a verdict for \$11,000 for an injury to a foot which practically crippled her for life, caused a deformity, interfered with her obtaining a livelihood and was attended with permanent pain. *Chicago & S. H. S. S. Co. v. Lynch*, 119 C. C. A. 408, 201 Fed. 70.

In *Stetson v. Mackinac Transp. Co.*, 182 Mich. 355, a verdict for \$5,000 was upheld in favor of a man 34 years of age who had been earning \$45 per month and upwards and his board and had sustained an injury to his leg which caused great pain and suffering and had practically lost the use of it, necessitating the constant use of a cane or crutch.

Where a common laborer who had

the lack of such limb; it also includes any unnatural stiffening of the joints, impairing their use, or any interference with the

been earning \$1.50 to \$1.75 per day had his left foot injured so that it was necessary to amputate it at the ankle, and also had the fingers of his right hand injured but was able to earn \$1.25 per day after recovery, a verdict for \$10,000 was reduced to \$5,000. *St. Louis & S. F. R. Co. v. Hart*, — Okla. —, 146 Pac. 436.

A verdict for \$3,000 was sustained where a laborer had both bones of his right leg fractured so that a portion of one of them protruded through the flesh, and the injury was permanent so as to interfere with his performing manual labor. *McComb v. City of Chicago*, 183 Ill. App. 243, aff'd 263 Ill. 510.

A verdict for \$7,500, after being reduced to \$6,000 by the trial court, was affirmed in favor of a laborer aged 50 years, earning 16 cents an hour, one of whose legs was crushed so that the bones overlapped where the fracture occurred, leaving it crooked and two inches shorter than the other, the probability being that he would always need crutches. *Bertulis v. Illinois S. Co.*, 152 Wis. 49.

The loss of leg two inches below the knee by a strong man of 37 years, earning \$2.30 a day, was not excessively compensated for by \$7,666. *Jakopac v. Newport M. Co.*, 153 Wis. 176.

A broken leg, which failed to unite after two operations, there being doubt as to improvement, justified a verdict for \$10,000 in favor of a man of 23 years. *Hall v. Northwest L. Co.*, 61 Wash. 351.

A man aged 49, earning \$100 a month, retained a verdict for \$14,000 for the loss of a leg. *Galveston,*

etc. R. Co. v. Murphy, 52 Tex. Civ. App. 420.

The loss of a leg, in connection with a lesser injury, by a miner aged 24, who was disabled for a year, was not over-compensated for by an award of \$10,000. *Swearingen v. Consolidated T. M. Co.*, 212 Mo. 524.

A verdict for \$6,000 for the loss of a foot of an electric motor operator in a coal mine was sustained. *Yates v. Crozer Coal & Coke Co.*, — W. Va. —, 84 S. E. 626.

In *Crooks v. Tazewell Coal Co.*, 263 Ill. 343, a verdict for \$3,000 was sustained in favor of a coal miner who had his left ankle sprained and the arch of his left foot broken so that four months afterwards at the time of trial he was unable to use it, the injury probably being permanent.

A verdict for \$20,000 in favor of a man aged 62 who lost a leg below the knee and had the prospect of another amputation, was reduced to \$10,000, with an allowance for the surgeon's fees. *Newcomb v. New York Cent., etc. R. Co.*, 182 Mo. 687.

A verdict for \$12,250 was upheld in favor of a man of 32 years who lost a leg. *Merchants' & M.'s T. Co. v. Coreoran*, 4 Ga. App. 654.

For the loss of a foot a boy aged 14 retained a judgment for \$15,000. *Texas, etc. R. Co. v. McLeod* (Tex. Civ. App.), 131 S. W. 311.

A verdict in favor of a passenger for \$18,000 for the loss of a leg which caused intense suffering for a long time, and necessitated medical and other expenses amounting to \$3,000 was sustained. *Norfolk Southern R. Co. v. Crocker*, — Va. —, 84 S. E. 681.

A verdict for \$6,000 was sustained

circulation or nerve supply, resulting in a withering or lack of development of the limb, fractures or sprains weakening

where an injury to the kneecap left the plaintiff an incurable cripple, caused him great expense, greatly reduced his earning capacity, and caused him great pain. *Ryan v. City of Chicago*, 181 Ill. App. 642.

For a broken leg, one of the bones of which failed to unite, the foot being turned in, and for severe burns, a man of 27 years, whose earnings averaged \$65 a month, was not entitled to \$25,000; the award was reduced to \$17,000. *Houston & T. Cent. R. Co. v. Shapard*, 54 Tex. Civ. App. 596.

A carpenter, aged 55 years and earning from \$2.50 to \$3.50 per day, retained a verdict for \$10,000 for the loss of a leg. *Missouri, etc. R. Co. v. Redus*, 55 Tex. Civ. App. 205, 21 Am. Neg. Rep. 625.

A severe fracture of the kneecap and practical loss of the use of the tendons, causing the leg to be an incumbrance, was ground for affirming a judgment for \$10,000 in favor of a man of 67 years. *Freeman v. Johnson* (Tex. Civ. App.), 136 S. W. 275.

For the loss of a leg below the knee a man of 45 years, in previous good health and able to do manual labor, retained a verdict for \$9,338.65. *McCoy v. New York Cent., etc. R. Co.*, 119 App. Div. (N. Y.) 531.

A verdict for \$9,500 in favor of a man of 64 years, engaged in the real estate business, for the loss of a foot, was reduced to \$6,000. *Rang-enier v. Seattle E. Co.*, 52 Wash. 401.

The loss of a leg above the knee and of three toes of the remaining foot by a man of 37 years, earning from \$90 to \$100 per month, was ground for sustaining a verdict for

\$20,000. *Burch v. Southern Pac. Co.*, 32 Nev. 75.

The loss of a foot by a man aged 28, earning \$15 per week, and who was not wholly incapacitated from following his trade, was over-compensated for by \$12,500, which the court reduced to \$6,000. *Blades v. Des Moines City R. Co.*, 146 Iowa 580.

A verdict in favor of an infant who lost a foot was reduced by the trial court to \$12,000, and by the appellate court to \$9,000. *Chicago, etc. R. Co. v. Krayenbuhl*, 70 Neb. 766.

A verdict for \$35,000 for the loss of a leg by a girl of 16 years was reduced to \$25,000. *Noakes v. New York, etc. R. Co.*, 121 App. Div. (N. Y.) 716.

A boy of 10 years retained a judgment for \$10,000 for the loss of a foot. *St. Louis, etc. R. Co. v. Sparks*, 81 Ark. 187.

For the loss of a leg by a boy of less than three years a verdict for \$30,000 was reduced to \$20,000. *Texas, etc. R. Co. v. Brouillette* (Tex. Civ. App.), 130 S. W. 886.

For the loss of a leg below the knee a verdict for \$7,000, after being reduced from \$10,000, in favor of a girl, aged seven years was approved. *Buckry-Ellis v. Missouri Pac. R. Co.*, 158 Mo. App. 499.

The loss of a leg below the knee, the loss of a toe of the other foot and wounds in the head justified a judgment for \$20,950 in favor of a child aged four years. *Missouri, etc. R. Co. v. Nesbit*, 43 Tex. Civ. App. 630.

Where there was a compound comminuted fracture of both bones of the leg two inches above the ankle, and the leg was shorter than the

or deforming the leg, or healing in such a way as to prevent its free use in the normal way. The cases cited indicate that the

other and crooked, the wound being open two years after the injury and the plaintiff was unable to work for more than a year thereafter, an award of \$10,000 was approved. *Pierson v. Lyon*, 150 Ill. App. 116.

A verdict for \$20,000 was reduced to \$12,000 where a man of 22 years, earning \$2.40 per day, had a leg amputated near the hip. *Aluminum Co. v. Ramsey*, 89 Ark. 522.

The loss of a foot by an active, healthy woman aged 75 years was cause for affirming a judgment for \$10,000. *Montgomery T. Co. v. Knabe*, 158 Ala. 458.

A laborer retained a verdict for \$11,000 for the loss of a leg. *Anderson v. Foley*, 110 Minn. 151.

A judgment for \$15,000 was reduced to \$10,000 where an ankle was crushed and the plaintiff was in a hospital three months. *Maloney v. Winston*, 18 Idaho 740, 47 L.R.A. (N.S.) 634.

A judgment was reduced from \$23,071 to \$17,500 where there was the loss of a leg above the knee and of the ends of the ring and middle fingers of one hand, and also burns and nervous shock. *O'Brien v. White*, 105 Me. 308.

For the loss of a foot six inches above the ankle, as the result of a second amputation, which improved his condition, a railroad engineer was required to submit to the reduction of a verdict from \$22,500 to \$17,000. Prior to the second operation \$12,000 was held sufficient. *International, etc. R. Co. v. Brice* (Tex. Civ. App.), 126 S. W. 613, 20 Am. Neg. Rep. 675.

Where there was a loss of a foot and a sickness of three months at an expense of \$750, a verdict for \$20,750 was reduced to \$10,750, the

evidence showing that health was not endangered or that plaintiff was incapacitated from following his business as a bookkeeper. *Kennon v. Gilmer*, 5 Mont. 257, 51 Am. Rep. 45, 9 Mont. 108, 4 Am. Neg. Cas. 823.

A verdict for \$8,000 was sustained for the loss of a brakeman's leg, he being in the prime of young manhood, and unfitted for any employment save one of manual labor. *L. & N. R. Co. v. Moore*, 83 Ky. 675, 11 Am. Neg. Cas. 620. In another case, not notably different, a verdict for \$10,000 was sustained. *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 15 Am. Neg. Cas. 163.

A brakeman, aged twenty-four, lost a leg below the knee; in the absence of proof of what he was earning, of the loss resulting, the loss of time or the extent of the impairment of his ability to earn money, \$10,000 was held excessive and the option given to remit \$3,000. *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58, 15 Am. Neg. Cas. 125. Compare *Pennsylvania Co. v. Reidy*, 99 Ill. App. 477, and *Momence S. Co. v. Groves*, 100 id. 98.

A brakeman aged twenty-seven, earning \$60 per month, lost a leg below the knee; it had to be sawed off three times; he was confined to his room more than fifty days; had lockjaw for twelve or fifteen days, and suffered intensely. A verdict for \$8,000 on a former trial was increased to \$10,000 on a retrial, and affirmed. *Atchison, etc. R. Co. v. Moore*, 31 Kan. 197. In another case not dissimilar except that plaintiff was a locomotive fireman aged thirty-nine, a verdict for \$12,000 was sustained. *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298.

extent of recovery permitted will depend not only upon the nature of the injury but as well upon the effect that it had upon

A judgment for \$15,000 for the loss of a leg was affirmed, the suffering resulting from repeated surgical operations being unusual. *Chicago, etc. R. Co. v. Spurney*, 97 Ill. App. 570.

A verdict for \$8,000 was affirmed in favor of a brakeman aged nineteen for an injury which affected his foot and ankle and made him a cripple. *Henry v. Sioux City & P. R. Co.*, 75 Iowa 84, 14 Am. Neg. Cas. 669, 9 Am. St. 457.

A farmer aged fifty had a thigh bone broken and was confined to his bed nine weeks; the fracture did not join and the injured leg was shortened about two and one-half inches. A verdict for \$8,000 was sustained. *Funston v. Chicago, etc. R. Co.*, 61 Iowa 452, 11 Am. Neg. Cas. 534.

A verdict for \$5,000 for injuries which permanently destroyed the use of a lower limb of a healthy, active woman of seventy was sustained. *Hinton v. Cream City R. Co.*, 65 Wis. 323.

A verdict for \$10,000 was sustained in favor of a miner aged twenty-four for the loss of a foot. *Bowers v. Union Pac. R. Co.*, 4 Utah 215. An award of \$11,000 in favor of a man advanced in years for a like injury was sustained. *Jordan v. New York & H. R. R. Co.*, 16 Daly 130. And \$12,000 in favor of a brakeman. *Trinity & S. R. Co. v. Lane*, 79 Tex. 643. And \$10,000 where a brakeman was permanently injured in one leg and a shoulder. *Daniels v. Union Pac. R. Co.*, 6 Utah 357.

A child aged nine was rendered lame for life by an injury to one of its legs. A verdict for \$10,000 was sustained. *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517.

Where a young man employed as a laborer in a sawmill lost one of his legs above the knee \$9,650 was not exorbitant. *Nadan v. White River L. Co.*, 76 Wis. 120, 17 Am. Neg. Cas. 917, 20 Am. St. 29.

An employee on a gravel train retained a verdict for \$8,000 for the loss of a leg near the thigh. *Schumacher v. St. Louis, etc. R. Co.*, 39 Fed. 174.

The testimony tended to show that the injuries, a broken leg and bruised shoulder, were permanent in their nature, that for four years after they were sustained plaintiff had been able to labor but half the time, and his weight had been reduced 35 pounds. A verdict for \$7,500 was sustained. *Hallaek v. Johnson*, 12 Colo. 244, 13 Am. Neg. Cas. 585.

An award of \$7,000 for the loss of a railroad laborer's leg was not excessive. *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134.

A brakeman aged twenty-three, earning from \$500 to \$600 a year, was made a physical wreck through the loss of one leg, the toes on the other foot, a dislocation of the hip and an injury to his chest. A verdict for \$12,000 was sustained. *Kentucky Cent. R. Co. v. Ryle*, 13 Ky. L. Rep. 862.

Where a young brakeman lost one foot and four toes on the other the court reduced a judgment for \$8,000 one-half. *Wood v. Louisville & N. R. Co.*, 88 Fed. 44.

As the result of a compound fracture of a leg the bone protruded through the flesh and was denuded of the periosteum. More than one hundred pieces of bone were taken out, and they continued to work out more than twenty months after the

the victim's general health and his capacity for earning a living, taking into consideration his equipment for undertaking a

injury. The expenses for medical attendance were large, and the lameness probably permanent. A verdict for \$15,000 was approved. *Western U. Tel. Co. v. Engler*, 21 C. C. A. 246, 75 Fed. 102. See *Chitty v. St. Louis, etc. R. Co.*, 166 Mo. 435.

Judgment for \$10,000 in favor of an experienced railroad man earning \$80 a month, for the loss of a leg below the knee and other injuries was affirmed. *Yerkes v. Northern Pac. R. Co.*, 112 Wis. 184.

A verdict for \$9,000 in favor of a farmer aged forty, whose earnings were about \$500 a year, for the loss of a foot was sustained. *Georgia R. & B. Co. v. Keating*, 99 Ga. 308.

A verdict for \$15,000 for injuries to a child of nine which necessitated the amputation of one of its legs was sustained. *Roth v. Union D. Co.*, 13 Wash. 525, 546, 31 L.R.A. 855.

A verdict for \$10,500 was sustained in favor of a woman aged thirty-eight, of previous good health, who had been earning \$75 a month, but was wholly incapacitated from following her vocation, the injuries consisting of a permanent displacement of the womb and the breaking of an ankle bone, which would probably require the amputation of the injured leg. *Smith v. Spokane*, 16 Wash. 403.

A girl of three years retained a judgment for \$10,500 for the loss of a foot, the defendant being grossly negligent, though punitive damages were not claimed. *Chipman v. Union Pac. R. Co.*, 12 Utah 68.

When injured so as to be obliged to have one of his feet amputated the plaintiff was aged thirty-seven, and earning from \$1,800 to \$2,400 a year. A verdict for \$15,000 was

allowed to stand. *Galveston, etc. R. Co. v. Scott*, 21 Tex. Civ. App. 24.

Where a leg of a man of thirty-two, earning \$65 a month, was crushed below the knee and three amputations were necessary (the last being above the knee), a judgment for \$10,000 was upheld. *Hollenbeck v. Missouri Pac. R. Co.*, 141 Mo. 97, 112. See *Houston & T. C. R. Co. v. Kelley*, 13 Tex. Civ. App. 1. In *Wimber v. Iowa Cent. R. Co.*, 114 Iowa 551, a judgment for \$14,500 in favor of a brakeman, aged thirty-six, who lost a leg below the knee, was reduced to \$8,000.

The recovery of \$7,500 by a railroad conductor, aged forty, whose wages were \$90 a month, for the loss of a leg was not excessive. *Thompson v. Great Northern R. Co.*, 79 Minn. 291.

The loss of a foot by a boy of eighteen earning \$60 a month, justified an award of \$8,000. *San Antonio, etc. R. Co. v. Green*, 20 Tex. Civ. App. 5.

The plaintiff, a woman of seventy-five, and before the accident in somewhat feeble health, met with an injury which resulted in the fracture of one of the bones on the outer side of an ankle, the tearing of its lateral ligaments and injury to the joint. The suffering was great, the disability permanent, as also the pain. In view of her expectation of life a judgment for \$4,000 was reduced to \$2,500. *Johnson v. St. Paul City R. Co.*, 67 Minn. 260, 36 L.R.A. 586.

A verdict for \$10,000 in favor of an infant of six for an injury necessitating the amputation of a leg above the knee was not considered unusual in *Louisville & N. R. Co. v. Popp*, 96 Ky. 99, 112.

new occupation. Similar considerations govern those cases growing out of the loss of both legs,⁸¹ or the loss of their use, but

In *Kroener v. Chicago, etc. R. Co.*, 88 Iowa 16, a verdict in favor of a youth of twenty for \$12,000 for the loss of a foot was reduced one-third.

Where a well man of forty-six, earning \$1,500 a year, had a foot and ankle broken and crushed and underwent an amputation below the knee, a verdict for \$15,000 was sustained. *Galveston, etc. R. Co. v. Cooper*, 2 Tex. Civ. App. 42.

A verdict for \$22,500 in favor of a boy aged eleven, who underwent two amputations which removed the portion of a leg below the knee, was sustained by a majority of the court. *Williamson v. Brooklyn Heights R. Co.*, 53 App. Div. (N. Y.) 399.

Where a healthy married woman in the prime of life had one leg amputated below the knee, the stump of which did not completely heal, suffered from an enlargement of an arm which interfered with its use and had her hearing impaired a verdict for \$23,000 was upheld. *Erickson v. Brooklyn Heights R. Co.*, 11 N. Y. Misc. 662.

The reviewing court refused to set aside a verdict for \$15,000 for the loss of one of the legs of a child above the knee, the trial court having refused to interfere. *Kalfur v. Broadway Ferry, etc.*, 34 App. Div. (N. Y.) 267.

An award of \$25,000 to a man of twenty-eight, earning \$12 a week, for the loss of a leg was reduced to \$15,000. *Tully v. New York & T. S. Co.*, 10 App. Div. (N. Y.) 463.

Where a brakeman, who earned \$1.60 per day, was injured so that his leg was amputated below the knee, and had his right arm, one of his lips and one of his legs cut, and a knee joint stiffened, a verdict for \$16,000 was reduced to \$9,000. Two

previous trials had resulted in verdicts for \$8,000 and \$10,000 respectively. Before the third trial the plaintiff had become able to earn something, but how much did not appear. *Bailey v. Rome, etc. R. Co.*, 80 Ill. 4.

⁸¹ An award of \$25,000 in favor of a man of 36 years, employed in a switchyard, for the loss of both legs, one above the knee, the other above the ankle, was reduced to \$15,000. *Lessenden v. Missouri Pac. R. Co.*, 238 Mo. 247, 4 N. C. C. A. 183.

In another case a brakeman of 30 years, earning \$100 a month, with a prospect of promotion, retained a verdict for \$35,000 for a similar injury. *Texas & P. R. Co. v. Matkin* (Tex. Civ. App.), 142 S. W. 604.

A verdict for \$22,000 was sustained in favor of a railroad switchman 26 years old who had been earning \$111 per month and lost both of his legs. *Woodworth v. Iowa Cent. Ry. Co.*, — Iowa —, 149 N. W. 522.

Where a railroad switch foreman who was 37 years of age and had been earning \$130 per month was internally and permanently injured so as to paralyze his legs a verdict for \$15,000 was sustained. *Houston & T. C. R. Co. v. Menefee*, — Tex. Civ. App. —, 162 S. W. 1038.

A verdict for \$4,000 in favor of a boy of 11 years for the loss of part of the left foot and one toe on the right foot, was sustained. *Karlow-ski v. Peoria R. Co.*, 179 Ill. App. 411.

A verdict for \$22,500 for the loss of both legs midway between the ankle and the knee in favor of a boy 12 years old was sustained. *Paton v. Great Northern R. Co.*, 129 Minn. 101.

in them there appears sanction for a much more substantial recovery in recognition of the patent fact that such injury carries

Where punitive damages were properly allowed a man in good health, earning \$1.50 per day, retained a verdict for \$27,000 for the loss of the left leg between the knee and ankle and the loss of the right foot diagonally from the small toe across the instep to the heel. He was unable to work for 13 months and thereafter earned but \$1 a day. *Louisville & N. R. Co. v. Williams*, 183 Ala. 138.

A verdict for \$35,000 for the loss of two limbs and other injuries in favor of a man who had a life expectancy of 36.7 years and had been earning \$65 per month was reduced to \$25,000. *St. Louis, I. M. & S. Ry. Co. v. McMichael*, 115 Ark. 101.

A young man earning \$50 a month retained a verdict for \$20,000 for the loss of a leg, the other leg being broken, but having been restored to use. *Bump v. Delaware, etc. R. Co.*, 145 App. Div. (N. Y.) 102.

A verdict for \$10,000 in favor of a child of five years who lost both feet was affirmed, exemplary damages being included. *Sheffield Co. v. Harris*, 183 Ala. 357.

A switchman aged 29 years retained a verdict for \$30,000 for the loss of both legs. *Hackett v. Chicago, etc. R. Co.*, 170 Ill. App. 140.

A brakeman aged 25 years lost his left leg eight inches below the knee, and all of his right foot in front of the heel; he knew no means of earning a livelihood in his crippled condition. A verdict for \$24,750 was affirmed. *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326.

A man aged 21, earning \$3.25 per day, with a prospect of increased remuneration, retained a verdict for \$25,000 for the loss of one leg above

the knee and injury to the other which left it worse than useless. *Reeks v. Seattle E. Co.*, 54 Wash. 609.

The loss of the use of his legs by a man of 33 years who was earning \$125 a month, and whose heart, kidneys and bladder were affected, and who had lost control of his lower bowels and bladder was ground for approving a verdict for \$20,000. *San Antonio, etc. R. Co. v. Spencer*, 55 Tex. Civ. App. 456.

A judgment for \$23,000 in favor of a laborer earning \$1.65 per day for the loss of both legs was reduced to \$17,000. *Eidem v. Chicago, etc. R. Co.*, 158 Ill. App. 82.

A young carpenter earning \$3 a day lost one leg at the knee, the other at the hip; his ribs on one side were broken, and also his back, resulting in paralysis from the waist down. A verdict for \$22,000 was approved. *Louisville & N. R. Co. v. Melton*, 127 Ky. 276.

A verdict for \$25,000 in favor of a man aged 21, who earned from \$75 to \$80 a month and was in line for promotion, was sustained, he having lost both legs. *St. Louis, etc. R. Co. v. Rogers*, 93 Ark. 564.

A boy of eight years who lost both legs retained a verdict for \$20,000. *Pittsburgh, etc. R. Co. v. Simons*, 168 Ind. 333. And so did a boy of 18 years, who also had an arm broken. *Southern R. Co. v. Brock*, 132 Ga. 858.

A brakeman aged 27 retained a verdict for \$30,000 for the loss of both legs, one being removed three inches above the ankle and the other three or four inches above the knee. *Whitehead v. Wisconsin Cent. R. Co.*, 103 Minn. 13. In *Yazoo, etc. R.*

with it at least the possibility of serious mental affliction, due to the radically changed outlook upon life of the victim. Like-

Co. v. Wallace, 91 Miss. 492, a judgment for a similar injury was reduced from \$50,000 to \$30,000.

A verdict for \$35,000 in favor of a locomotive engineer in the front of his calling, aged 45, for the loss of both legs below the knee was reduced to \$20,000. *Markey v. Louisiana & M. R. Co.*, 185 Mo. 348. See *Scullin v. Wabash R. Co.*, 184 Mo. 695, sustaining a verdict for \$20,000 in a like case.

A man aged 24 retained a verdict for \$22,500 for the loss of both legs. *St. Louis S. R. Co. v. Cleland*, 50 Tex. Civ. App. 499.

For the loss of both legs a fireman of 21 years, earning \$1.75 a day, retained a verdict for \$25,000. *Seaboard A. L. R. v. Miller*, 5 Ga. App. 402. In another case a man of 31 years retained a verdict for \$27,500 for a like injury. *Union Pac. R. Co. v. Connolly*, 77 Neb. 254.

Where a miner aged thirty-six, who had been before the injury in good health, was so hurt that his lower limbs were paralyzed to such an extent that he had but little use of them and could do nothing to help himself, a verdict for \$20,000 was reduced to \$15,000 by the trial court and affirmed for the latter sum. *Reddon v. Union Pac. R. Co.*, 5 Utah 344.

A recovery of \$13,000 was upheld in favor of a man of thirty-nine, whose earnings were \$100 a month, for the loss of both legs, one being amputated four or five inches below and the other above the knee. *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219, 230.

A verdict for \$25,000 in favor of a switchman aged seventeen, who lost his left leg and right foot was

reduced to \$20,000 and affirmed. *Waldhier v. Hannibal, etc. R. Co.*, 87 Mo. 37.

Where the injury to a boy of seven necessitated the amputation of both legs a verdict for \$30,000 was held to be considerably in excess of what was right. *Heddles v. Chicago & N. R. Co.*, 74 Wis. 239. A second verdict for \$18,500 was sustained. *s. c.*, 77 Wis. 228. See *Waterman v. Chicago & A. R. Co.*, 82 Wis. 613.

In *Gulf, etc. R. Co. v. Shelton*, one of the Texas courts of civil appeals sustained a verdict for \$35,000 in favor of a man of forty-nine who lost both legs and more than \$2,000 in one year because of his diminished capacity.

A verdict for \$25,000 was sustained where a conductor of thirty years was so injured as to be incurable, and suffered greatly from nervous prostration and debility, and had lost to a great extent the use of his lower limbs and was troubled with gradual failure of mind and memory. *Chicago, etc. R. Co. v. Holland*, 18 Ill. App. 418.

A verdict for \$20,000 was sustained where there was a loss of a portion of both legs, the plaintiff having been in a hospital almost a year. *Fonda v. St. Paul City R. Co.*, 77 Minn. 336.

A verdict for \$18,000 for the loss of a leg and a permanent injury to the other foot was not excessive, the plaintiff being aged forty-one, and his wages \$45 a month. *Galveston, etc. R. Co. v. Hynes*, 21 Tex. Civ. App. 34.

The loss by a boy of both feet was not over-compensated by a judgment for \$30,000. *Retan v. Lake Shore, etc. R. Co.*, 94 Mich. 146.

A verdict for \$35,000 in favor of

wise are included within this group cases involving the loss, or loss of use, of an arm,⁸² or portion thereof, or any portion of

a young, recently married woman who lost both her legs was sustained. *St. Louis Southwestern Ry. Co. of Texas v. Waits*, — Tex. Civ. App. —, 164 S. W. 870.

⁸² A young woman teacher retained a verdict for \$10,000 for an injury to the ulnar nerve of an arm. *Cleveland, etc. R. Co. v. Hadley*, 170 Ind. 204, 16 L.R.A.(N.S.) 527.

For an injury to the bone of an arm which broke that part fitting into the socket and which it was necessary to remove, a verdict for \$6,000 was upheld. *Bachelor v. Morgan*, 179 Ala. 339.

A verdict for \$20,700, as reduced to \$15,000 by the trial court, was upheld where the plaintiff, who had previously lost his right hand, lost his left arm. *Ohio & Western Pennsylvania Dock Co. v. Trapnell*, 88 Ohio St. 516.

A minor employed in a mill retained an award for \$10,000 for the loss of an arm after a *remittitur* of \$5,000, the verdict having been for \$15,000. *Mithen v. Jeffery*, 174 Ill. App. 602.

A verdict for \$2,500 in favor of a boy of 16 years employed in a mill for the loss of a part of his arm was increased by the supreme court to \$5,000. *Doiron v. Baker-W. C. Co.*, 131 La. 618.

A verdict for \$12,500 in favor of a mechanic who earned about \$850 a year for an injury which rendered his right arm practically useless for any kind of work was reduced to \$10,000. *McKeon v. Proctor & Gamble Mfg. Co.*, 76 Misc. (N. Y.) 599.

A switchman aged 23, and earning from \$110 to \$115 per month, lost his right arm near the shoulder. One year later he was able to earn \$2 per day, and at a subsequent time

earned \$55 a month. A verdict for \$13,000 was retained. *Grand Trunk Western R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836.

A verdict in favor of a brakeman of 27 years, who lost an arm, was reduced from \$12,000 to \$7,500. *Strubble v. Burlington, etc. R. Co.*, 128 Iowa 158.

An engineer of 31 years, earning \$2.50 to \$3 per day, retained a judgment for \$8,000 for injuries which partially paralyzed his right shoulder and totally paralyzed his arm. *Howard v. Beldenville L. Co.*, 129 Wis. 98.

The loss of the right arm of a mechanic below the elbow, in connection with temporary injuries, was not excessively compensated for by \$10,500. *Larson v. Haglin*, 103 Minn. 257. See the opinion for cases in which judgments for such injuries have been reviewed.

The loss of the right arm of a youth of 19 was not over-compensated for by \$8,000. *Henderson v. Kansas City*, 177 Mo. 477, 15 Am. Neg. Rep. 717.

A car repairer, aged 26, retained \$7,500 for the loss of the use of his left arm. *Smith v. Fordyce*, 190 Mo. 1.

For the loss of an arm under circumstances which entailed unusual suffering the first mate of a vessel, earning \$150 per month, and whose earning capacity was reduced one-third, retained a judgment for \$17,500. *The Fullerton*, 92 C. C. A. 463, 167 Fed. 1.

Where a woman 66 years of age was knocked senseless, was severely bruised, had her collar bone broken, and the socket in her right arm broken so that she could not use it to perform her usual labor, and even

both arms, the permitted recovery depending upon much the same considerations as govern cases involving the loss of the

to raise her hand to her head, and the injury to the arm was probably permanent, a verdict for \$4,000 was reduced to \$3,000. *Osborn v. Texas & P. R. Co.*, 134 La. 863.

A verdict for \$1,200 in favor of a seamstress 65 years old, earning \$5 or \$6 per week, for permanent injury to her arm so that she lost the use of it and was unable to dress herself, was sustained. *City of Covington v. Visse*, 158 Ky. 134.

An engineer of thirty years, earning \$1,500 a year, retained a verdict for \$6,000 as compensation for the loss of his right hand. *Crosby v. Cuba R. Co.*, 158 Fed. 144.

A verdict for \$7,000 in favor of a U. S. private soldier was upheld where he received an injury consisting of a multiple compound fracture of the left elbow involving the lower end of the bone of the upper arm and the upper end of the bone of the forearm, each of which was splintered and protruded through the skin so that the joint was exposed, resulting in a permanent stiffening of the elbow joint, and necessitating his discharge from the army. *Crotshin v. Pennsylvania R. Co.*, 87 N. J. L. 11.

In *Knock v. Tonopah & G. R. Co.*, — Nev. —, L.R.A.1915F 3, 145 Pac. 939, a verdict for \$25,500 for the loss of the right forearm below the elbow in favor of a railroad man who had been earning \$170 per month as conductor and as brakeman was reduced to \$15,000.

A verdict for \$15,000 was sustained in favor of a railroad switchman who was 30 years of age, and in good health at the time of the accident in which he lost his arm, had had four years experience, had been earning \$175 per month, had

a life expectancy of 35.33 years, and was wholly incapacitated to pursue his employment. *White v. Chicago, M. & P. S. R. Co.*, 49 Mont. 419.

A verdict for \$15,000 in favor of a young locomotive fireman who lost his left hand was reduced to \$10,000. *Seheu v. Pennsylvania R.*, 141 Fed. 495. In another case a brakeman aged 26 retained a verdict for \$12,000 for the loss of a hand. *San Antonio, etc. R. Co. v. Beauchamp*, 54 Tex. Civ. App. 123.

A man of 21, earning between \$80 and \$100 per month, retained a verdict for \$10,000 for the loss of his right arm above the elbow. *St. Louis S. R. Co. v. Groves*, 44 Tex. Civ. App. 63.

A yard foreman and station agent retained a verdict for \$15,000 for the loss of an arm. *Southern R. Co. v. Smith*, 107 Va. 553.

A laborer of 57 years retained a judgment for \$9,000 for the loss of an arm. *Price C. & V. Co. v. Haley*, 137 Ky. 305. See *Kentucky W. Mfg. Co. v. Shake*, 137 Ky. 742, for a review of many local cases involving the excessiveness of verdicts.

A verdict for \$14,500 in favor of a man of 43 years, earning \$2.75 per day, who lost the left arm close to the shoulder, was disfigured in the face, had ribs fractured and nose broken, was affirmed by a majority of the court. *Monaghan v. Northwestern F. Co.*, 140 Wis. 457.

The loss of an arm by a minor was not over-compensated for by a verdict for \$10,000. *Waggoner v. Porterfield*, 55 Tex. Civ. App. 169.

A verdict for \$10,000 in favor of a child of 10 years who lost the left arm near the shoulder and sustained other minor injuries, was approved.

lower limbs. Naturally the wide range of possible consequences is reflected in an equally wide variance in recoveries allowed

Schwind v. Chicago, etc. R. Co., 140 Wis. 1, 133 Am. St. 1055.

A verdict for \$15,000 in favor of a locomotive engineer who lost his left hand near the elbow, was reduced to \$10,000. *Texas, etc. R. Co. v. Hartnett*, 33 Tex. Civ. App. 103.

A disability of the right arm of a railroad engineer forty years of age, earning \$100 a month, who is not fitted for any pursuit which would bring him one-third of that sum, was not excessively compensated for by \$9,500. *Knapp v. Sioux City & P. R. Co.*, 71 Iowa 41.

A compound fracture of the left arm of a laboring man and a partial dislocation of the elbow of the same arm, impairing its usefulness permanently, was not over-compensated by \$4,000. *Van Winter v. Henry County*, 61 Iowa 684.

It has been said that a verdict for \$13,750 is "extreme if not excessive," where a boy of nine years lost an arm. *Western & A. R. Co. v. Young*, 83 Ga. 512.

A freight conductor's recovery of \$6,500 for the loss of an arm at the shoulder was sustained in *Chicago, etc. R. Co. v. Warner*, 22 Ill. App. 62.

A child of five years sustained the fracture of an arm, which became and remained disfigured at the elbow. A verdict for \$6,600 was reduced to \$3,000. *Ryder v. Mayer*, 50 N. Y. Super. Ct. 220.

A verdict for \$6,000 was sustained in favor of a man of twenty-five who lost the use of his right arm and who was educating himself for an engineer and earning \$56 per month, and whose earning power was reduced one-half. *Howard O. Co. v. Davis*, 76 Tex. 630.

A verdict for \$7,000 in favor of a switchman aged thirty, the father

of a family, for the loss of one arm below the elbow, seemed large to the court but was not disturbed. *So-bieski v. St. Paul & D. R. Co.*, 41 Minn. 169.

In *Shaw v. Boston & W. R. Co.*, 8 Gray 45, a woman lost one arm and the use of the other, and was much bruised and injured otherwise so as to greatly injure and impair her health and memory and cause constant pain. There were three trials which resulted in verdicts for \$15,000, \$18,000 and \$22,250, respectively. The last amount was held not to be excessive.

The loss of the left arm just above the elbow by a girl of seven years is over-compensated by \$12,000. The court reduced a verdict for that sum to \$5,000. *Lehman v. Louisiana W. R. Co.*, 37 La. Ann. 705. But where a boy of seven years, "the son of a laboring man, without property or means," was deprived of an arm, the court, though it at first thought the sum excessive, affirmed a judgment for \$10,000. *Ketchum v. Texas & P. R. Co.*, 38 La. Ann. 777.

In *Standard O. Co. v. Tierney*, 92 Ky. 367, 36 Am. St. 595, 14 L.R.A. 677, the court reversed a judgment for \$25,000 in favor of a railroad conductor of thirty who was burned about the face so as to disfigure him for life and whose left arm was permanently disabled; his right hand was also injured and feet were badly burned. The court say: "It is by comparison with verdict after verdict in this state where more flagrant wrongs were committed and punitive damages claimed, in which juries composed of men, as we have the right to assume, of like intelligence, passion and feeling, have made their findings for a much less

for substantially similar original injuries, and it is practically impossible to deduce any general rule from the reported cases.

amount; and without enumerating the cases it will be found that \$10,000 is the extent to which a verdict has been sustained by this court.

* * * While we do not pretend to adjudge that no verdict would or ought to be sustained for a larger amount than \$10,000, we do say that some moderation should be indulged in when arriving at verdicts in this class of cases." A second verdict for \$20,000 was set aside. *Standard Oil Co. v. Tierney*, 96 Ky. 89.

Where a boy of sixteen had one arm amputated and the other so injured that its use was permanently impaired, and was also injured on the head, a verdict of \$20,000 was reduced to \$12,000. *Renne v. United States L. Co.*, 107 Wis. 305.

An award of \$10,000 for an injury necessitating the amputation of the left arm of a boy of nineteen was not excessive. *Baltzer v. Chicago*, etc. R. Co., 89 Wis. 257.

A judgment for \$10,000 in favor of an employee in a brick manufacturing establishment for the loss of an arm did not shock the reviewing court's sense of justice. *Chicago Anderson P. B. Co. v. Rembarz*, 51 Ill. App. 543. And so of one for \$8,000 in favor of a brakeman for the loss of a hand. *Illinois Cent. R. Co. v. Harris*, 63 id. 172. But it was otherwise as to a verdict for \$20,000 for the loss of an arm in favor of a man of twenty who was earning \$1 per day when injured, and afterward secured employment at \$35 per month. *Chicago & N. R. Co. v. Kane*, 70 id. 676. In *Illinois Cent. R. Co. v. O'Connor*, 90 id. 142, a judgment for \$15,000 for the loss of an arm was sustained.

A verdict for \$25,000 in favor of

an oiler of machinery for the loss of his right arm half way between the hand and the elbow was, after being reduced by the trial court to \$15,000, further reduced to \$10,000. *O'Donnell v. American S. R. Co.*, 41 App. Div. (N. Y.) 307. See *Mis-souri, etc. R. Co. v. Kirkland*, 11 Tex. Civ. App. 528.

A verdict for \$8,000 in favor of a truckman of twenty-five for the loss of the use of his right arm was regarded as large, but not excessive, though he earned as much as a book-keeper after the injury as he earned before. *O'Keefe v. Eighth Ave. R. Co.*, 33 App. Div. (N. Y.) 324.

In *De Wardener v. Metropolitan St. R. Co.*, 1 App. Div. (N. Y.) 240, a left arm was permanently crippled; a difficult and painful surgical operation had been undergone, and the plaintiff's nerves had become affected. No loss of earnings was shown, nor was the permanency of his nervous condition established. A verdict for \$25,000 was reduced to \$15,000 and the amount of the bill for surgical and medical attention.

A verdict for \$6,500 in favor of a switchman of twenty-six, whose wages were \$60 a month, for the loss of his right arm, was approved in *Illinois Cent. R. Co. v. Price*, 72 Miss. 862. In *Rodney v. St. Louis S. R. Co.*, 127 Mo. 676, a verdict in favor of a switch foreman aged twenty-eight, earning \$100 a month, for \$12,500 for the loss of an arm was sustained.

In *St. Louis Southwestern Ry. Co. v. Wynnegar*, — Ark. —, 173 S. W. 427, a verdict for \$600 for an injury to the right forefinger of a child eight months old, which, although causing severe pain for a

The award is often further complicated by including compensation for other injuries. The loss of an eye, or of both eyes,⁸³

few days, did not impair its use or substantially disfigure it.

A verdict for \$100 was set aside as inadequate where the plaintiff bruised her knee and dislocated her shoulder so that it would cause pain in the future and permanently deprive her of the use of her arm, and she was confined to her bed for some time and incurred medical expenses. *Murphy v. Town of Cleveland*, — Miss. —, 63 So. 572.

Where a passenger was maliciously shot by a brakeman in such a manner as to break her arm, so that she was unable to move for three weeks, and she was confined to her home for two months and a half, and four months later at the time of the trial was unable to use her arm or to follow her profession of seamstress and hairdresser in which she had been earning \$10 to \$15 per week, a verdict for \$3,000 as compensatory damages was sustained. *Pine Bluff & A. R. Ry. Co. v. Washington*, 116 Ark. 179.

⁸³ A student upon whom a vicious assault was made, which caused him to be lame and bruised for two weeks, and who practically lost the use of one eye, was slightly disfigured and subject to constant suffering, kept a verdict for \$7,000. *St. Louis, etc. R. Co. v. Grant*, 75 Ark. 579.

An increase of a verdict for \$6,000 for the loss of an eye of a minor, the orbital cavity being so injured as to prevent the use of an artificial eye to avoid disfigurement, the other eye being affected, was refused. *Johnson v. Pickering L. & T. Co.*, 132 La. 425.

For the entire loss of sight a man of 31 years, earning \$2.50 to \$3 per day, retained a verdict for \$20,000.

Marsh v. Usk H. Co., 73 Wash. 543.

For the loss of one eye a mule driver in a mine retained a verdict for \$6,000. *Carney v. Marquette Third Vein C. Co.*, 175 Ill. App. 139.

A youth of 17 years employed in a sawmill retained a verdict for \$6,000 for the loss of an eye and impairment of vision of the remaining eye. *Brossard v. Morgan Co.*, 150 Wis. 1.

For the loss of an eye, the sight of the other being seriously affected, a man aged 23, earning \$3 a day, retained a verdict for \$7,000. *Chicago V. Co. v. Jones*, 143 Ky. 21.

The loss of an eye by a medical student and the partial loss of the sight of the other, necessitating the abandonment of his studies, was not over-compensated for by \$7,500. *Louisville v. Keher*, 117 Ky. 841.

A boy of 18 years who lost one eye, the other being impaired to the extent of nine-tenths, and there being a probability that a total loss of sight might result, retained a verdict for \$14,400. *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329, 15 Am. Neg. Rep. 51.

The loss of one eye and sympathetic impairment of the other, though the earnings of the party were not affected, was not over-compensated for by \$7,500. *Phelan v. Granite B. P. Co.*, 227 Mo. 666, 137 Am. St. 582.

An award of \$12,000 for injuries to one of the eyes of an unmarried woman doing clerical work, which necessitated long and painful treatment and its removal, was reduced by one-half. *Olwell v. Skobis*, 126 Wis. 308.

A verdict for \$9,500 in favor of a laborer aged 39, who lost both eyes, was reduced to \$8,000, of which

likewise comes within the group of permanent injuries, for which liberal recovery is generally permitted, with due allow-

\$6,000 was for the pecuniary loss and \$2,000 for the suffering endured. *Peterson v. Roessler & H. C. Co.*, 131 Fed. 156.

A railroad track foreman, aged thirty-five, had his right eye destroyed and suffered from the other eye at times; his ability to work was reduced about one-half. Judgment for \$5,000 affirmed. *Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 Am. St. 351.

A child aged eight years had both eyes burned out, both ears burned off, his hands burned almost to a crisp—"in short, the mental and physical functions of his person almost completely destroyed—everything that would make life either enjoyable or useful gone, and nothing left but the capacity to exist." A verdict of \$50,000 was reduced to \$25,000, and affirmed. *Dunn v. Burlington, etc. R. Co.*, 35 Minn. 73.

Judgment for \$9,000 was sustained where a laborer lost both eyes. *Stearns v. Reidy*, 33 Ill. App. 246. The Colorado court set aside a verdict for \$37,500 in favor of a miner whose sight was destroyed. *Deep M. & D. Co. v. Fitzgerald*, 21 Colo. 533.

In *De La Vergne R. M. Co. v. Stahl*, 24 Tex. Civ. App. 471, judgment for \$8,000 for the loss of an eye by an employee aged twenty-four was reduced to \$7,000.

Where a female infant lost the sight of one eye and it was disfigured, a verdict for \$7,000 was allowed to stand. *Shaw v. Chicago & G. T. R. Co.*, 123 Mich. 629, 49 L.R.A. 308.

The plaintiff was badly burned and lost one eye; the sight of the other had been seriously impaired by a previous accident. Before the *Suth. Dam. Vol. IV.—73.*

injury he earned \$1.60 a day, and a few weeks after it earned from \$15 to \$20 a month. He was required to remit \$5,000 from a verdict for \$15,000. *Ribich v. Lake Superior S. Co.*, 123 Mich. 401, 48 L.R.A. 649.

The sum of \$10,000 was not regarded as too much where a woman of forty-one, who had been able to do all ordinary housework, was injured so that her eyes were affected, her range of vision contracted, the heart action made irregular, and she suffered from nervous prostration, her condition being permanent. *Illinois Cent. R. Co. v. Treat*, 75 Ill. App. 327. In *North Chicago St. R. Co. v. Fitzgibbons*, 79 id. 632, a verdict for a like sum was sustained, the result of the injury being similar.

The sum of \$11,400 was not excessive where a healthy man of twenty-seven became a physical wreck from a compound fracture of the skull, which affected the brain and one eye, probably necessitating the removal of the latter. *Cobb v. St. Louis & H. R. Co.*, 149 Mo. 609.

A verdict for \$4,935 was upheld in favor of a man 23 years old who had been earning \$2 per day and lost the sight of one eye, which loss affected the other eye. *Rollins v. Central Maine Power Co.*, 112 Me. 175.

Where a man 55 years of age lost his right eye, resulting in a derangement of the nervous system which probably would not be permanent, and had been earning \$2.75 per day part of the time of each year and \$10.50 per week part of the time, and incurred a bill of \$300 for medical expenses a verdict for \$6,500 was reduced to \$3,500. *Dudley v. R. P. Hazzard Co.*, 112 Me. 453.

ance for impaired earning capacity. In the same class come injuries resulting in impairment of the sense of hearing⁸⁴

A verdict for \$11,500 was upheld in favor of a locomotive engineer who was 54 years of age, had been earning \$157 per month prior to the injury, and in two months would have been advanced to \$175 per month, and had a life expectancy of 18.28 years, and, as a result of the loss of an eye would be unable to fulfil a position in the future. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419.

⁸⁴ See *Dunn v. Burlington, etc. R. Co.*, 35 Minn. 73, in preceding note; *Macon Con. St. R. Co. v. Barnes*, 113 Ga. 212, in note 93.

⁸⁵ A verdict for \$16,000 was sustained in favor of a woman whose spine suffered a severe concussion and contusion and whose health was permanently impaired as the result. *Central R. Co. v. White*, 175 Ala. 60.

Where an express messenger 33 years of age had been previously receiving \$65 per month salary and sustained such an injury to the spinal cord as to permanently cripple him and nearly destroy his earning capacity, but he was well nourished and could move about to a limited extent and his mind was unimpaired, and he might be able to perform easy clerical work, a verdict for \$35,000 was reduced to \$30,000. *Padrick v. Great Northern R. Co.*, 128 Minn. 228.

For an injury to the spine which caused a girl of 14 years to become a permanent mental and physical wreck \$15,000 was not excessive. *San Antonio T. Co. v. Emerson* (Tex. Civ. App.), 152 S. W. 468.

For an injury to the spine which probably permanently affected the nerves and general health of a woman a verdict for \$5,394, while

large, was not excessive. *Sewing v. Harrison County*, 156 Iowa 229. In *Krouse v. Detroit United R. Co.*, 170 Mich. 438, a verdict for \$1,500 in a case apparently quite as serious was unsuccessfully challenged as being excessive.

Where the back of a car repairer was broken at the junction of the dorsal and lumbar vertebrae, and the spinal cord was severed or destroyed by pressure so as to produce loss of sensation and paralysis, a verdict for \$25,000 was upheld. *Texas, etc. R. Co. v. Barwick*, 50 Tex. Civ. App. 544.

A brakeman of 35 years, earning \$79 per month, retained a verdict for \$35,000 for a marked curvature of the spine, resulting in the wreckage of his life physically and otherwise. *St. Louis, etc. R. Co. v. Webster*, 99 Ark. 265.

A man aged forty was so injured that, besides lesser hurts, he sustained a concussion of the spine, which resulted in chronic inflammation of the membranes enveloping the spinal cord; his faculties, mental and physical, were largely impaired at the time of the trial, the probability being that paralysis and premature death would result. A verdict for \$30,000 was sustained. *Harrold v. New York E. R. Co.*, 24 Hun 184.

An infant aged nineteen months sustained an injury to his spine which resulted in an incurable disease, which would disable him from competition with laboring men, and probably shorten his life. An award of \$7,500 was affirmed. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32.

A physician was disabled from pursuing the practice of his profes-

and spinal difficulties.⁸⁵ Another wide range of awards is shown in injuries to the hands,⁸⁶ the circumstances of the in-

sion, which brought him \$2,000 a year, by an injury to his spine which caused great suffering and was so serious as to make it reasonably certain his life would be shortened. The court affirmed a judgment for \$10,000. *Carthage T. Co. v. Andrews*, 102 Ind. 138, 52 Am. Rep. 653.

Where a man of twenty-five, earning \$50 a month, was injured in the spine, and suffered greatly, a verdict for \$10,500 was not excessive. *Alabama, etc. R. Co. v. Bailey*, 112 Ala. 167.

When injured the plaintiff, aged thirty, was strong and healthy and was making \$50 a month in addition to discharging her household duties. She permanently lost the use of her lower limbs by reason of paralysis resulting from a concussion of the spinal cord. A verdict for \$15,000 was sustained. *Sears v. Seattle Con. R. Co.*, 6 Wash. 227. See *Sutton v. Snohomish*, 11 Wash. 24.

A woman of twenty-four, permanently injured in her spine and limbs, and confined to her bed the greater part of a year, and whose nervous system was greatly disturbed, was not over-compensated by \$11,500. *Savage v. Bauland Co.*, 42 App. Div. (N. Y.) 285. See *Kraemer v. Metropolitan St. R. Co.*, 51 App. Div. (N. Y.) 475.

Where the injuries to a girl of five resulted in chronic cystitis and concussion of the spine, and it was reasonably certain the spinal trouble would be permanent, and she suffered from nervous shock and hysteria, a judgment for \$10,000, the full sum sued for, was affirmed. *McTague v. Dowst*, 51 App. Div. (N. Y.) 206.

⁸⁵ A verdict for \$6,500 in favor of

a minor who lost the thumb on her right hand at the second knuckle, and the forefinger on the left hand at the second knuckle and sustained a temporary injury to another finger was set aside. *Gray-M. P. B. Co. v. McNally*, 138 Ky. 823.

For injuries to both hands which left the plaintiff with the use of only the thumb and forefinger of the left hand a verdict for \$25,000 was not excessive. *Goetzke v. Chicago*, 174 Ill. App. 446.

A verdict for \$500 in favor of a youth for the loss of parts of three fingers of his right hand was set aside as inadequate. *Orr v. Wahlfeld Mfg. Co.*, 179 Ill. App. 235.

An award of \$3,500 for the loss of part of a thumb was sustained. *Brossman v. Drake Standard M. Works*, 177 Ill. App. 323.

A verdict in favor of a miner for the loss of the second and third fingers and a permanent stiffening of the index finger, the hand being capable of use in manual labor, was reduced from \$5,000 to \$3,000. *Mollanen v. Washington I. Co.*, 176 Mich. 505.

A verdict for \$1,000 for the loss by a common laborer of the little finger of his left hand was sustained. *Barnett v. United Kansas Portland Cement Co.*, 91 Kan. 719.

A man of 31 years, engaged in manual labor, lost three fingers of his left hand, the point of his thumb, and sustained other injuries to the hand. A verdict for \$4,000 was upheld. *Cleveland, etc. R. Co. v. Oesterling* (Ind. App.), 100 N. E. 856.

A verdict for \$7,500 in favor of a five-year-old girl who lost two fingers and part of another, and sustained other lesser injuries, was

jury and the effect upon the plaintiff's earning capacity being usually the ruling considerations. The effect of such injuries

approved by a majority of the court. *Johnson v. Bay City*, 164 Mich. 251.

The loss of both hands by a boy aged 13 was not over-compensated for by \$25,000. *Olson v. Gill Home I. Co.*, 58 Wash. 151, 27 L.R.A. (N.S.), 884.

A strong, vigorous man of 44 years who earned \$2,000 a year, kept a verdict for \$12,000 for the loss of one hand and an injury rendering the other useless. *Louisville & N. R. Co. v. Smith*, 135 Ky. 462.

A verdict for \$4,500 for the loss of a thumb and forefinger of a laboring man of 22 years was reduced to \$3,000. *Rittel v. Southern I. Co.*, 127 Mo. App. 463.

A minor female whose hand was burned so that three fingers were necessarily amputated and the little finger became attached to the palm of the hand, retained a verdict for \$12,750. *Gents v. Spring Valley C. Co.*, 155 Ill. App. 628.

An award of \$1,000 for a broken arm, mutilation of a hand, the loss of part of an ear and partial deafness was increased to \$4,500 by a court of admiralty. *The San Rafael*, 72 C. C. A. 388, 141 Fed. 270.

A verdict for \$12,000 in favor of a girl 15 years of age, who was employed in a laundry at a wage of \$4.50 per week, and lost her left hand, was reduced to \$9,000. *Ronca v. Wendell & Evans Co.*, 166 App. Div. (N. Y.) 216.

An award in favor of a boy of 13 years who lost a thumb and forefinger and parts of the next two fingers was increased by the appellate court from \$1,000 to \$2,500. *Rossey v. Lawrence*, 123 La. 1053.

An award of \$7,500 in favor of a woman of 22 years whose left hand was so badly crushed in a laundry

machine as to make it practically useless was regarded as high, but not excessive. *Carlin v. Kennedy*, 97 Minn. 141.

A factory employee who lost four fingers of his right hand was not entitled to \$7,500; a verdict for which was reduced to \$5,000. *Campbell v. Wheelihan-W. Co.*, 45 Wash. 675.

Under circumstances disclosing a premeditated intent to injure and which justified punitive damages, a verdict for \$45,000 was sustained in favor of a young man whose injuries were caused by being shot at four times, maiming him for life. *Wirsing v. Smith*, 222 Pa. 8.

A verdict for \$7,500 in favor of a railroad brakeman 35 years of age, who had his right hand permanently injured so as to be deprived of the use of it for life, was reduced to \$5,000. *Judd v. N. Y. Cent. & H. River R. Co.*, 165 App. Div. (N. Y.) 935 (Woodward, J., dissenting).

A verdict for \$6,000 was sustained where a man employed in coupling cars lost the use of one hand. *Missouri Pac. R. Co. v. Jones*, 75 Tex. 151, 16 Am. St. 879. And a \$4,000 verdict was upheld where the flesh was torn from the thumb and finger of a carpenter. *Galveston O. Mills v. Malin*, 60 Tex. 651.

Where a brakeman aged twenty-five lost his right hand at the wrist, and the case had been pending in the courts for nearly nine years, and two juries had awarded him substantially the same amount, a judgment for \$10,000 was affirmed. *Union Pac. R. Co. v. Young*, 19 Kan. 488.

A woman aged fifty-seven was permanently deprived of the use of her left arm, her power to move was im-

seems to be generally considered to be capable of more exact computation in terms of money than is the case with other per-

paired, a shoulder bone broken, her spine injured and her general health affected and her system rendered more liable to disease. A verdict for \$5,000 was not excessive. *Texas Pac. R. Co. v. Davidson*, 68 Tex. 370.

The loss of the thumb and first finger of the right hand of a brakeman who was disabled for three or four months was over-compensated by a verdict for \$6,500. *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169, 34 id. 472.

A verdict for \$5,000 was affirmed, after seriously questioning its correctness, where a switchman's hand was so injured that he could never use it naturally, and would never be able to do any kind of labor for which he could realize any considerable amount of wages. Before the injury his earnings were \$55 a month. *Toledo, etc. R. Co. v. Fredricks*, 71 Ill. 294.

A \$3,000 judgment in favor of a boy of fourteen for the loss of three fingers, sustained. *Neilon v. Marinette & M. P. Co.*, 75 Wis. 579.

In *Brown v. Southern Pac. R. Co.*, 7 Utah 288, the court refused to affirm a judgment for \$10,000 in favor of a man of twenty-two who lost a hand and received other injuries, and who had been earning \$75 a month. He was not educated for a profession, but had so far recovered at the time of the trial as to be able to do light work. On remitting \$6,000 the judgment was affirmed for the balance.

Where a child of two and one-half years had both hands cut off and one leg and foot lacerated and seriously injured, and had not been able to walk at the time of the trial, a verdict for \$40,000 was set aside.

St. Louis, etc. R. Co. v. Waren, 65 Ark. 619, 627.

Where there was the loss of the second and third fingers of the left hand and an injury to the first finger of a man employed as a car-coupler at \$45 a month, a verdict for \$4,000 was sustained though it went to the extreme limit if not beyond it. *Central R. & B. Co. v. Lanier*, 83 Ga. 587.

A verdict for \$4,700 was quite moderate for the loss of the right hand of a man of twenty-three, he having sustained other severe wounds and bruises. *Central R. v. De Bray*, 71 Ga. 406; *Grannis v. Chicago, etc. R. Co.*, 81 Iowa 444.

A man with a life expectancy of 46 years, employed as a sawmill laborer, retained a verdict for \$7,500 for the loss of his right hand. *Sprague v. Atlee*, 81 Iowa 1.

A verdict for \$5,000 for the loss of two fingers has been condemned. *Louisville & N. R. Co. v. Foley*, 94 Ky. 220. As has one for \$2,000 for an injury necessitating the amputation of a thumb at the first joint. *Same v. Law*, 14 Ky. L. Rep. 850. Where a boy of nine had the ends of the ring and middle fingers of his left hand mangled so as to require their amputation at or near the first joint, a judgment for \$1,800 was reduced to \$1,200. *Gahagen v. Aermotor Co.*, 67 Minn. 252. A man of twenty lost the index finger of his left hand, and had the first and second joints of the second finger thereof permanently injured, and also sustained such injury to the joints of the thumb as affected its use. The trial court reduced a verdict for \$4,500 to \$3,500, and the higher court reduced the latter sum to \$2,500 and interest from

manent injuries, notably those that result in disfigurement,⁸⁷ or weaken the nervous system.⁸⁸ Special considerations gov-

the date of the trial. *Stiller v. Bohn Mfg. Co.*, 80 Minn. 1.

Where a man of twenty-nine, earning about \$70 a month had his thumb and index finger so mangled that they had to be amputated, with the result that a very large portion of the physical capacity of his wrist was lost and the back of his hand was covered with "scar tissue," a verdict, on the first trial, for \$8,000 was reduced by the trial court to \$6,000; a second verdict, for \$10,500, was reduced by that court to \$8,000, and further reduced by the supreme court to \$6,500. *Thompson v. Chicago, etc. R. Co.*, 71 Minn. 89, 98.

A verdict for \$4,000 in favor of a laborer who lost a little finger and had the one next it broken, the hand being weak and stiff a year after the injury, was reduced to \$3,000. *Mayhood v. Pleasant Valley C. Co.*, 8 Utah 85.

⁸⁷ A verdict for \$30,000 was sustained where a youth of 18 years was burned to the extent that his sight and hearing were affected, his hands rendered useless for manual labor, one ear was gone and the other mutilated, his neck stiffened and his face so injured as to make him repulsive. *Waters-P. O. Co. v. Snell*, 47 Tex. Civ. App. 413.

Where a girl 15 years old had one of her fingers broken, and cinders were forced into her face and forehead, necessitating a very painful treatment for their removal, and sustained other injuries so that she was confined to her bed for two weeks, and her face was disfigured by a permanent scar, the court, taking into consideration the decreased purchasing power of the dollar sustained a verdict for \$4,000. *Hays*

v. United Rys. Co. of St. Louis, 183 Mo. App. 608.

Under quite novel circumstances a female passenger on a train was struck by a bullet in the side of her face, the bones of the nostril and other small bones of the face being broken; after passing between the spinal cord and the large veins of the neck the bullet lodged in the back of the neck, with the result that the face was partially paralyzed, one nostril closed, and she was permanently disfigured. A verdict for \$18,000 was set aside. *Louisville & N. R. Co. v. McEwan*, 17 Ky. L. Rep. 706.

A verdict for \$1,500 for a lacerated wound on the face and neck of a girl of eighteen, causing a permanent scar and pain and suffering, was sustained. *Cameron v. Bryan*, 89 Iowa 214.

⁸⁸ Where the immediate injury, a wound on the knee, caused a nervous shock which resulted in the development of heart disease and a nervous disorder, both of which were probably permanent and rendered the plaintiff, a previously healthy, active woman, a helpless invalid, a judgment for \$10,000 was affirmed. *Galloway v. Chicago, etc. R. Co.*, 56 Minn. 346, 45 Am. St. 468, 23 L.R.A. 442.

A verdict for \$3,000 was sustained where a normally healthy married woman received injuries and a nervous shock which caused a functionally nervous disease which had incapacitated her for five months prior to the trial, but from which she would eventually recover. *Weide v. City of St. Paul*, 126 Minn. 491.

Where a woman 25 years of age had enjoyed good health prior to her injury and at the time of the trial

ern recovery for partial or total loss of mentality,⁸⁹ rupture,⁹⁰ loss of both arms and one leg,⁹¹ loss of one arm and one leg,⁹² and those less capable of accurate classification,⁹³ such as skull

about three years afterwards was suffering from an incurable nervous trouble, but her condition would probably improve to some extent in the future, a verdict for \$27,500 was reduced to \$20,000. *Gibbons v. Rhode Island Co.*, 37 R. I. 89.

⁸⁹ For a compound, comminuted, depressed fracture of the skull which resulted in progressive traumatic epilepsy a man of 29 years, earning \$1,800 a year, and who was nearly qualified to become a public accountant, retained a judgment for \$40,000. *Hughes v. Harbor & S. B. & S. Ass'n*, 131 App. Div. (N. Y.) 185.

A verdict for \$8,500 was sustained where a child became practically an idiot in consequence of an injury. *Wehnyk v. Second Ave. R. Co.*, 14 App. Div. (N. Y.) 515.

⁹⁰ A double rupture, causing total inability to labor by a man of 55 years who earned \$21 a week, was cause for sustaining a verdict for \$16,000. *Freeman v. Cleary* (Tex. Civ. App.), 136 S. W. 521.

A sailor aged thirty-two, earning from \$12 to \$20 a week, sustained a fracture of the ankle and a rupture, in consequence of which he was in a hospital eighty-five days; his injuries permanently incapacitated him for heavy work. The court awarded \$6,500. *Miller v. The W. G. Hewes*, 1 Woods 363; *The D. S. Gregory*, etc., 2 Bene. 226.

⁹¹ The loss of both arms and one leg by a man aged 27, earning about \$2,500 a year, was cause for approving a judgment for \$70,000, after its reduction to that sum by the

remitting of \$30,000. *Zibbell v. Southern Pac. Co.*, 160 Cal. 237.

⁹² An award of \$20,000 for the loss of one leg and one arm of a brakeman was reduced to \$12,000. *Williams v. Pickering L. Co.*, 125 La. 1087, 136 Am. St. 365. See the opinion for local cases in point.

A verdict for \$25,000 in favor of a woman of 30 years, the wife of a laborer, for the loss of the left arm and a foot, a disfiguring wound above one of her eyes and a nervous shock, was reduced to \$17,000 by the appellate court. *Fike v. Pere Marquette R. Co.*, 174 Mich. 167.

A minor engaged in manual labor retained a judgment for \$17,793 for the loss of his left arm and left leg. *Mendizabal v. New York Cent.*, etc. R. Co., 89 App. Div. (N. Y.) 386.

⁹³ A verdict for \$35,000 was sustained in favor of a brakeman whose injuries could not have been more serious, and who died after the trial. *Clay v. Chicago*, etc. R. Co., 104 Minn. 1.

A verdict for \$50,000 in favor of a railroad employee 32 years of age who received injuries which rendered him sexually impotent, caused paralysis of the left side and which would probably shorten his life and permanently disable him, was reduced to \$20,000. *Missouri, K. & T. Ry. Co. of Texas v. Smith*, — Tex. Civ. App. —, 172 S. W. 750.

A verdict for \$1,750 was sustained in favor of a railroad brakeman 37 years of age who had been in good health, had been earning \$100 per month prior to his injuries and who was rendered uncon-

fractures, kidney troubles, impotency or sterility, abdominal injuries generally, necessitating dangerous operations, fractures

scious by the accident, was confined in a hospital for 10 days and in his room for a longer period, suffered from a partial hernia which was curable only by an operation, it appearing that his nervous system was affected, that he had not been able to work for several months and that he would be unable to work for several months after the trial. *Snyder v. Great Northern R. Co.*, 127 Minn. 518.

A verdict for \$18,000 in favor of a miner 29 years old who had been earning \$4 per day and board and lodging, and was severely crushed and injured was sustained. *Johansen v. Pioneer Min. Co.*, 77 Wash. 421.

A verdict for \$12,500 was sustained in favor of a coal miner who received a compound fracture of the skull, the fractured bone contusing and lacerating the brain, and the injury resulting in atrophy of the optic nerve of both eyes, nearly destroying the central vision of each of them. *Jenkins v. La Salle County Carbon Coal Co.*, 182 Ill. App. 36.

A verdict for \$4,000 was sustained in favor of a farm laborer who was rendered unconscious and afterward suffered from constant headaches and insomnia, and the sight of one eye was impaired so that it was necessary that it either be removed or that he wear a patch over it, and his back was weakened so that he was unable to perform more than half as much work as formerly, and was unable to do any heavy work. *Hitz v. Pittsburgh & B. St. Ry. Co.*, 245 Pa. 7.

In *Gillespie v. Great Northern R. Co.*, 124 Minn. 1, the action of the trial court in reducing a verdict for \$11,375 to \$9,000 was sustained

where the accident caused the loss of one eye, fracture of the jawbone, permanent disfigurement of the face, the teeth remaining out of alignment, and pain being suffered a year after the accident and up to the time of trial, and the plaintiff incurred doctor's bills and lost some time but there was no decrease in his earning capacity.

A verdict for \$15,000 was sustained in favor of a man 41 years of age who had been earning \$150 per month and was permanently disabled and crippled, was in bed eleven weeks and incurred a doctor bill of \$2,000. *Hamilton, Harris & Co. v. Larrimer*, — Ind. —, 105 N. E. 43.

A verdict for \$5,960 was sustained in favor of a piano salesman, 44 years old, who had been earning \$40 per week as salesman and \$500 per year as pipe organist and also other sums as a musician, who had the muscles of one of his legs permanently injured so that he experienced difficulty in moving around, suffered after the accident from a hernia and would never be able to play the pipe organ again. *Anderson v. Wood*, 125 Minn. 102.

Where a man 37 years old had been engaged in the real estate business and had been strong and active prior to his injury, which, however, did not immediately disable him but caused much pain, later developments necessitating a dangerous operation on the kidneys, and he became nervous, melancholic and his kidneys caused him much pain, and would be permanently injured unless a second dangerous operation, which might possibly result in death, was successfully performed, a verdict for \$17,500 was

of the jaw bones, collar bone, or ribs, or those causing loss of the power of speech. As an examination of the notes will

reduced to \$10,000. *Lyons v. Metropolitan St. R. Co.*, 253 Mo. 143 (Blair, C., and Bond, J., dissenting).

A verdict for \$12,000 was sustained in favor of an electrician 44 years of age who had been earning \$85 to \$95 per month, and was incapacitated for labor as a result of a comminuted fracture of the spine and was terribly mutilated in the region of the lower part of the spine and buttocks, as a result of which he had no control over his bowels, and was otherwise injured. *Smale v. Wrought Washer Mfg. Co.*, 160 Wis. 331.

A verdict for \$18,000 was sustained in favor of a man 54 years of age who had been previously earning \$1,500 per year, and who became a hopeless cripple, suffered from an injury to the sciatic nerves which resulted in one of his legs being in constant motion, causing him pain and interfering with his rest and sleep. *St. Louis & S. F. R. Co. v. Coy*, 113 Ark. 265.

A verdict for \$20,000 in favor of a young woman who had been earning five and one-half dollars per week and who sustained a fracture of the elbow and other serious injuries, necessitating two abdominal operations, was reduced to \$13,000. *Bankwitz v. Northwestern El. R. Co.*, 182 Ill. App. 55.

In *Lynch v. Southern Pac. Co.*, 24 Cal. App. 108, a verdict for \$22,750, after reduction to \$15,750 by the trial court was upheld in favor of a woman 23 years of age who had a leg broken, three ribs fractured, her back wrenched and was suffering from what was probably a permanent paralysis of the left arm.

An increase of an award of

\$10,000 in favor of a farmer aged 31 years for the loss of a leg at the knee, there having been two amputations, and the loss of parts of three fingers was refused. *Roby v. Kansas City S. R. Co.*, 130 La. 894.

A verdict for \$25,000 was approved where a locomotive fireman of 27 years, earning \$1,650 a year, and in line of promotion, lost a leg, had a shoulder broken so it probably would not unite and was permanently disqualified from resuming his vocation. *St. Louis, etc. R. Co. v. Brogan*, 105 Ark. 533.

A man of 32 years retained a verdict for \$5,000 for an injury to his head which caused deafness in one ear and impaired the hearing of the other 30 or 40 per cent. *Meyer v. Nassau E. R. Co.*, 152 App. Div. (N. Y.) 709.

Where a woman of 35 years, previously in good health, was so injured as to be confined to bed for three months and continued to be unable to work and suffered pain two years after the injury, and submitted to an operation which, in connection with a previous operation independent of the injury, rendered her sterile, a verdict for \$12,000 was approved. *San Antonio T. Co. v. Corley* (Tex. Civ. App.), 154 S. W. 621.

The removal of the right breast of a woman in consequence of a surgeon's leaving a drain in an incision therein was not over-compensated for by \$1,250. *Evans v. Munro* (R. I.), 83 Atl. 82.

Where a boy of 12 years lost a hand by a current of electricity and was otherwise so injured that his growth had stopped, some of his teeth had fallen out, his gums had shrunk, his ears and speech were

disclose, the recovery allowed for any of these injuries is based upon so many special factors that the verdicts are practically

affected and he had become timid and nervous, a verdict for \$20,000 was reduced one-half. *Campbell v. United R. Co.*, 243 Mo. 141. Compare *Thompson L. Co. v. Thomas* (Tex. Civ. App.), 147 S. W. 296, and *Kentucky D. & W. Co. v. Wills*, 149 Ky. 275.

A verdict for \$12,695 in favor of a boy of 10 years whose right foot was crushed, necessitating the amputation of the toes and part of the metatarsal bones, which was followed by an attack of tetanus, was reduced by the trial court to \$11,000 and by the appellate court to \$8,000. *Tierney v. Sampsell*, 172 Ill. App. 119.

A verdict for \$20,000 in favor of a man of 32 years was sustained for the loss of three fingers, a broken rib, a Pott's fracture of an ankle, and a fracture of the spine, resulting in almost complete paralysis from the hips down. *Farrell v. Illinois T. Co.*, 177 Ill. App. 425.

A miner of 29 years who earned \$4 per day retained a verdict for \$18,000 for injuries which crippled him for life and almost destroyed his earning capacity. *Gennaux v. Northwestern I. Co.*, 72 Wash. 268.

A verdict for \$10,500 in favor of a miner for the fracture of a thigh bone and bad bruises to the same which caused the kneejoint to be stiff and tender, with a probability that it would remain so, and a possibility that tuberculosis might set in, was sustained. *Vasby v. United States G. Co.*, 46 Mont. 411.

A verdict for \$14,000 was affirmed in favor of a widow (who had been such for 15 years) who earned \$18 a week and who had both arms and both the bones of one leg broken and who sustained two scalp

wounds. *Hatch v. Terry*, 153 App. Div. (N. Y.) 230.

The supreme court reduced a verdict for \$4,000 to \$3,000 where a man of 81 years had a broken collar bone, which confined him to bed one month and suffered from two inguinal hernias which pained him greatly and rendered him almost a cripple. *Buccola v. Shreveport T. Co.*, 132 La. 106.

A verdict for \$30,000 in favor of a man of 42 years, with earning capacity of \$1,200 a year, who was so injured as to be paralyzed from the waist down, was reduced to \$22,000. *Penson v. Inland Empire P. Co.*, 73 Wash. 338.

A man of 27 years, earning \$50 a month, who lost a right arm at the shoulder, had both bones of the left arm broken and the left hand disfigured, two ribs broken, collar bone dislocated, and sustained other injuries of a minor nature, retained a verdict for \$35,000. *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355.

For the breaking of an ankle and a leg of a young girl, who also received flesh wounds and a general nervous shock, an award of \$5,000 was not excessive. *Dudley v. Wabash R. Co.*, 171 Mo. App. 652.

For the loss of a leg, the dislocation of the other leg, and lesser injuries a verdict for \$25,000 in favor of a man of 27 years was reduced to \$15,000. *Yost v. Union Pac. R. Co.*, 245 Mo. 219.

A man of 27 years, earning \$1,000 a year, retained a verdict for \$8,500 for an injury which confined him to his bed 42 days, permanently injured one of his kidneys, partially paralyzed his right limb, and permanently disabled him. *St. Louis,*

useless so far as furnishing precedents is concerned. The varying facts make it necessary that each case be a law unto itself.

etc. *R. Co. v. Clifford* (Tex. Civ. App.), 148 S. W. 1163.

A girl of seven years had a leg shortened three-fourths of an inch by the breaking of a thigh bone; some curvature of the spine and pain and sensitiveness in the vertebrae and a detrimental effect upon general health followed. A judgment for \$2,500 was sustained. *Pickell v. St. Paul City R. Co.*, 120 Minn. 340.

A verdict in favor of a young mail clerk earning \$1,000 a year, who sustained injuries resulting in partial paralysis, was reduced from \$33,000 to \$20,000. *Williams v. Spokane Falls & N. R. Co.*, 42 Wash. 597.

A plaintiff aged 40, who had previously lost a leg and two fingers of one hand, but who was in good health, retained a verdict for \$8,500 for a permanent injury to his urinary organs and bladder. *De Blois v. Great Northern R. Co.*, 99 Minn. 18.

A man of 27 years, earning \$1,100 per year, retained a verdict for \$32,916 for an injury which resulted in paralysis from the small of the back to his extremities. *Huggard v. Glucose S. R. Co.*, 132 Iowa 724.

A section hand of 18 years, earning \$36 a month, who was made a nervous, mental and physical wreck and endured the most intense suffering, failed to keep a verdict for \$49,000; the court suggested that \$25,000 was ample. *Canfield v. Chicago, etc. R. Co.*, 142 Iowa 658.

An award of \$12,500 was not excessive where a strong man of 31 years, earning \$3.40 per day and upwards was made a physical wreck. *Foley v. Everett*, 142 Ill. App. 250.

A man of 35 years, earning \$50

per month, who was permanently paralyzed, retained a verdict for \$20,000. *Missouri, etc. R. Co. v. Bailey*, 53 Tex. Civ. App. 295.

A brakeman of twenty, earning from \$63 to \$65 a month retained a verdict for \$10,000 for an injury which resulted in shortening a leg two inches. *Fourche River Valley, etc. R. Co. v. Tippet*, 101 Ark. 376.

An injury to a woman in the prime of life whose pursuits required all her physical faculties and which permanently disabled her was not excessively compensated for by \$3,500. *Calder v. Smalley*, 66 Iowa 219, 55 Am. Rep. 270.

Where an engineer of thirty-four, in good health, and earning from \$165 to \$195 per month, was so injured as to be incapacitated for the performance of any profitable labor, bereft of his hearing and made a physical wreck, \$15,000 was not an excessive award. *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421.

Where the injuries sustained by an able-bodied and industrious mechanic rendered him a physical and mental wreck, after great suffering, which would probably continue, a verdict for \$20,000 was sustained. *International, etc. R. Co. v. Brazzil*, 78 Tex. 314.

Where a physician negligently tied a ligature so tightly around the penis of a new-born child as to destroy nearly all the glands of that member a verdict of \$5,500 was sustained. When the actual damages, said the court, may include mental suffering through life, a verdict can rarely be set aside as excessive. *Brooke v. Clarke*, 57 Tex. 105.

In *Groves v. Rochester*, 39 Hun 5, the suit was by a husband and his wife to recover for injuries to the latter, who was twenty-eight years

The temporary injuries for which compensation is demanded are as numerous and varied as those of a more permanent charac-

of age when the accident occurred. The character of the injuries for which recovery was sought is not fully disclosed by the report, except that they "were severe and her suffering has been very great. She still suffers from the effect of them; and medical opinion is that she may never fully recover, and that they may materially shorten her life." A verdict for \$19,000 was sustained.

A verdict for \$8,250 was sustained where a farmer of sixty-five had two or three ribs broken, so that they punctured one of his lungs to such an extent that air escaped therefrom and inflated the surrounding tissues. He was confined to his bed for three weeks and to his house for seven, and appeared to be permanently injured. *Reed v. Chicago, etc. R. Co.*, 74 Iowa 188.

In *Rueping v. Chicago, etc. R. Co.*, 116 Wis. 625, a verdict for \$12,000 in favor of a man of forty-five, engaged in office work, for the compound fracture of a leg below the knee was regarded as unreasonably excessive; the court indicated that \$3,500 was ample.

A verdict for \$14,833 was held excessive where the plaintiff was aged twenty-one, and the injury was permanent; he was earning from \$800 to \$1,200 a year, and was deprived of employment by the accident. *Southwestern R. v. Singleton*, 66 Ga. 252.

An injury to a woman of sixty, which resulted in progressive paralysis and disabled her from following a lucrative business was not excessively compensated for by \$6,000. *Wardle v. New Orleans, etc. R. Co.*, 35 La. Ann. 202.

Plaintiff was aged fifty-four; three of his ribs were fractured, he

had a crushing wound on the lower part of one leg, was injured above such wound, confined six or seven weeks and was troubled with pain on one side when he breathed, and was so troubled and lame at the time of the trial, nine months after the accident. A \$5,000 verdict was sustained. *Quinn v. Long Island R. Co.*, 34 Hun 331.

In *Hall v. Chicago, etc. R. Co.*, 46 Minn. 439, an able-bodied young railroad engineer was so injured as to be almost a cripple and was an invalid for life. The suffering endured was very severe. A verdict for \$40,000 was reduced to \$25,000, and judgment for the latter amount was affirmed.

Where a well and young man earning \$3,000 a year suffered a great physical shock, had his hearing impaired and lost his sexual powers, though it was not certain these injuries would be permanent, and his income was reduced but \$25 a month, a verdict for \$12,000 was sustained. *Macon Con. St. R. Co. v. Barnes*, 113 Ga. 212.

A verdict for \$6,565 for injuries permanently and completely disabling and leaving in a condition of suffering a woman of forty-four, who had previously done all her housework and earned from \$6 to \$12 per week besides, was not disturbed. *Miller v. Boone County*, 95 Iowa 5.

In *Illinois Cent. R. Co. v. Souders*, 79 Ill. App. 41, a verdict for \$20,000 in favor of a woman of fifty-four, who had kept boarders, and who suffered much for four years and was permanently disabled, was upheld.

A verdict for \$7,000 for injuries of a subjective nature, except for a

ter, and inspection of the reported cases shows that the awards that have been approved rest upon substantially similar foun-

brief time, in favor of a woman aged fifty-nine, whose earnings did not exceed \$15 a week, was reduced one-half. *Chicago City R. Co. v. Anderson*, 182 Ill. 298.

In a case in which there was great injury to the right arm and shoulder, some of the internal ligaments of the shoulder joint being seriously ruptured, the plaintiff having suffered great pain for two years, her memory being impaired, and she being unable to perform services of any value, a verdict for \$15,000 was not disturbed. *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 17 L.R.A. 71.

A judgment for \$6,000 was affirmed in favor of a man of seventy-two, who was crippled and infirm as the result of a previous injury, but who, up to the time of the injury complained of, had his normal powers of speech and was a good penman. Such injury deprived him, to a considerable extent, of these faculties, impaired his power to move about, and caused continuous pain, which seriously interfered with his sleep. *Illinois Cent. R. Co. v. Wheeler*, 50 Ill. App. 205.

A verdict for \$7,000 in favor of an unmarried woman of thirty-five, and excellent health, for injuries causing great pain and which disabled her for active exercise and permanently shattered her nervous system, was upheld. *Illinois Cent. R. Co. v. Robinson*, 58 Ill. App. 181.

The injuries to a girl of eight comprised damage to one eye, the loss of part of the bones of the face and skull, a portion of the gray matter of the brain and the exposure of some of that remaining except as it was protected by a scar tissue which grew over it. A ver-

dict for \$30,000 was set aside, and, in view of the fact that two juries had fixed the damages at \$12,000, judgment for that sum was given though it was deemed large. *Mitchell v. Tacoma R. M. Co.*, 13 Wash. 560.

A man of twenty-eight, earning from \$80 to \$95 a month, had his skull crushed and a portion of it removed, leaving the brain unprotected except by the skin, and his left eye destroyed. At the time of the trial he was unable to labor. A verdict for \$10,000 was sustained. *Missouri, etc. R. Co. v. Parker*, 20 Tex. Civ. App. 470.

A verdict for \$17,500 in favor of a woman of thirty-five who was, previous to her injury, in good health and able to attend to all her household duties, was excessive for a partial disability, though much suffering had been endured. Some stress was laid upon the fact that she had not been earning money and had no qualification for doing so. *Louisville & N. R. Co. v. Creighton*, 20 Ky. L. Rep. 1691.

The sum of \$14,000 in favor of a woman of thirty-five, whose previous health had been good, who suffered greatly and who must continue to suffer or submit to a surgical operation by which the injured organs may be removed, which operation might imperil her life, is not excessive. *Illinois Cent. R. Co. v. Cheek*, 152 Ind. 663, 678.

Notwithstanding a car driver, who was so disabled physically that he could only walk on crutches, and suffered great pain four years after the injury, could earn, temporarily at least, more in a clerkship than he was receiving when injured, a verdict for \$15,000 was not inter-

dations. Thus, leg fractures generally⁹⁴ are held properly compensated by the value of the time lost thereby, the cost of treat-

ferred with. *Chicago City R. Co. v. Taylor*, 68 Ill. App. 613.

Where a man of forty-five, in good health and vigor and with average prospects, and whose earnings had been from \$80 to \$90 a month, had his capacity for every kind of employment seriously and permanently impaired, a judgment for \$16,500 was affirmed. *Chicago City R. Co. v. Leach*, 80 Ill. App. 354. See *North Chicago St. R. Co. v. Dudgeon*, 83 id. 528. In another case, not very dissimilar, a verdict for \$11,000 was sustained. *Chicago v. Gillett*, 91 Ill. App. 287.

When injured the plaintiff was earning \$12 a week; he was confined in a hospital for one year. His permanent injuries consisted of an enlargement of the calf of the right leg and varicose veins, which prevented his doing hard or heavy work. A verdict for \$15,000 was reduced to \$8,000. *Chapman v. Atlantic Ave. R. Co.*, 14 N. Y. Misc. 384.

A verdict for \$12,500 in favor of a cab driver aged thirty-two, earning \$12 a week and who suffered a compound fracture of the jaw and a comminuted fracture of both legs, though large, was not disturbed. *McDonnell v. Elias B. Co.*, 16 App. Div. (N. Y.) 223.

When injured plaintiff was twenty-eight, and earning \$3,600 a year and expenses. His right arm and five ribs were broken, and he had serious cuts upon a leg, bruises and wounds in the back, some of the large muscles being torn from their attachments to the spine. His ultimate recovery was placed at periods of from two to five years. A verdict for \$25,000 was sustained, with an intimation that the result would

have been the same if the trial court had not reduced it by \$10,000. *Diefenbach v. New York, etc. R. Co.*, 5 App. Div. (N. Y.) 91.

A woman of twenty-seven, severely and permanently injured, and who had expended \$1,000 for medical services, retained a verdict for \$15,000. *Mitchell v. Broadway & Seventh Ave. R. Co.*, 70 Hun 387.

Where a railroad section hand was so injured that he suffered from almost complete motor and sensory paralysis of the left side, and the effect of the injury was apparently permanent, a judgment for \$10,000 was affirmed. *Foster v. Missouri Pac. R. Co.*, 115 Mo. 165. See *Gratiot v. Same*, 116 Mo. 450, 16 L.R.A. 189.

⁹⁴ A verdict for \$15,000 for a fracture of a leg between the ankle and knee, after being reduced to \$9,000 by the trial court, was further reduced to \$5,266.20. *Ross v. Metropolitan St. R. Co.*, 116 App. Div. (N. Y.) 507.

A woman of 30 years, earning \$900 per year, retained a verdict for \$7,500 for an impacted fracture of the hip, causing a shortening of the limb and continuous and intense pain. *Washington-Virginia R. Co. v. Bouknight*, 113 Va. 411.

A verdict for \$50,000, reduced to \$35,000 by the trial court, was further reduced to \$10,000 where an able-bodied man of 29, earning \$90 per month, had his back and five ribs broken, his pelvis and hip bones mashed and was otherwise bruised throughout his whole body, and who died after the trial but before the decision of the reviewing court. *Gordon v. Kansas City S. R. Co.*, 222 Mo. 516.

A man of 45 years, engaged in

ment and an allowance for mental suffering, if any; the same rule is generally applied in cases of fractured arms.⁹⁵ But

office work, who was incapacitated for six months because of a compound fracture of the tibia below the knee and a simple fracture of the fibula, these resulting in no permanent incapacity except to the ligaments of the knee joint, was not entitled to more than \$5,000. *Ruepping v. Chicago & N. R. Co.*, 123 Wis. 319.

A verdict for \$5,000 in favor of a logger earning \$3 per day, whose loss of time was 18 months, in consequence of the fracture of his thighs, was reduced to \$3,500, no claim for hospital fees or medical bills being made. *Hart v. Cascade T. Co.*, 39 Wash. 279.

For the fracture of a lady's leg in two places and the dislocation of her ankle, resulting in confinement to her room for four and the use of crutches for eight months, and from the effects of which she had not recovered at the time of the trial, \$6,000 was not excessive. *Penniston v. Chicago, etc. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444.

A man of sixty-seven retained a judgment for \$5,000 for a broken leg. *North Chicago St. R. Co. v. Wiswell*, 68 Ill. App. 443.

A verdict for \$1,400 was retained for the fracture of one of the bones of the leg above the ankle, the plaintiff having been confined to his house for more than two months, and incurred liability for \$75 for medical aid. *Smith v. Des Moines*, 84 Iowa 685.

A verdict for \$4,100 in favor of a man aged thirty, earning \$35 a month, for the transverse fracture of a thigh bone, whose recovery had been satisfactory, though his leg was shortened about three-fourths of an inch, was reduced to \$2,100.

Slette v. Great Northern R. Co., 53 Minn. 341.

A judgment for \$4,250 in favor of a woman of seventy-two for the breaking of a leg and bruising her body was reversed because excessive. *Cherokee P. Co. v. Hilson*, 95 Tenn. 1.

A simple fracture of the fibula of a child of thirteen which reunited under the usual treatment so as to show a complete recovery was overcompensated by \$1,700, to which sum it was reduced by the trial court, the verdict being for \$2,500. *Collins v. Janesville*, 107 Wis. 436.

⁹⁵ An award of \$4,500 for the fracture of an arm, the only proof of permanent injury being the testimony of the plaintiff and a fellow-workman to the effect that the former could not do the work of an able-bodied laborer, was set aside. There was no evidence of decreased earnings. *Chicago, etc. R. Co. v. Hughes*, 87 Ill. 94. See *Same v. Avery*, 10 Ill. App. 210.

A verdict in favor of a woman whose collar bone was dislocated for \$5,000, after being reduced one-half by the trial court, was sustained. *Calumet E. St. R. Co. v. Jennings*, 83 Ill. App. 616.

A verdict for \$2,000 for a broken arm was approved in New Orleans & C. R. Co. v. *Schneider*, 8 C. C. A. 571, 60 Fed. 210.

In *Cleburne St. Ry. Co. v. Barnes*, — Tex. Civ. App. —, 168 S. W. 991, a verdict for \$100 for the simple fracture of the radial bone in the left arm of a woman 63 years old was held not to be grossly inadequate.

A broken bone in an arm between the wrist and elbow, in the absence of proof of permanent injury for

where the injury has a permanent aspect, as in a fracture of the ribs,⁹⁶ nervous derangements,⁹⁷ injuries to the eyes,⁹⁸ miscar-

ordinary purposes, was over-compensated for by a verdict for \$3,000. *Kentucky T. & T. Co. v. Downing*, 152 Ky. 25.

⁹⁶ Where a young woman sustained injuries which resulted in broken ribs and injured spine, and was under medical treatment for many weeks, though not confined to her room, and suffered at intervals of about six weeks pains resembling those of child-birth, which continued to the time of the trial, \$6,933 was not excessive. *Houston, etc. R. Co. v. Lee*, 69 Tex. 556.

⁹⁷ Where the injury to a man of twenty-five years was a concussion of the spinal cord, resulting in an abnormal condition of the nervous system which affected his health and rendered him unfit to follow the avocation of a railroad engineer, but he had so far recovered as to engage in business and be able to devote most of his time to it, and the evidence was conflicting as to the probability of an ultimate recovery, a verdict for \$6,250 was reduced to \$3,000. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578.

Though punitive damages were recoverable, a verdict for \$26,000 for serious external cuts and bruises and a shock which greatly affected plaintiff's nervous system was set aside. *Louisville & N. R. Co. v. Long*, 94 Ky. 410.

In *Louisville Southern R. Co. v. Minogue*, 90 Ky. 369, 29 Am. St. 378, a verdict for \$10,000 was set aside, the injury being a shock caused by the running of a train into the rear of a passenger coach.

Where internal organs were displaced as the result of being thrown

from a car and sustaining a severe shock, and the nervous trouble and other difficulties were probably curable, a verdict for \$20,000 was reduced to \$7,500. *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334.

Where a woman was injured by the infliction by a dog of a wound on her wrist, penetrating to the bone, and one in her side three-fourths of an inch long and one-fourth of an inch deep, and was rendered so nervous she could scarcely sleep and was threatened with convulsions, a verdict for \$800 was sustained. *Robinson v. Marino*, 3 Wash. 434, 441, 28 Am. St. 50, 1 Am. Neg. Cas. 253.

A verdict for \$500 in favor of a person who was assaulted by being seized by the collar at the throat and threatened with the fist, nervous prostration resulting, has been approved. *Sabre v. Mott*, 88 Fed. 780.

⁹⁸ One of plaintiff's eyes was injured by glass being thrown into it; he was confined to his house five weeks and suffered pain. He was able to work for the twenty months intervening between his recovery and the trial, and the condition of the eye, though it was permanently weakened, did not become worse. In the absence of proof showing to a reasonable certainty that his condition would grow worse a verdict for \$9,000 was reduced to \$4,000. *Jewell v. Union P. R. Co.*, 16 Phila. 64.

⁹⁹ A woman who was bruised and sustained a miscarriage a month after the injury, followed by conditions of anæmia and neurasthenia, retained a verdict for \$5,000.

riages⁹⁹ and other more complicated injuries,¹ the rule of award is difficult to trace.

Berger v. St. Paul City R. Co., 95 Minn. 84.

Where the injury resulted in a miscarriage and other suffering a verdict for \$2,000 was sustained. *Joliet v. Conway*, 17 Ill. App. 577.

¹An injury to a knee-cap, resulting in the loss of three or four weeks' time, and a good deal of pain, was more than compensated for by \$4,000, it appearing probable there would be a recovery. *Chicago v. Colman*, 33 Ill. App. 557.

A verdict for \$800 was sustained for the impaling of a man's hand upon a point of a railing in consequence of a fall. *Bushnell v. Metz*, 18 Ill. App. 84.

A man aged fifty-two, earning \$540 per year, was so injured as to cause a "knot" on his head of the size of a hen's egg, and afterwards was troubled with slight attacks of vomiting, pain in his head and dizziness; there was some evidence to the effect that injury to the hearing was probable. A verdict for \$2,500 was reduced to \$1,250. *Yates v. Southwestern B., etc. Co.*, 40 La. Ann. 467.

Where the plaintiff was seriously injured, suffered great pain, was exposed to loss of time and business and large expenses, but improved rapidly under medical treatment, was able for months before the trial to attend to business and earn his livelihood, and there was strong evidence he would be completely cured, a verdict for \$25,000 was set aside, and judgment for \$5,000 rendered. *Peyton v. Texas & P. R. Co.*, 41 La. Ann. 861, 17 Am. St. 430.

Where a child 5 years old who had been strong, bright and healthy prior to an accident was seriously injured in both body and mind and
Suth. Dam. Vol. IV.—74.

probably would continue to suffer for some time in the future a verdict for \$1,000 was held not excessive. *St. Louis Southwestern R. Co. v. Overton*, 114 Ark. 98.

A verdict for \$1,000 for the fracture of the left collar bone and other slight injuries was sustained. *Morris v. St. Louis & S. F. R. Co.*, 184 Mo. App. 106.

A verdict for \$900 was sustained in favor of an employee who was injured by a fire hose which was jerked out of his hands by the force of the water when it was turned on, causing the stream to strike his skin and injure it so that it later became infected and ulcerated, and rendered him unable to work at his employment at which he was earning \$3 to \$3.50 per day for three or four months. *Hilden v. Great Lakes Coal & Dock Co.*, 156 Wis. 205.

A verdict for \$750 was sustained where the plaintiff was rendered unconscious at the time of the injury and suffered pain in his shoulder for a year thereafter and was prevented from working for 51 days at which he received a salary of \$70 per month. *Scragg v. Sallee*, 24 Cal. App. 133.

A girl aged nine was set upon by a dog, thrown down and bitten so that a wound nearly two inches in length and half an inch in depth was inflicted upon her hip; she was confined to bed several weeks and was lame at the time of the trial. A verdict for \$1,450 (which was to be doubled pursuant to a statute) was affirmed. *Fitzgerald v. Dobson*, 78 Me. 559.

A wanton injury to a child of eight whereby the outer plate of

In determining whether an award is excessive the appellate court will regard the length of time that has elapsed since the injury was sustained,² the number of trials the case has had and the expense thereof to the plaintiff, so far as the defendant is responsible for these things.³ The damages based on the considerations last stated are allowed in lieu of interest, which

the skull was fractured, inflicting a temporary loss of speech and unconsciousness for two days, was over-compensated by \$5,000, the only permanent injury being a slight depression in that plate. *Alabama, etc. R. Co. v. Burgess*, 119 Ala. 555, 72 Am. St. 943.

Where plaintiff's earning capacity was not impaired by the injury a verdict for \$2,500 for injuries which confined him to bed for two, and to the house for four, months was reduced to \$2,000, notwithstanding all the effects of the injury had not disappeared. *West Chicago St. R. Co. v. Musa*, 80 Ill. App. 223.

A verdict for \$1,500 in favor of a woman of fifty-nine whose face was badly bruised, and one of whose eyes was badly discolored and swollen nearly shut for five weeks was set aside, there having been no expense for medical attendance and the apparent effects of the bruise having passed away in two months. *Dixon v. Scott*, 74 Ill. App. 277.

The only evidence of injury being that the plaintiff sustained a shock, a sprained wrist, discolorations on one of the limbs, back and sides, and the resulting pain, a verdict for \$2,500 was excessive. *Lake St. El. R. Co. v. Johnson*, 70 Ill. App. 413.

The Kentucky superior court refused to interfere with a verdict for \$2,750 in favor of a lady who was publicly assaulted by a youth of seventeen, the assault being accompanied by opprobrious epithets, though but slight bodily harm resulted. Vindictive damages were

included. *Crosby v. Bradley*, 11 Ky. L. Rep. 954.

Where a laundryman sustained a badly bruised foot, no bones being broken, which prevented him from walking on it, and obliged him to use crutches for six or eight weeks, and which was painful at the time of the trial, and which might render the ankle permanently weak, but which left him able to follow his usual occupation, a verdict for \$3,000 was reduced to \$2,000. *Kennedy v. St. Paul City R. Co.*, 59 Minn. 45.

The plaintiff, a school teacher of fifty-four, whose salary was \$1,750 a year, was confined to bed for two weeks, suffered and continued to suffer from congestion of the brain, and was unable to perform her duties for four months, and, after that time, with less than her usual vigor. The pecuniary loss was small, and no medical expense was shown to have been incurred. A verdict for \$10,000 was reduced one-half. *Smith v. Third Ave. R. Co.*, 10 App. Div. (N. Y.) 409. See *Becker v. Albany R. Co.*, 35 App. Div. (N. Y.) 46.

² *Zipperlein v. P. C. & St. L. R. Co.*, 8 Ohio Dec. 587; *Smith v. Mauch Chunk*, 3 Pa. Super. Ct. 495, 502.

³ *Waterman v. Chicago & A. R. Co.*, 82 Wis. 613. *Illinois Cent. R. Co. v. Harris*, 63 Ill. App. 172.

The objection that a verdict is the result of passion and prejudice will not ordinarily prevail if a former verdict was for a larger sum;

is not recoverable as such.⁴ The interest on the sum awarded by the verdict and the effect of the injury upon the earning ability of the plaintiff are matters to be considered in passing on the reasonableness of such sum.⁵ In considering whether a verdict is excessive notice will be taken of the purchasing power of money.⁶

It is the duty of the court to direct the jury whether they may consider the question of exemplary damages; when it is submitted the jury may allow them or not according to their judgment.⁷ It will be error if the court withhold that question from the jury in a case proper for such damages,⁸ and a verdict which includes them in a case where only compensation should be given will be set aside.⁹ It is matter of law to determine the elements of damage. On the trial the evidence should not be permitted to embrace any elements not proper to be considered; but incidentally on the trial of proper questions irrelevant matters sometimes creep in. By instructions the court should, as far as practicable, eliminate them and

and in passing upon the question of excessiveness the court will bear in mind that the standards of the court of last resort have been more favorable to the plaintiff in later years than formerly. *Hackett v. Chicago, etc. R. Co.*, 170 Ill. App. 140.

⁴ *Zipperlein v. R. Co., Smith v. Mauch Chunk, supra.*

⁵ *Lee v. Republic I. & S. Co.*, 148 App. 585.

⁶ *Johnson v. St. Paul City R. Co.*, 67 Minn. 260, 36 L.R.A. 586; *Peaslee v. Railway T. Co.*, 120 Minn. 347.

The facts that the money value of life and health is appreciating and the earning capacity of money steadily diminishing are to be weighed. *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355.

⁷ *Myers v. San Francisco*, 42 Cal. 215; *Owen v. Brockschmidt*, 54 Mo. 289. See § 403.

⁸ *Bass v. Chicago, etc. R. Co.*, 30 Wis. 636.

⁹ *Paducah T. Co. v. Streit*, 152 Ky. 63; *Malloy v. Chicago Tel. Co.*, 159 Ill. App. 556; *National C. Co. v. Powar*, 137 Ky. 156; *Baxter v. Campbell*, 17 S. D. 475; *Chicago v. Langlass*, 52 Ill. 256, 4 Am. Rep. 603; *Chicago v. Kelly*, 69 Ill. 475; *Decatur v. Fisher*, 53 id. 407; *Keightlinger v. Egan*, 65 id. 235; *Chicago, etc. R. Co. v. McKittrick*, 78 id. 619; *Nashville, etc. R. Co. v. Smith*, 6 Heisk. 174; *Goodno v. Oshkosh*, 28 Wis. 304; *Patry v. Chicago, etc. R. Co.*, 77 id. 218 (setting aside a verdict because of error in authorizing such damages though it was not certain they were allowed).

An instruction favoring such damages should not be given unless the evidence warrants it. *Aurora, etc. R. Co. v. Gary*, 221 Ill. 29.

direct the attention of the jury to those elements on which their estimate should be made.¹⁰ It is error to submit such cases with the general instruction as to damages which are susceptible of definite proof, that they may find such damages as in their judgment, from the evidence, the plaintiff ought to recover; thus giving the jury free scope to give such damages as, according to their individual notions of right and wrong, they might think the plaintiff ought to have, unguided by any legal rule as to the elements.¹¹ In a Connecticut case¹² Loomis, J., said: "The parties made no requests in relation to the damages. And it may not be perfectly clear that we ought to grant a new trial on account of the charge as given on this subject. It was, however, somewhat objectionable as not giving the jury any rule at all on the subject except 'their own sense of right and justice,' and that, too, in a case where sympathy for the plaintiff would naturally produce a powerful effect. There was danger that the jury might take the charge as meaning that their power over the damages was practically unlimited by any other rule." The instructions should direct the jury to allow

¹⁰ If improper evidence has been admitted the right of the jury to consider all the facts and circumstances in the case must be limited to those which are relevant thereto or which bear thereon. *Monongahela River Con. C. & C. Co. v. Hard-saw*, 169 Ind. 147.

¹¹ *Lyman v. Chicago City R. Co.*, 176 Ill. App. 27; *Jaegar v. Metcalf*, 11 Ariz. 283; *Goodrich v. Cort* (Del.), 77 Atl. 1049; *Elam v. Majestic C. & C. Co.*, 155 Ill. App. 375; *Chicago & E. R. Co. v. Fretz*, 173 Ind. 519; *Broadstreet v. Hall*, 32 Ind. App. 122; *Lexington R. Co. v. Britton*, 130 Ky. 676; *Chesapeake & O. R. Co. v. Crank*, 128 Ky. 329, 16 L.R.A.(N.S.) 197; *Dorris v. Warford*, 124 Ky. 768, 9 L.R.A.(N.S.) 1090; *Louisville G. Co. v. Fuller*, 122 Ky. 614; *Jageriskey v. Detroit United R.*, 163 Mich. 631; *Nashville, etc. R. Co. v. Wither-*

spoon, 112 Tenn. 128; *Dallas C. E. St. R. Co. v. Chambers*, 55 Tex. Civ. App. 331; *Newport News Pub. Co. v. Beaumeister*, 104 Va. 744; *Keightlinger v. Egan*, 65 Ill. 235, 1 Am. Neg. Cas. 84; *Hawes v. Kansas City S. Y. Co.*, 103 Mo. 10; *Gulf, etc. R. Co. v. Head* (Tex. App.), 15 S. W. 504; *McGowan v. St. Louis O. & S. Co.*, 109 Mo. 518, 531, quoting the text; *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614; *Brink's Chicago City Exp. Co. v. Herron*, 104 Ill. App. 269; *Louisville & N. R. Co. v. Berry*, 96 Ky. 604; *Holt v. Spokane & P. R. Co.*, 3 Idaho 703. Compare *Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 322; *Griffin W. Co. v. Markus*, 79 Ill. App. 82; *West Chicago St. R. Co. v. Lups*, 74 id. 420.

¹² *Wilson v. Granby*, 47 Conn. 47. In accord: *Atlanta, etc. R. Co. v. Barnwell*, 138 Ga. 569.

only such damages as the plaintiff had shown to have been sustained,¹³ and claimed the declaration.¹⁴ Because pain is not measurable in money, though it is a circumstance to be taken into account in fixing the sum due an injured plaintiff, an instruction that leaves the jury to regard it as an independent item of damages to be compensated by a sum of money that may be regarded as a pecuniary equivalent is erroneous. The word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price or value, but as describing an allowance looking towards recompense for, or made because of, the suffering consequent upon the injury.¹⁵ Probably because exceptions to the instructions are examined in the light of the verdict, there is not unanimity among the authorities as to the particularity with which the court must charge the jury in these matters. In Alabama and

¹³ St. Louis, etc. R. Co. v. Steed, 105 Ark. 205; Totten v. Totten, 172 Mich. 565; Southern R. Co. v. Broughton, 128 Ga. 814; Same v. Scott, 128 Ga. 244; Macon R. & L. Co. v. Vining, 120 Ga. 511; Chicago Union T. Co. v. Miller, 212 Ill. 49; Chicago & E. R. Co. v. Fretz, 173 Ind. 519; Knoefel v. Atkins, 40 Ind. App. 428; Camparetti v. Union R. Co., 95 App. Div. (N. Y.) 66; Barron v. Northern Pac. R. Co., 16 N. D. 277; Bockelcamp v. Lackawanna, etc. R. Co., 232 Pa. 66; Freeman W. & I. Co. v. Collins, 53 Ill. App. 29; Illinois Cent. R. Co. v. Creighton, id. 45; Same v. Farrell, 86 id. 436; Cleveland, etc. R. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. 296; Gilbertson v. Forty-second St., etc. R. Co., 14 App. Div. (N. Y.) 294; Quincy H. R. & C. Co. v. Schulte, 18 C. C. A. 211, 71 Fed. 487.

The verdict may show that nothing was awarded for an element of damage as to which the court instructed and concerning which there was no evidence. Tarr v. Oregon

S. L. R. Co., 14 Idaho 192, 125 Am. St. 151.

¹⁴ Show v. Alton, etc. T. Co., 152 Ill. App. 552.

¹⁵ Per Williams, J., in Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 15, 55 Am. St. 705; Ritchie v. Victorian R. Com'r, 25 Vict. L. R. 272; Deep M. & D. Co. v. Fitzgerald, 21 Colo. 533. See McLane v. Pittsburg R. Co., 230 Pa. 29.

The award for pain must be confined within reasonable limits; it cannot be made arbitrarily. Latchimacker v. Jacksonville T. & W. Co., 181 Fed. 276.

In actions for injuries negligently inflicted the jury must not attempt to award the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider, under all the circumstances, a fair compensation; and this rule applies to judges who try such actions without juries. Sheahen v. Toronto R. Co., 25 Ont. L. R. 310.

Wyoming it is laid down that if the case is one in which punitive damages may be allowed and the elements of physical and mental pain and suffering enter into it there is no error in saying to the jury that if the plaintiff is entitled to recover they may award him such sum as they see proper, not in excess of that sued for.¹⁶ In a Georgia case in which the only ground of recovery was for injury to the peace, happiness and feelings of the plaintiff, no harm was done the defendant by saying to the jury that the damages were left to their enlightened consciences;¹⁷ and that is the only practicable standard by which to measure the loss of a minor who has been incapacitated.¹⁸ These and other like cases are probably to be taken as meaning only that the use of such language in the instructions, viewed in the light of the verdicts, did no harm to the defendant; and not as signifying that because a verdict is based mainly on the allowance for pain and suffering and exemplary damages it will thereby be saved from condemnation by the court if it appears to have been given because of improper motives.¹⁹ It is not necessary that any witness express an opinion as to the amount of damages caused by pain and suffering; the jury may make such estimate from the facts and circumstances in proof.²⁰

It is important that the court exercise discretion in its remarks to the jury and avoid everything that looks toward an undue increase of the award.²¹ It has been held error to say that "no sane man would lose a leg for any compensation, but you are not to be guided by such a consideration as that in arriving at the amount of damages;"²² to instruct that damages may be given to the extent of the sum claimed, that being emphasized by the statement that, if any are given, they should

¹⁶ Alabama, etc. R. Co. v. Burgess, 119 Ala. 555, 564, 72 Am. St. 943; Williams v. Campbell, 22 Wyo. 1.

¹⁷ Georgia R. & B. Co. v. Jett, 95 Ga. 236; Atkinson v. Taylor, 13 Ga. App. 100; Krakowski v. Aurora, etc. R. Co., 167 Ill. App. 469. See Orr v. Wahlfeld Mfg. Co., 179 Ill. App. 235; Linder v. Brown, 137 Ga. 352.

¹⁸ Betts v. Hancock, 139 Ga. 198.

¹⁹ Louisville & N. R. Co. v. Brown, 127 Ky. 732, 13 L.R.A. (N.S.) 1135.

²⁰ Muskogee El. T. Co. v. Mueller, 39 Okla. 63.

²¹ Foley v. Philadelphia R. T. Co., 240 Pa. 169 (as to say plaintiff is entitled to a considerable verdict if his testimony is believed).

²² Dooner v. Delaware & H. C. Co., 164 Pa. 17, 34; Lessenden v.

be given to the full;²³ to make what the jurors would want for the injury the basis of their verdict,²⁴ or to lead them to believe that the damages may be affected by the false testimony of the defendant.²⁵ On the other hand, the court may authorize the jury to fix upon such amount as will fully compensate the plaintiff for the elements of damage mentioned in the instructions,²⁶ and instruct that the sum sued for is not to be taken as a criterion, but is a limit beyond which the verdict cannot go.²⁷ In an action for malpractice and for performing an operation without the consent of the patient it is not permissible to charge that there may be an award for the impairment of health; such a standard is too uncertain. The elements of damages are pain and suffering and the permanent impairment of earning power.²⁸

§ 1257. **False imprisonment.** The injury done by being illegally restrained of one's liberty is akin to that suffered from assault and battery.²⁹ The injured party in such cases, even though the act complained of be done without malice, is entitled to recover the expenses reasonably incurred to procure discharge from the restraint,³⁰ for loss of time, interruption of his business, and the suffering, bodily and mental, which the wrong occasioned.³¹ The right to recover the money paid to

Missouri Pac. R. Co., 238 Mo. 247; Whitehead v. Pittsburg R. Co., 230 Pa. 79. See Canfield v. Chicago, etc. R. Co., 142 Iowa 658.

²³ Rost v. Brooklyn Heights R. Co., 10 App. Div. (N. Y.) 477; Fries v. American L. P. Co., 141 Cal. 610, 15 Am. Neg. Rep. 716. See Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; Guinard v. Knapp-S. & Co., 95 Wis. 482; Doherty v. Des Moines City R. Co., 137 Iowa 358; Morgan v. Bross, 64 Ore. 63.

²⁴ Greer v. Union R. Co., 53 N. Y. Misc. 638; Rhodes v. Same, 52 N. Y. Misc. 501.

²⁵ Hickey v. Booth, 29 R. I. 466, 132 Am. St. 832.

²⁶ Sorensen v. Case T. M. Co., 129 Wis. 366,

²⁷ McDermott v. Severe, 202 U. S. 600, 50 L. ed. 1162.

²⁸ Van Meter v. Crews, 149 Ky. 335.

²⁹ Cooley on Torts, 169; Comer v. Knowles, 19 Kan. 440, 441.

³⁰ Nelson v. Kellogg, 162 Cal. 621; Melanson v. Lavigne, 37 New Bruns. 539. But see Sam Chak v. Campbell, 45 Nova Scotia 1.

³¹ Cleveland v. Emerson, 51 Ind. App. 339; Ross v. Kohler, 163 Ky. 583, L.R.A.1915D 621; Chicago, etc. R. Co. v. Radford, 36 Okla. 657, citing the text as to both points; Hayes v. Hutchinson & Shields, 81 Wash. 394; St. Louis, etc. R. Co. v. Hudson, 95 Ark. 506; Neves v. Costa, 5 Cal. App. 111; Golibart v. Sullivan, 30 Ind. App. 428; Philadel-

obtain release from restraint under an illegal tax warrant is not affected by the validity of the tax,³² nor because the commitment was void.³³ But interest on the tax is not recoverable as matter of law; its allowance as damages, and not strictly as interest, is within the discretion of the jury.³⁴ A married

phia, etc. R. Co. v. Crawford, 112 Md. 508; Paine v. Kelley, 197 Mass. 22; Mumford v. Starmont, 139 Mich. 188, 69 L.R.A. 350; Simper v. Carroll, 12 Ohio C. C. (N.S.) 140; Mihalyik v. Klein, 22 Pa. Super. Ct. 193; Gold v. Campbell, 54 Tex. Civ. App. 269; Parsons v. Harper, 16 Gratt. 64; Fenelon v. Butts, 53 Wis. 344; Butler v. Stockdale, 19 Pa. Super. Ct. 98; Harness v. Steele, 159 Ind. 286; Young v. Gormley, 120 Iowa 372; Petit v. Colmery, 4 Pennw. (Del.) 266; Stewart v. Maddox, 63 Ind. 51; Jay v. Almy, 1 Woodb. & M. 262; Bonesteel v. Bonesteel, 30 Wis. 511; Blythe v. Tompkins, 2 Abb. Pr. 468; Abrahams v. Cooper, 81 Pa. 232; Ocean S. Co. v. Williams, 69 Ga. 251; Blanchard v. Burbank, 16 Ill. App. 375; Wheeler & W. Mfg. Co. v. Boyce, 36 Kan. 350; 59 Am. Rep. 571; Wentz v. Bernhardt, 37 La. Ann. 636; Ross v. Leggett, 61 Mich. 445, 1 Am. St. 608; Rown v. Christopher, etc. R. Co., 34 Hun 471; Hays v. Creary, 60 Tex. 445; Ogg v. Murdock, 25 W. Va. 139; Clarke v. American D. & I. Co., 35 Fed. 478; Kilbourn v. Thompson, MacArthur & M. (D. C.) 401; Hewlett v. George, 68 Miss. 703, 13 L.R.A. 682; Mexican Cent. R. Co. v. Gehr, 66 Ill. App. 173; State v. Evans, 83 Mo. App. 301, 397, quoting the text; Duggan v. Baltimore & O. R. Co., 159 Pa. 248, 39 Am. St. 672; Vanderberg v. Connolly, 18 Utah 112, 125; Lovick v. Atlantic C. L. R. Co., 129 N. C. 427; Coffin v. Varila, 8

Tex. Civ. App. 417. *Contra*, as to damage to business. Gold v. Campbell, 54 Tex. Civ. App. 269.

Newspaper accounts of the arrest and commitment of the plaintiff may be received as evidence on the question of damages, no comment being published in connection with the accounts. Scott v. Flowers, 60 Neb. 675, 689; Newburn v. Durham, 10 Tex. Civ. App. 655; Karner v. Stump, 12 Tex. Civ. App. 460; Bolton v. Vellines, 94 Va. 393, 64 Am. St. 737. In opposition, though the accounts were received merely to show the extent of the mental suffering, is Butler v. Stockdale, 19 Pa. Super. Ct. 98.

The petty nature of the charge concerning which the plaintiff was held to testify as a witness may be shown as bearing on the annoyance and humiliation suffered. Bates v. Kitchel, *infra*.

The recovery of expenses and damages from the commencement to the conclusion of the prosecution should not be denied because the proceedings were adjourned from time to time at the plaintiff's request and he was at large on his own recognizance under a void warrant. Worden v. Davis, 195 N. Y. 391, 22 L.R.A. (N.S.) 1196.

Mental suffering may be inferred. Shannon v. Simms, 146 Ala. 673.

³² Clark v. Woods, 17 L. J. (Mag. Cas.) 189; Morton v. Monckton, 11 T. L. Rep. 242.

³³ Bates v. Kitchel, 166 Mich. 695.

³⁴ Taylor v. Coolidge, 64 Vt. 506.

woman cannot recover expenses paid by her husband in consequence of her false imprisonment; he must bring an independent action therefor.³⁵ The filthy condition of the jail in which the plaintiff was confined or any other discomfort, deprivation or circumstance may be shown to enhance compensatory damages for mental anguish and discomfort;³⁶ but not wrongful acts done by an officer if they were not authorized by the defendant.³⁷ The unanticipated acts of the plaintiff's fellow prisoners are not chargeable to the defendant.³⁸ But it is otherwise as to a search by police officers of the person detained by the defendant in his place of business, whether they were called by him or by the plaintiff, and regardless of who requested that the search be made.³⁹ The plaintiff may show the condition of his family though the defendant had no knowledge thereof.⁴⁰ One who makes an arrest without process and turns the person arrested over to a jailer, after keeping watch of him a few hours, is not liable for any damages sustained by such person after his subsequent arrest on process, the defendant not having anything to do with the latter arrest.⁴¹ Liability for a void arrest continues only for such time as the person

³⁵ *Burnham v. Webster*, 54 N. Y. Super. Ct. 30; *Friesenhan v. Maines*, 137 Mich. 10.

³⁶ *Sebring v. Harris*, 20 Cal. App. 56; *Rucker v. Barker* (Tex. Civ. App.), 151 S. W. 871 (confinement with negroes and Mexicans); *Ragland v. Norfolk & W. S. Co.*, 163 Fed. 376; *Fuqua v. Gambill*, 140 Ala. 464; *Grimes v. Greenblatt*, 47 Colo. 495, disapproving *Zebley v. Storey*, 117 Pa. 478, which is also disapproved in *Stoecker v. Nathanson*, 5 Neb. (Unof.) 435; *Piedmont H. Co. v. Henderson*, 9 Ga. App. 672; *Allen v. Fromme*, 141 App. Div. (N. Y.) 362; *Weigel v. Brown*, 115 C. C. A. 442, 194 Fed. 652; *Fenelon v. Butts*, 53 Wis. 344; *Miller v. Fano*, 134 Cal. 103, citing the text; *Jacques v. Parks*, 96 Me. 268; *Petit v. Col-*

mery, 4 Pennew. (Del.) 266; *Mexican Cent. R. Co. v. Gehr*, 66 Ill. App. 173; *San Antonio, etc. R. Co. v. Griffin*, 20 Tex. Civ. App. 91; *Kindred v. Stitt*, 51 Ill. 401; *Abrahams v. Cooper*, 81 Pa. 232; *Clarke v. American D. & I. Co.*, 35 Fed. 478; *Southwestern P. C. Co. v. Reitzer* (Tex. Civ. App.), 135 S. W. 237, citing the text. See § 1237.

³⁷ *Ocean S. Co. v. Williams*, 69 Ga. 251.

³⁸ *Southwestern P. C. Co. v. Reitzer* (Tex. Civ. App.), 135 S. W. 237.

³⁹ *Simper v. Carroll*, 12 Ohio C. C. (N. S.) 140.

⁴⁰ *Stoecker v. Nathanson*, *supra*.

⁴¹ *Wyatt v. Hill*, 71 Vt. 468; *Southwick v. Hare*, 24 Ont. 528; *Grinnell v. Weston*, 95 App. Div. (N. Y.) 454. See *Cheng Fun v. Campbell*, 44 Nova Scotia 51.

arrested is detained by virtue of it.⁴² But the failure of an officer to take a person arrested without process before a court makes him a trespasser *ab initio*.⁴³ If the arrest is made after the suit has been begun the expense of defending the latter cannot be recovered.⁴⁴ The plaintiff may recover for loss of work, not only up to the time of the suit, but also for the time lost thereafter if by the arrest he failed to get the work he otherwise would have obtained.⁴⁵ But the loss of employment for nine months in consequence of the failure of a person imprisoned for one night to keep an appointment in the morning after his discharge is not the proximate consequence of such imprisonment.⁴⁶ It is otherwise as to the withdrawal of an offer of employment which would have been accepted but for the imprisonment.⁴⁷ Where the master of a vessel unjustifiably imprisoned a seaman until his effects on board were lost or sold it was held that the damages should not be vindictive unless the motives of the master were bad; but compensation should usually be made for the time of the imprisonment, the value of the articles lost or sold, and interest on the amount, and the cost of passage home.⁴⁸ There cannot be a recovery for a loss resulting from sickness which is experienced after the imprisonment has ceased unless the petition sets forth the fact of the sickness or facts from which it may be inferred,

⁴² *Harris v. McReynolds*, 10 Colo. App. 532; *McCullough v. Greenfield*, 133 Mich. 463, 62 L.R.A. 906; *Cabell v. Arnold* (Tex. Civ. App.), 22 S. W. 62.

If the plaintiff was offered opportunity to give bail and could readily have done so, and declining, remained in jail subsequent thereto, his separation from his family and any humiliation resulting from his continued detention must be attributed to his own acts and not to those of the defendant. *Sloss-Sheffield Steel & Iron Co. v. Devaney*, — Ala. —, 66 So. 523.

A person who solicits the arresting officer not to present him before

the court and is thereupon released from custody cannot claim any advantage from the officer's act in complying with his request. *Clark v. Tilton*, 74 N. H. 330.

⁴³ *Piedmont H. Co. v. Henderson*, 9 Ga. App. 672; *Broek v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390.

⁴⁴ *Gibbs v. Randlett*, 58 N. H. 407.

⁴⁵ *Thompson v. Ellsworth*, 39 Mich. 719.

⁴⁶ *Carpenter v. Pennsylvania R. Co.*, 13 App. Div. (N. Y.) 328.

⁴⁷ *Stoecker v. Nathanson*, 5 Neb. (Unof.) 435.

⁴⁸ *Jay v. Almy*, 1 Woodb. & M. 262.

or from which the law will imply, that it would necessarily follow from the facts alleged.⁴⁹ If one is simultaneously arrested on two warrants, one of which is invalid, he sustains no additional injury for that reason except as to the money paid to be released from the detention under the void warrant.⁵⁰ The consequences of the suppression of a criminal prosecution are not to be regarded.⁵¹ If special damages are not pleaded and punitive damages are not recoverable, injury to the plaintiff's reputation is not an element of his damage.⁵² The arrest being unlawful, it is not necessary to prove malice,⁵³ and probable cause is only material in mitigation of damages.⁵⁴ Motive may be shown as a circumstance to aid in assessing the damages.⁵⁵ A declaration which alleges that the imprisonment was by means of threats and violence, without reasonable cause and unlawful, states the ingredients of malice and is broad enough to support a charge on that basis.⁵⁶ And in such cases, when there is no possible way of measuring damages with any certainty, the sound discretion of the jury under all the circumstances is the only measure practicable.⁵⁷ The trial court may,

⁴⁹ *Atchison, etc. R. Co. v. Rice*, 36 Kan. 593.

⁵⁰ *Allison v. Hobbs*, 96 Me. 26; *Doherty v. Munson*, 127 Mass. 495.

⁵¹ *Clark v. Tilton*, 74 N. H. 330.

⁵² *Bergeron v. Peyton*, 106 Wis. 377, 381.

⁵³ *Cleveland v. Emerson*, 51 Ind. App. 339; *Welmeyer v. Mulvihill*, 150 Mo. App. 197; *Gold v. Campbell*, 54 Tex. Civ. App. 269, citing the text; *Wentz v. Bernhardt*, 37 La. Ann. 636; *Gross v. Rice*, 71 Me. 241; *Chismon v. Carney*, 33 Ark. 316; *Painter v. Ives*, 4 Neb. 122; *Hight v. Naylor*, 86 Ill. App. 508; *Reynolds v. Price*, 22 Ky. L. Rep. 5; *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. 513, 44 L.R.A. 673; *Linnen v. Banfield*, 114 Mich. 93; *Monson v. Rouse*, 86 Mo. App. 97; *Johnson v. Bouton*, 35 Neb. 898; *Hewitt v. Newburger*, 66 Hun 230.

⁵⁴ *Gray v. Strickland*, 163 Ala.

344; *Southern R. Co. v. Shirley*, 121 Ky. 863; *Parke v. Fellman*, 145 App. Div. (N. Y.) 836; *Norman v. Manciette*, 1 Sawyer 484; *Sleight v. Ogle*, 4 E. D. Smith 445; *Brown v. Chadsey*, 39 Barb. 253; *Bacon v. Bacon*, 76 Miss. 458, 471; *Bergeron v. Peyton*, 106 Wis. 377, 381, citing the text; *Garnier v. Squires*, 62 Kan. 321; *Wells v. Johnston*, 52 La. Ann. 713; *Gambrill v. Schmuck*, 131 Ala. 321.

The plaintiff's admission of guilt of the charge on which he was arrested may be shown in mitigation notwithstanding his prior discharge on habeas corpus. *Friesenhan v. Maines*, 137 Mich. 10.

⁵⁵ *Gambill v. Cargo*, 151 Ala. 421.

⁵⁶ *Brushaber v. Stogemann*, 22 Mich. 266, 270.

⁵⁷ *Id.*; *Rucker v. Barker* (Tex. Civ. App.), 151 S. W. 871; *Chicago, etc. R. Co. v. Radford*, 36 Okla.

of course, grant a new trial on the ground of excessiveness of the damages, and its discretion in so doing will not be reversed unless it has been abused.⁵⁸ The appellate court will, in a proper case, require a remittitur of such sum as it thinks excessive or grant a new trial,⁵⁹ and will reverse a judgment for

657; *Nelson v. Kellogg*, 162 Cal. 621; *Gomez v. Scanlan*, 155 Cal. 528; *Gold v. Campbell*, 54 Tex. Civ. App. 269; *Golibart v. Sullivan*, 30 Ind. App. 428; *Philadelphia, etc. R. Co. v. Crawford*, 112 Md. 508; *Dunlevy v. Wolferman*, 106 Mo. App. 46; *Talcott v. National E. Co.*, 144 App. Div. (N. Y.) 337; *Allen v. Fromme*, 141 App. Div. (N. Y.) 362. See *Young v. Gormley*, 120 Iowa 372; *Josselyn v. McAllister*, 22 Mich. 300; *Farman v. Lauman*, 73 Ind. 568; *Harris v. Louisville, etc. R. Co.*, 35 Fed. 116; *Bacon v. Bacon*, 76 Miss. 458, 472; *Scott v. Flowers*, 60 Neb. 675, 690; *Pastor v. Regan*, 9 N. Y. Misc. 547, 551; *Coffin v. Varila*, 8 Tex. Civ. App. 417; *Bolton v. Vellines*, 94 Va. 393, 64 Am. St. 737; *Bergeron v. Peyton*, 106 Wis. 377, 382; *Pinkerton v. Sydnor*, 87 Ill. App. 76; *McKelvey v. Marsh*, 63 App. Div. (N. Y.) 396; *Mexican Cent. R. Co. v. Gehr*, 66 Ill. App. 173; *Atchison, etc. R. Co. v. Henry*, 55 Kan. 715, 29 L.R.A. 465; *Wegner v. Risch*, 114 Wis. 270 (verdict for nominal sum); *Alau v. Everett*, 7 Hawaii 82; *Efroymsen v. Smith*, 29 Ind. App. 451.

Where a girl 17 years of age was arrested without a warrant and without probable cause and compelled against her will to go with officers in a patrol wagon to the police station where she was questioned in an offensive manner by other officers, but was released upon information that she was not

the person desired, a verdict for \$750 was upheld. *Ross v. Kohler*, 163 Ky. 583, L.R.A. 1915D 621.

⁵⁸ *Miller v. Ashcraft*, 98 Ky. 314.

⁵⁹ *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 69 Am. St. 513, 44 L.R.A. 673; *Yost v. Tracey*, 13 Utah 431; *Bailey v. Hart*, 9 Viet. L. R. (law) 66; *Rapken v. Adams*, 23 id. 187; *Fanjoy v. Portland*, 29 New Bruns. 24; *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. 909; *Whittaker v. Sandford*, 110 Me. 77.

In the following cases excessive verdicts were set aside: *Woodward v. Glidden*, 33 Minn. 108; *Schneider v. McGill*, 23 Ky. L. Rep. 585; *Dodge v. Alger*, 53 N. Y. Super. Ct. 107; *Fotheringham v. Adams Exp. Co.*, 36 Fed. 252, 1 L.R.A. 474; *Brown v. Chadsey*, 39 Barb. 253; *Reuck v. McGregor*, 32 N. J. L. 70; *McConnell v. Hampton*, 12 Johns. 234; *Kilbourn v. Thompson, MacArthur & M. (D. C.)* 401; *Maher v. Wilson*, 139 Cal. 514; *Gore v. Marshall Field & Co.*, 184 Ill. App. 486; *Davern v. Drew*, 153 App. Div. (N. Y.) 844; *Condron v. Carr*, 156 App. Div. (N. Y.) 658.

Where the arrest was justifiable, but the detention of the prisoner continued for an unreasonable length of time, and he was handcuffed and carried out of the county without a warrant, it was erroneous to instruct that nominal damages were legally possible. *Potter v. Swindle*, 77 Ga. 419. Very moderate damages were assessed by the court in *Jacques v. Parks*, 96 Me. 268.

a nominal sum if the facts warrant the recovery of substantial damages.⁶⁰

§ 1258. Same subject; exemplary damages; mitigations. If the defendant has acted wantonly, oppressively or maliciously in causing the arrest he may, in the discretion of the jury, be liable for exemplary damages;⁶¹ but not otherwise⁶² unless the

⁶⁰ *Cleveland v. Emerson*, 51 Ind. App. 339.

⁶¹ *Cleveland v. Emerson*, 51 Ind. App. 339; *Wendelken v. Stone* (N. J. L.), 86 Atl. 376; *Chicago, etc. R. Co. v. Radford*, 36 Okla. 657, citing the text; *Rucker v. Barker* (Tex. Civ. App.), 151 S. W. 871; *Saunders v. Davis*, 153 Ala. 375; *Piedmont Hotel Co. v. Henderson*, 9 Ga. App. 672; *Schnider v. Montross*, 158 Mich. 263; *Kelly v. Durham T. Co.*, 132 N. C. 368; *McAleer v. Good*, 216 Pa. 473, 10 L.R.A. (N.S.) 303, 116 Am. St. 782; *Gold v. Campbell*, 54 Tex. Civ. App. 269; *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. 608; *Gambrill v. Schmuck*, 131 Ala. 321; *Tucker v. Winders*, 130 N. C. 147; *Woodward v. Glidden*, 33 Minn. 108; *Grace v. Dempsey*, 75 Wis. 313; *Parsons v. Harper*, 16 Gratt. 64; *Parsons v. Lloyd*, 3 Wils. 341, 2 W. Bl. 845; *Turner v. Telgate*, 1 Lev. 95; *Barker v. Braham*, 3 Wils. 368; *Codrington v. Lloyd*, 8 Ad. & E. 449; *Curry v. Pringle*, 11 Johns. 444; *Gold v. Bissell*, 1 Wend. 210; *Fellows v. Goodman*, 49 Mo. 62; *Warwick v. Foulkes*, 12 M. & W. 507; *Josselyn v. McAllister*, 22 Mich. 300; *Thorpe v. Wray*, 68 Ga. 359; *Atchison, etc. R. Co. v. Henry*, 55 Kan. 715, 8 Am. Neg. Cas. 280, 29 L.R.A. 465; *San Antonio, etc. R. Co. v. Griffin*, 20 Tex. Civ. App. 91; *Roza v. Smith*, 65 Fed. 592; *Boyle v. Case*, 18 Fed. 880; *Pinkerton v. Synnor*, 87 Ill. App. 76; *Stevens v. O'Neill*, 51 App. Div. (N. Y.) 364, affirmed 169

N. Y. 375; *Craven v. Bloomingdale*, 171 N. Y. 439; *Bingham v. Lipman*, 40 Ore. 363; *Johnson v. Ebberts*, 11 Fed. 129; *Harness v. Steele*, 159 Ind. 286.

A corporation is liable for punitive damages for the wilful acts of its officers in forcibly and wilfully detaining and confining a newsboy who had come to purchase papers in a room in the circulation department so that he with other newsboys similarly detained might be on hand to distribute a forthcoming extra and in order to prevent their selling an extra issued by a rival newspaper. *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527.

An improper motive may be inferred from a wrongful act based upon no reasonable ground. Such motive constitutes legal malice; the act need not be prompted by anger, malevolence or vindictiveness. *Bolton v. Vellines*, 94 Va. 393, 404, 64 Am. St. 737; *Harness v. Steele*, *supra*.

A plea of justification if not proved authorizes the jury to allow additional damages. *Ocean Steamship Co. v. Williams*, 69 Ga. 251; *Smith v. Macomber*, 28 R. I. 248.

⁶² *Holmes v. LeFors*, 36 Okla. 729; *Gore v. Marshall Field & Co.*, 184 Ill. App. 486; *Maher v. Wilson*, 139 Cal. 514; *Grinnell v. Weston*, 95 App. Div. (N. Y.) 454; *Stevens v. Nater*, 4 Porto Rico Fed. 158; *Lo-vick v. Atlantic C. L. R. Co.*, 129 N. C. 427.

arrest was made contrary to a statute, as where a female is arrested on civil process; in such a case good faith may be shown only in mitigation of punitive damages.⁶³ The reputed wealth of the defendant is a proper matter for proof where such damages are recoverable.⁶⁴ The absence of malice and proof of good faith will be no justification of an unlawful imprisonment, nor exempt the wrong-doer from the payment of actual damages.⁶⁵ Exemplary damages should not be allowed against an officer who makes or causes an illegal arrest unless he acts in bad faith, or is guilty of some oppression or misconduct.⁶⁶ An officer may show that he acted under orders of a superior in mitigation of exemplary damages.⁶⁷ But where an officer is guilty of bad faith, or one not an officer sets the law in motion and causes an arrest on process in bad faith, the jury will be warranted in allowing liberal damages.⁶⁸ Exemplary damages may be awarded in a proper case, though there is no proof of actual damage.⁶⁹ But these should not be awarded against an

The liability of an officer is not increased because he took the usual precautions to prevent the escape of a prisoner. *McCallough v. Greenfield*, 133 Mich. 463, 62 L.R.A. 906.

⁶³ *Nelson v. Kellogg*, 162 Cal. 621.

⁶⁴ *Nelson v. Halvorson*, 117 Minn. 255; *Tucker v. Winders*, 130 N. C. 147. See §§ 404, 405, 1254.

The defendant has been permitted to show what his earnings are. *McCaffery v. Thomas*, 4 Pennw. (Del.) 437.

⁶⁵ *Mitchell v. Malone*, 77 Ga. 301; *Patzack v. Von Gerichten*, 10 Mo. App. 424; *Painter v. Ives*, 4 Neb. 122; *Comer v. Knowles*, 17 Kan. 440, 441; *Newton v. Locklin*, 77 Ill. 103; *Carey v. Sheets*, 60 Ind. 17; *Van Deusen v. Newcomer*, 40 Mich. 90; *McCall v. McDowell*, *Deady* 233; *Dunlevy v. Wolferman*, 106 Mo. App. 46. Compare *McAleer v. Good*, 216 Pa. 473, 10 L.R.A. (N.S.) 303, 116 Am. St. 782.

Where there is no malice upon the part of the officer and no evidence to show the extent of the injury from the wrongful arrest nominal damages only may be awarded *Salo v. Smith*, 25 Cal. App. 295.

⁶⁶ *Hamlin v. Spaulding*, 27 Wis. 360; *La Roe v. Roesser*, 8 Mich. 537; *McCall v. McDowell*, *Deady* 233; *Dinsman v. Wilke*, 12 How. 405, 13 L. ed. 1042.

⁶⁷ *Cullen v. Dickinson*, 33 S. D. 27, 50 L.R.A.(N.S.) 987.

⁶⁸ *Marsh v. Smith*, 49 Ill. 399; *Fellows v. Goodman*, 49 Mo. 62; *Harris v. Louisville, etc. R. Co.*, 35 Fed. 116; *Union D. & R. Co. v. Smith*, 16 Colo. 361; *Petit v. Colmery*, 4 Pennw. (Del.) 266; *Newburn v. Durham*, 10 Tex. Civ. App. 655. See *Wells v. Johnston*, 52 La. Ann. 713.

⁶⁹ *Blanchard v. Burbank*, 16 Ill. App. 375; *Hight v. Naylor*, 86 id 508.

employer unless the acts of the employee were wanton and malicious and the former was implicated with the latter in such acts or expressly or impliedly ratified them.⁷⁰ Where the officers wielding the whole executive power of a corporation participate in and direct all that was planned and done in relation to the imprisonment their malicious, wanton or oppressive intent may be regarded as the intent of the corporation, for which it must answer in exemplary damages.⁷¹

So far as damages depend on malice and would be enhanced by it they will be reduced by proof which negatives malice. Evidence of good faith is therefore generally admissible in mitigation; but this mitigation will be limited to the damages it tends to controvert.⁷² Evidence of provocation can be received only in mitigation of exemplary damages.⁷³ If it is shown in mitigation that the plaintiff was strongly suspected and accused by the public of the crime for which he was arrested the latter may show his good character and reputation in rebuttal;⁷⁴ but if his character is not assailed evidence concerning it is not admissible.⁷⁵ It is competent to show the plaintiff's guilt of

⁷⁰ *Craven v. Bloomingdale*, 171 N. Y. 439. See *Gambill v. Cargo*, 151 Ala. 421; *Gallon v. House of Good Shepherd*, 158 Mich. 361, 133 Am. St. 387, 24 L.R.A.(N.S.) 286.

⁷¹ *Welmeier v. Mulvihill*, 150 Mo. App. 197; *Bingham v. Lipman*, 40 Ore. 363.

⁷² *Rogers v. Toliver*, 139 Ga. 281; *Klien v. Pollard*, 149 Mich. 200, 119 Am. St. 670, 10 L.R.A.(N.S.) 1008; *Dunlevy v. Wolferman*, 106 Mo. App. 46; *Barnes v. Viall*, 6 Fed. 661; *Brown v. Chadsey*, 39 Barb. 262; *Fenelon v. Butts*, 53 Wis. 344; *Little v. Munson*, 54 Ill. App. 437; *Karner v. Stump*, 12 Tex. Civ. App. 460; *Comer v. Knowles*, 17 Kan. 441; *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 412, 69 Am. St. 513, 44 L.R.A. 673; *McMullin v. Erwin*, 69

Vt. 338. See *Robinson v. Clark*, 53 Ill. App. 368. See *Whittaker v. Sandford*, 110 Me. 77.

A complaint, information and warrant of arrest issued after the imprisonment has ceased is not admissible in evidence. *Gold v. Campbell*, 54 Tex. Civ. App. 269.

⁷³ *Grace v. Dempsey*, 75 Wis. 313.

⁷⁴ *American Exp. Co. v. Patterson*, 73 Ind. 430.

It is competent to show in mitigation of compensatory damages that the arrest and detention were due to the efforts of the plaintiff to evade the law; the extent to which such evidence shall affect the recovery is for the jury. *Sam Chak v. Campbell*, 45 Nova Scotia 1.

⁷⁵ *Davis v. Sanders*, 133 Ala. 275.

the offense charged against him,⁷⁶ and any reprehensible or unwarranted conduct on his part.⁷⁷

If money or property has been taken from the plaintiff by the defendant it may be recovered if it is declared for.⁷⁸ The plaintiff's ability to have paid the fine imposed and avoided the imprisonment complained of does not affect the measure of his recovery.⁷⁹ There are, however, authorities which deny the right of action where one submits to arrest and imprisonment rather than pay a small license fee exacted from him, and which, if paid, could have been recovered.⁸⁰ This doctrine seems to accord with the principle which denies damages which the plaintiff might have prevented by the exercise of reasonable diligence. Evidence that the plaintiff has a wife and children is not admissible; neither is evidence that after his arrest the defendant brought an action against the plaintiff and garnished a third party who was supposed to have the money which was the cause of the imprisonment.⁸¹ The occupation of the plaintiff may be considered in estimating the damages, but does not bar a recovery.⁸²

⁷⁶ Shannon v. Simms, 146 Ala. 673.

Proof of theft is admissible in mitigation of both compensatory and punitive damages where the plaintiff is unlawfully imprisoned. Nelson v. Snoyenbos, 155 Wis. 590.

⁷⁷ Wehmeyer v. Mulvihill, 150 Mo. App. 197.

The defendant may show that two months after a false imprisonment for alleged theft that the plaintiff, a boy 13 years of age, was found in another store and was taken by the sheriff to the county jail and that he was thereafter placed with a family in another

town, as bearing upon the degree of shame and humiliation suffered from wrongful imprisonment and mitigating damages. Nelson v. Snoyenbos, *supra*.

⁷⁸ Blanchard v. Burbank, *supra*.

⁷⁹ Barker v. Anderson, 81 Mich. 508. Compare Yost v. Tracy, 13 Utah 431.

⁸⁰ Cottam v. Oregon City, 98 Fed. 570; Trescott v. Waterloo, 26 id. 592.

⁸¹ Bergeron v. Peyton, 106 Wis. 377, 382.

⁸² Holmes v. Le Fors, 36 Okla. 729.

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